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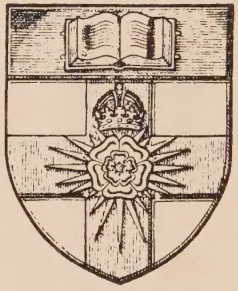

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1803-1813

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The cases printed in this volume were originally reported by members of the Bar whose names are given in the Reports from which the cases have been selected.

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HUGUENIN AND ANOTHER *v.* BASELEY AND ANOTHER

[Lord Chancellor's Court (Lord Eldon, L.C.), November 14, 16, 17, 18, 23, 1807]

[Reported 14 Ves. 273; 33 E.R. 526]

Undue Influence—Confidential relation—Gift not pure, voluntary, and well understood act of donor—Lack of knowledge which donee under duty to communicate—Third parties—Gift thereto by donor through undue influence—Tainted gift—Jurisdiction to set aside.

The court will set aside, as being against public policy, any gift which has been obtained from the donor by undue influence, i.e., as the result of transactions which were not the pure, voluntary, and well understood acts of the donor, but were executed by him without that knowledge of their effect, nature, and consequences which the donee was bound, by his duty resulting from the respective positions of the parties, to communicate to the donor before he executed them. The court will take from third parties a benefit which they have derived from the undue influence of the donee, regarding the gift to them as tainted by the undue influence of the person procuring it.

Notes. Considered: *Hunter* v. *Atkins* (1834), Coop. temp. Brough. 464. Distinguished: *Harrison* v. *Wiltshire* (1834), 4 L.J.Ch. 30. Considered: *Dent* v. *Bennett* (1839), 4 My. & Cr. 269; *Middleton* v. *Sherburne* (1841), 4 Y. & C. Ex. 358. Applied: *Scholefield* v. *Templer* (1859), John. 155; *Topham* v. *Portland* (1863), 1 De G.J. & Sm. 517. Considered: *Galway Borough Petition* (1869), 1 O'M. & H. 303. Applied: *Coutts* v. *Acworth* (1869), L.R. 8 Eq. 558; *Baker* v. *Loader* (1872), L.R. 16 Eq. 49; *Allcard* v. *Skinner*, [1886 90] All E.R. Rep. 90; *Coxon* v. *Schofield* (1893), 9 T.L.R. 290; *Morley* v. *Loughnan*, [1893] 1 Ch. 736. Considered: *Cavendish* v. *Strutt* (1903), 19 T.L.R. 483. Distinguished: *Wright* v. *Carter*, [1900–3] All E.R. Rep. 706. Explained: *John* v. *Dodwell*, [1918] A.C. 563. Considered: *Re Lloyds Bank, Ltd., Bomze and Lederman* v. *Bomze*, [1931] 1 Ch. 289; *Lancashire Loans, Ltd.* v. *Black*, [1933] All E.R. Rep. 201; *Tufton* v. *Sperni*, [1952] 2 T.L.R. 516; *Zamet* v. *Hyman*, [1961] 3 All E.R. 933. Referred to: *Harris* v. *Tremenheere* (1808), 15 Ves. 34; *Lloyd* v. *Passingham* (1815), Coop. G. 152; *Pratt* v. *Barker*, *Pretty* v. *Barker* (1825), 1 Sim. 1; *MacCabe* v. *Hussey* (1831), 5 Bli. N.S. 715; *Cockell* v. *Taylor*, *Collett* v. *Preston*, *Preston* v. *Collett* (1852), 15 Beav. 103; *Hoghton* v. *Hoghton* (1852), 15 Beav. 278; *Reynell* v. *Sprye*

(1852), 1 De G.M. & G. 660; *Russell* v. *Jackson* (1852), 10 Hare, 204; *Tee* v. *Ferris* (1856), 2 K. & J. 357; *Re Royal British Bank, Nichol's Case* (1859), 3 De G. & J. 387; *Forshaw* v. *Welsby* (1860), 30 Beav. 243; *Nottidge* v. *Prince* (1860), 2 Giff. 246; *Brown* v. *Kennedy* (1863), 33 Beav. 133; *Rhodes* v. *Bate* (1865), 4 Giff. 670; *Lyon* v. *Home* (1868), L.R. 6 Eq. 655; *Natal Land and Colonization Co.* v. *Good* (1868), L.R. 2 P.C. 121. *Topham* v. *Portland* (1869), 5 Ch. App. 40; *Turner* v. *Collins* (1871), 7 Ch. App. 334, n.; *Galway County Petition* (1872), 2 O'M. & H. 46; *Hall* v. *Hall* (1873), 8 Ch. App. 430; *Vane* v. *Vane* (1873), 8 Ch. App. 383; *Moxon* v. *Payne* (1873), 8 Ch. App. 881; *Re Stead, Whitham* v. *Andre* (1899), 69 L.J.Ch. 49; *Barron* v. *Willis*, [1900] 2 Ch. 121; *Powell* v. *Powell*, [1900] 1 Ch. 243; *Re McCallum, McCallum* v. *McCallum*, [1901] 1 Ch. 143; *Wilton* v. *Osborn*, [1901] 2 K.B. 110; *Bischoff's Trustee* v. *Frank* (1903), 89 L.T. 188; *Howes* v. *Bishop*, [1909] 2 K.B. 390; *Manks* v. *Whiteley*, [1911] 2 Ch. 448; *Lloyd* v. *Coote and Ball*, [1915] 1 K.B. 242; *Shears & Sons, Ltd.* v. *Jones*, [1922] All E.R. Rep. 378; *Re Paulings Settlement Trusts, Younghusband* v. *Coutts & Co.*, [1963] 3 All E.R. 1.

As to undue influence, see 17 HALSBURY'S LAWS (3rd Edn.) 672–681; and for cases see 12 DIGEST (Repl.) 110 et seq., and 25 DIGEST (Repl.) 273 et seq.

Cases referred to:

(1) *Hylton* v. *Hylton* (1754), 2 Ves. Sen. 547; 28 E.R. 349, L.C.; 12 Digest (Repl.) 119, *704*.

(2) *Pierce* v. *Waring* (1745), cited 1 Ves. Sen. 379; 2 Ves. Sen. 548; 1 P. Wms. 6th ed. 121, n.; 27 E.R. 1093, L.C.; 12 Digest (Repl.) 119, *703*.

(3) *Griffin* v. *De Veiulle* (1781), cited in 14 Ves. at p. 283; 3 P. Wms. at p. 131, n.; 33 E.R. 530; 25 Digest (Repl.) 283, *895*.

(4) *Hatch* v. *Hatch* (1804), post 74; 9 Ves. 292; 1 Smith, K.B. 226; 32 E.R. 615, L.C.; 12 Digest (Repl.) 119, *705*.

(5) *Proof* v. *Hines* (1735), Cas. temp. Talb. 111; 25 E.R. 690, L.C.; 12 Digest (Repl.) 122, *725*.

(6) *Dixon* v. *Olmius* (or *Lutterel* v. *Lord Waltham*), unreported.

(7) *Wright* v. *Proud* (1806), 13 Ves. 136; 33 E.R. 246, L.C.; 33 Digest (Repl.) 592, *81*.

(8) *Newman* v. *Payne* (1793), 4 Bro. C.C. 350; 2 Ves. 199; 29 E.R. 930, L.C.; 43 Digest (Repl.) 204, *2021*.

(9) *Villers* v. *Beaumont* (1682), 1 Vern. 100; 23 E.R. 342, L.C., 17 Digest (Repl.) 250, *531*.

(10) *Gartside* v. *Isherwood* (1783), 1 Bro. C.C. 558; 2 Dick. 612; 28 E.R. 1297; 30 Digest (Repl.) 502, *1440*.

(11) *Bridgman* v. *Green* (1757), 2 Ves. Sen. 627; Wilm. 58; 28 E.R. 399, L.C.; 35 Digest (Repl.) 87, *797*.

Bill to set aside a conveyance made by the plaintiff, Mrs. Huguenin, previously to her marriage with the other plaintiff, her second husband, as having been improperly and fraudulently obtained.

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> "Sirs,—Having been so unfortunate as to lose the best of husbands and the sincerest friend by the premature death of Mr. Hill, I feel myself, as it were, left in that unprotected state that I now want the assistance of some friend with whom I can advise in the adjustment of my affairs and who will kindly interpose in seeing that my property is managed to the best advantage. From reflection I have the greatest reason to believe that Providence has raised me up a friend, and that friend is Mr. Baseley, who will take upon him the trouble of bringing all my affairs into such a plan as I shall hereafter be enabled to conduct them with felicity to myself. Impressed with this agreeable idea, I beg leave to inform you, that I commit (subject to my own inspection) the perfect arrangement of my business with you into Mr. Baseley's hands, and hope, that you will prepare without any delay every account that you have standing against me, with the deeds, etc., of the estate at Hampton. As I wish to leave London at Lady Day next, I must desire, that no delay on your part will take place. Mr. Baseley will be ready to meet you on the business, whenever you will appoint a day. With this determination, I remain, etc., Ann Hill."

The deeds were accordingly delivered to Baseley and were deposited by him with his solicitor. The bill further represented that the defendant artfully dissuaded the plaintiff from residing in the house at Hampton Gay, and letting the estate as she had proposed, and recommended to her a surveyor who gave a very unfavourable account of the situation of the estate; and the defendant Baseley soon afterwards offered her £400 a year for a lease of the whole, clear of all expenses, and keeping the premises in repair, representing £420 a year as the utmost value, which was confirmed by his solicitor. It was further alleged that she executed the deeds under the persuasion of the solicitor, that they were her will, and the lease to Baseley, and that she had no intention to give away or settle her estate. By the deed, dated May 5, 1804, which was the subject of the bill, the plaintiff, Mrs. Huguenin, in consideration of 10s. conveyed the Hampton Gay estates to a trustee, his heirs and assigns, to the use that she and her assigns might, during her life, receive out of the said manor, etc., an annuity of £400 secured by a trust term of 500 years, and, subject thereto, to the use of the defendant Baseley for life without impeachment of waste, with remainders to trustees to preserve contingent remainders, to his wife for life, to their children, born or to be born, in tail, with cross-remainders, and the ultimate remainder to Mrs. Huguenin. The value of that estate was rather more than £400 a year.

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(1852), 1 De G.M. & G. 660; *Russell* v. *Jackson* (1852), 10 Hare, 204; *Tee* v. *Ferris* (1856), 2 K. & J. 357; *Re Royal British Bank, Nichol's Case* (1859), 3 De G. & J. 387; *Forshaw* v. *Welsby* (1860), 30 Beav. 243; *Nottidge* v. *Prince* (1860), 2 Giff. 246; *Brown* v. *Kennedy* (1863), 33 Beav. 133; *Rhodes* v. *Bate* (1865), 4 Giff. 670; *Lyon* v. *Home* (1868), L.R. 6 Eq. 655; *Natal Land and Colonization Co.* v. *Good* (1868), L.R. 2 P.C. 121. *Topham* v. *Portland* (1869), 5 Ch. App. 40; *Turner* v. *Collins* (1871), 7 Ch. App. 334, n.; *Galway County Petition* (1872), 2 O'M. & H. 46; *Hall* v. *Hall* (1873), 8 Ch. App. 430; *Vane* v. *Vane* (1873), 8 Ch. App. 383; *Moxon* v. *Payne* (1873), 8 Ch. App. 881; *Re Stead, Whitham* v. *Andre* (1899), 69 L.J.Ch. 49; *Barron* v. *Willis*, [1900] 2 Ch. 121; *Powell* v. *Powell*, [1900] 1 Ch. 243; *Re McCallum, McCallum* v. *McCallum*, [1901] 1 Ch. 143; *Wilton* v. *Osborn*, [1901] 2 K.B. 110; *Bischoff's Trustee* v. *Frank* (1903), 89 L.T. 188; *Howes* v. *Bishop*, [1909] 2 K.B. 390; *Manks* v. *Whiteley*, [1911] 2 Ch. 448; *Lloyd* v. *Coote and Ball*, [1915] 1 K.B. 242; *Shears & Sons, Ltd.* v. *Jones*, [1922] All E.R. Rep. 378; *Re Paulings Settlement Trusts, Younghusband* v. *Coutts & Co.*, [1963] 3 All E.R. 1.

As to undue influence, see 17 Halsbury's Laws (3rd Edn.) 672–681; and for cases see 12 Digest (Repl.) 110 et seq., and 25 Digest (Repl.) 273 et seq.

Cases referred to:

(1) *Hylton* v. *Hylton* (1754), 2 Ves. Sen. 547; 28 E.R. 349, L.C.; 12 Digest (Repl.) 119, *704*.

(2) *Pierce* v. *Waring* (1745), cited 1 Ves. Sen. 379; 2 Ves. Sen. 548; 1 P. Wms. 6th ed. 121, n.; 27 E.R. 1093, L.C.; 12 Digest (Repl.) 119, *703*.

(3) *Griffin* v. *De Veiulle* (1781), cited in 14 Ves. at p. 283; 3 P. Wms. at p. 131, n.; 33 E.R. 530; 25 Digest (Repl.) 283, *895*.

(4) *Hatch* v. *Hatch* (1804), post 74; 9 Ves. 292; 1 Smith, K.B. 226; 32 E.R. 615, L.C.; 12 Digest (Repl.) 119, *705*.

(5) *Proof* v. *Hines* (1735), Cas. temp. Talb. 111; 25 E.R. 690, L.C.; 12 Digest (Repl.) 122, *725*.

(6) *Dixon* v. *Olmius* (or *Lutterel* v. *Lord Waltham*), unreported.

(7) *Wright* v. *Proud* (1806), 13 Ves. 136; 33 E.R. 246, L.C.; 33 Digest (Repl.) 592, *81*.

(8) *Newman* v. *Payne* (1793), 4 Bro. C.C. 350; 2 Ves. 199; 29 E.R. 930, L.C.; 43 Digest (Repl.) 204, *2021*.

(9) *Villers* v. *Beaumont* (1682), 1 Vern. 100; 23 E.R. 342, L.C., 17 Digest (Repl.) 250, *531*.

(10) *Gartside* v. *Isherwood* (1783), 1 Bro. C.C. 558; 2 Dick. 612; 28 E.R. 1297; 30 Digest (Repl.) 502, *1440*.

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actuated by motives of gratitude for services received and benefits enjoyed, desirous of requiting those services and benefits, executes a purpose of bounty not only to the author of them, but also to his children, and the father, standing in a relation of confidence, is disabled by the rule, founded in general policy or public utility, to take in his own person, the failure of the purpose as to the father, merely by the effect of that rule of general policy, not through any misconduct or vice in the transaction, shall not be extended to the disappointment of the children, as it would if the disability arose from want of will in the donor, as in the instances of duress or fraud. Upon the ground of general policy, therefore, the interest of the children must be distinguished from that of the parent.

In *Wright* v. *Proud* (7) the transaction was set aside, as the party had been deceived and practised upon, not exercising a fair, unbiassed, purpose of bounty. The authority, cited from the French law, is not supported by the civil law which, prohibiting donations inter vivos on the ground of relation, does not go beyond that of husband and wife, but POTHIER [TRAITÉ DES DONATIONS ENTRE VIFS, s. 1], goes much further than the case of the "administrateur"—to a physician, a surgeon, a confessor, everyone who may have influence—and extends it even to wills. The rule, thus extended, can stand only upon the principle of the civil law by which an act of improvidence even may be restrained by the judge. In this country a man has the absolute dominion over his property, and may give it away in any manner he thinks proper. To whom is bounty usually distributed? To strangers, to persons in whom no confidence is placed. It is the natural effect of habits of intimate connection and friendship. It is not unusual for a gentleman at a certain age to remunerate by a gift his tutor who has never been deemed incapable of taking that way, yet that would be within the restriction of the French ordinance which, singular and severe as it is, does not go the length of prohibiting a present to the minister of a parish or chapel attended by the donor.

Admitting, what is not clear upon the authorities, that the relation of guardian and ward creates an absolute disability in the former, precluding gift by the latter without distinction between an act the result of abused confidence, under an impulse, preventing the free exercise of judgment, and the spontaneous bounty springing from affection of a person, emancipated from control, all accounts settled; admitting also, according to *Griffin* v. *De Veiulle* (3), that the restriction applies to any person assuming the office and functions of a guardian, though not legally so constituted, is there any case upon the relation of guardian and ward in which youth and inexperience on one side were not ingredients? Was that character ever applied to a confidential intercourse between persons of advanced life, and equal age? In those circumstances their intercourse was merely that of mutual kindness and reciprocal esteem. The defendant undertook no office. He never assumed the functions of Mrs. Huguenin's attorney—a relation, involving necessary confidence on one side and probable influence upon the other, calling for application of the principle of public policy, but in the capacity of attorney another person was employed by this plaintiff, her own attorney who prepared the deed from her instructions without any direction or interference of the defendant. She went alone to the attorney's office and gave her own instructions, from time to time dictating alterations.

It is said that the defendant was her agent. There is no authority that a mere agent, generally employed in receiving rents, etc., is not capable of receiving a gift, and *Gartside* v. *Isherwood* (10), where the leases were set aside expressly on the ground of fraud, disproves it. The principle of public policy has no reference to that mere naked relation. This defendant cannot be represented as an agent in that sense, undertaking for remuneration. If he was an agent, every man acting for his friend is so. Can it be stated that a man who goes beyond mere professions, engaging actively in the concerns of his friend, is, therefore, obnoxious to this principle of public policy? The utmost extent to which this case can be carried is

A that the defendant, as a friend, advised the plaintiff as to the management of her affairs. Her purpose was settled to withdraw her affairs from her former solicitors. The letter was obtained from the defendant in pursuance of that, her own purpose. Incapacity being neither proved nor alleged, the only ground for relief between such parties must be direct fraud. The letter amounts to no more than a warm testimony of her grateful sense of the defendant's friendship.

B *Sir Samuel Romilly* in reply: This bill puts the relief it prays directly upon the ground of undue influence exerted by the means of spiritual ascendancy, distinctly charging that the defendant had taken upon himself to be the adviser of this lady and the manager of her property and stating the letter as an instance of that influence. But, divesting this case of that relation and influence and considering it as the case of a stranger, the evidence of fraud or misapprehension is so strong that this transaction could not possibly stand. Upon all the evidence it cannot be represented that, when she executed the deed, she was apprised of its nature. How is her sudden change in so short a period from great anxiety about this estate to be accounted for but from the effect of a sort of fascination? Of what consequence was it to Mrs. Huguenin, what repairs were to be done, what conditions were to be kept upon the supposition that she was parting with the estate for ever? The removal of her husband's corpse, to be buried at Hampton Gay, is another circumstance, utterly inconsistent with the defendant's representation that she did not intend to remain the proprietor. Having a mother, a half-brother and sister, she was not at a loss for an object of bounty. The evidence as to her conversation with the attorney, suggested to her that a will would be revocable by a change of her circumstances, shows that she looked to the possibility of a second marriage. Her expression of satisfaction at having attained her object cannot be explained upon the supposition that she was giving away her estate, but may be accounted for if she was to get rid of the trouble, attending it. In these cases one of the strongest circumstances is the appearance by one person of consulting only the interest of another, and neglecting his own. The passage in Cicero [De Officiis, lib. 1, s. 13] is most applicable:

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> "Totius autem injustitiæ nulla capitalior est quam eorum, qui, cum maxime fallunt, id agunt, ut viri boni esse videantur."

The duty imposed upon the defendant by merely undertaking the concerns of this lady made it impossible for him to take the whole of her estate, for it is not necessary to go the extent that he could not accept any bounty. He took upon him the entire management of her affairs, acting as her agent, receiving her rents, attending arbitrations, etc. The rule is not confined to attorneys or persons entitled to reward. *Proof* v. *Hines* (5) was the case of a tradesman who officiously interfered. The relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another, and this case discovers one of a very peculiar nature—influence obtained through the sacred character of a minister of religion. Though there is no case in which the court has proceeded upon such grounds, the general principle has prevailed where the means of acquiring influence were much less powerful—the respect of a child or ward of a parent or guardian. Pothier says that by a latitude of interpretation proceeding upon principles of public utility, that ordinance, expressly concerning only a tutor or "administrateur," has been extended to the master of a school, the director of the conscience, the physician who is not permitted during his attendance to take a conveyance from the patient; and to other relations in which authority or influence must be supposed to exist.

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For the proper determination of this case, however, it is not necessary to rely on such authorities. The decisions of English courts of justice are amply sufficient. The same doctrine stated by your Lordship in *Hatch* v. *Hatch* (4), was laid down by Wilmot, C.J., in *Bridgman* v. *Green* (11). There was in that case much evidence that the person was perfectly aware of what he was doing and had repeatedly

confirmed it. Upon that WILMOT, C.J., observed that it only tends to show more clearly the deep-rooted influence obtained over him (Wilm. at p. 70):

> "In cases of forgery, instructions under the hand of the person whose deed or will is supposed to be forged, to the same effect as the deed or will, are very material: but, in cases of undue influence and imposition they prove nothing: for the same power, which produces one, produces the other; and, therefore, instead of removing such an imputation, it is rather an additional evidence of it."

Having before (Wilm. at pp. 60, 61) mentioned the distinction of the Roman Law between liberality and profusion, he says that our laws strike no such boundary: "stat pro ratione voluntas, is the law with us." This court never did, nor ever will, annul donations merely as being improvident and such as a wise man would not have made or a man of very nice honour have accepted, nor will this court measure the degrees of understanding and say that a weak man, provided he is out of the reach of a commission, may not give as well as a wise man. But, though this court disclaims any such jurisdiction, yet, where a gift is immoderate, bears no proportion to the circumstances of the giver, where no reason appears, or the reason given is falsified, and the giver is a weak man, liable to be imposed upon, this court will look upon such a gift with a very jealous eye, and very strictly examine the conduct of the persons in whose favour it is made, and, if it sees that any arts or stratagems, or any undue means, have been used, if it sees the least speck of imposition at the bottom, or that the donor is in such a situation with respect to the donee as may naturally give an undue influence over him, if there be the least scintilla of fraud, this court will and ought to interpose, and by the exertion of such a jurisdiction they are so far from infringing the right of alienation, which is the inseparable incident of property, that they act upon the principle of securing the full, ample, and uninfluenced enjoyment of it.

The ground, as between guardian and ward, is put upon the danger either of inducing guardians to flatter the passions of their wards, or of the improper exercise of their authority, as the relation of husband and wife is guarded from the effects both of indulgence and severity. If this reasoning has any weight, does not the principle apply with infinitely greater force to the present case? What is the authority of a guardian, or even parental authority; what are the means of influence by severity or indulgence in such a relation, compared with the power of religious impressions under the ascendancy of a spiritual adviser, with such an engine to work upon the passions, to excite superstitious fears or pious hopes, to inspire, as the object may be best promoted, despair or confidence, to alarm the conscience by the horrors of eternal misery, or support the drooping spirits by unfolding the prospect of eternal happiness, that good or evil which is never to end? What are all other means to these? Are inferior considerations to have so much effect, and is no regard to be given to the most powerful motive that can actuate the human mind? Though no direct authority is produced, your Lordship, dispensing justice by the same rule as your predecessors upon such a subject not confined within the narrow limits of precedent, will, as a new relation appears, look into the principles that govern the human heart, and decide in a case, far the strongest, that has yet occurred, upon this ground alone from its infinite importance to the community.

LORD ELDON, L.C.—With regard to the interests of the wife or children of the defendant, there was no personal interference upon their part in the transactions that have produced this suit. If, therefore, their estates are to be taken from them, that relief must be given with reference to the conduct of other persons, and I should regret that any doubt could be entertained whether it is not competent to a court of equity to take away from third persons the benefits which they have derived from the fraud, imposition, or undue influence of others. *Bridgman* v. *Green* (11) is an express authority that it is within the reach of the principle of

this court to declare that interests, so gained, by third persons, cannot possibly be held by them, and LORD HARDWICKE observes justly that, if a person could get out of the reach of the doctrine and principle of this court by giving interests to third persons instead of reserving them to himself, it would be almost impossible ever to reach a case of fraud. In that instance, therefore, the interest of the son was considered as capable of being affected by the decree as the interest of the father. The case afterwards came before the Lords Commissioners, and WILMOT, C.J., expresses himself thus (Wilm. at p. 64):

> "There is no pretence that Green's brother, or his wife, was party to any imposition, or had any due or undue influence over the plaintiff: but does it follow from thence that they must keep the money? No: whoever receives it must take it tainted and infected with the undue influence and imposition of the person procuring the gift: his partitioning and cantoning it out among his relations and friends will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it."

This was also the doctrine of LORD THURLOW in *Lutterel* v. *Lord Waltham* (sometimes cited as *Diron* v. *Olmius*) (6), and, though it was not practically acted upon, LORD THURLOW was inclined to carry it further. The object of the bill in that case was that an estate should be enjoyed as if a recovery had been suffered, upon the ground that Lutterel had, while Lord Waltham was upon his death-bed, engaged in suffering a recovery, prevented it, with the view that the estate should devolve upon the person with whom he was connected. That estate was by the law vested in that individual, a much stronger case, therefore, than the acquisition of property through imposition. LORD THURLOW, whatever might have been his final decision upon that case, had no doubt that it was against conscience that one person should hold a benefit which he derived through the fraud of another; and I have reason to know that his Lordship would not have discussed the case so much at large, if it had been no more than that. These plaintiffs, therefore, if entitled to relief against Baseley, are equally entitled against all the branches of his family.

As to persons concerned in these transactions, I agree with the argument that it is not upon the feelings which a delicate and honourable man must experience, hearing these instruments, taken altogether, as I think myself bound to take them, nor upon any notion of discretion in this court to prevent a voluntary gift by a man, stripping himself entirely of his property, if undue influence is not imputed, that any judge, sitting here, has ever thought himself at liberty to interpose. I agree further that the relief must proceed upon what is alleged and proved by the persons complaining, and that their complaints must be treated as effectual or ineffectual according to what they have, not what they could have, represented. Also, as to the defence, it may frequently happen that many circumstances may have taken place in the course of the transaction that are not brought into view, but the case must be dealt with, as it is alleged and proved. I have, therefore, looked through this bill with reference to the frame of it, and I have no doubt that this case might have been more clearly reached if the situation of the parties had enabled them to go through all the difficulties as to amendment, and also, that many circumstances might have been brought forward on behalf of the defendants which I am bound not to look at, but, taking the case as it stands, though there is in this bill much foul allegation which, if not true, ought not to be there, a great deal of which is denied and clearly disproved, there is enough upon the bill and in evidence to show that this deed cannot stand if the whole transaction, taken together, cannot stand.

This bill seeks relief only as to the deed of May, 1804. The deed of June relates to other estates, unquestionably has very different provisions for very different

persons, reserving a degree of dominion, and considerable dominion, to Mrs. Huguenin over that property; and I am disposed to think that deed could not be made the subject of the same bill, at least, that it was not necessary to complicate this cause by making that a subject of the relief prayed. But the view I take of the case is this, that, attending to the effect of the letter, the evidence of the transactions among these parties, and attending more especially to the evidence of the attorney, the defence rests in a great measure upon this, that the court is by the nature of the defence required to look at this deed, not merely by itself, but as being more or less justified with reference to the whole of the transactions in the course of which it was executed; and it is much the same as if the defendant had said that he puts his case, not upon that instrument merely, but as part of a general arrangement of the plaintiff's affairs, and that the deed is to be considered with regard not merely to its own contents, but to the whole transaction, of which this deed forms a part.

The great body of evidence shows the alarm of this lady at the trouble of taking possession of a dilapidated estate. Upon the evidence until November, 1803, she had no acquaintance whatsoever with Baseley. Her age was about forty. She had left in the West Indies a mother, had great regard for a female child Mary Ann Elliott, and had also a natural half brother, named Clarke, of the age of sixteen in whose education she appears to have been much interested. She brought him over to England and placed him with Mr. Baseley at an expense to herself of £200 a year. Her brother-in-law Benjamin Hill states that he, previously to the introduction of Baseley, managed her concerns, and that until after that introduction she expressed her entire satisfaction with the care of the solicitors in whose hands her affairs in this kingdom were placed. That is confirmed by another witness. The bill charges Baseley with infusing into her mind great dissatisfaction with the management and the want of professional skill and care of those solicitors. The inference that this dissatisfaction was created in her mind by Baseley is too strong. That she entertained that dissatisfaction is clear; that Baseley did not discourage it, that he gave into it, is in evidence; that he created it, I cannot say; that he participated in, and acted upon, it with her, is clearly established.

In October, preceding the month of January when her affairs were taken out of the hands of those solicitors, her husband, who came with her to England, died. She lived with, or was frequently with, the two brothers of her deceased husband. The answer, therefore, stating, that she was not without friends in this country, is material, but in this view only, that it could be supposed she had ever consulted with them. There is, however, no evidence that either Baseley ever stated to them what she proposed to do, or, that the attorney concerned in the transaction, as Wilmot, C.J., says, felt the obligation of talking both with the grantor and the grantee before this proposition was carried into effect. Benjamin Hill, one of her brothers-in-law, laid aside all the business after the solicitors were discharged, and, as to George Hill, though there is evidence that she did declare her purpose, it was in conversations in which it was suggested to them both and that ample provision was to be made for their children, which, I fear, had some influence with them. No such provision was made.

It is doubtful upon the report, whether Mrs. Huguenin had the immediate means of acting with the freedom of an affluent person. At the date of the report the rents remained to be accounted for by Baseley to the amount of £300 or £400. After the date of that report small sums were lent to her. She had not even then paid the costs of the deed. She had borrowed £100 from the attorney, and there is one item of £57, advanced by Baseley after June, 1804, to discharge her husband from an arrest. Certainly, therefore, she was not in a condition of immediate affluence. Under the influence of her dissatisfaction at the conduct of the solicitors in January, 1803, either she adopted the resolution of dismissing them and placing the whole management of all her concerns in the hands of Baseley, calling upon him to assist her in executing it, or it was suggested to her by Baseley. My opinion

is that the weight of the evidence, which does not agree upon this, is that she called upon Baseley, and desired him to assist her in executing that purpose of her own. If the proposition was her own, yet the transaction in a court of justice has this character at least—that it was demonstration to Baseley, that she placed confidence in him, as high as one individual ever placed in another. Where the evidence is contradictory, the fairest way to the defendant is to take his own account, and his answer represents it thus—that she called; and requested him to write a letter to the solicitors, and at her request he did in her presence, with her sanction, and by her direction, write the form of a letter, which he believes she copied and sent to them, but he positively denies that it was written at his instigation, or by his desire, and says that he wrote it at her pressing desire, and, though the language was his, the substance was hers. Who dictated that letter is of very little importance. If at her dictation he wrote it and permitted her to send it, that is the most direct communication to him of the nature and extent of the confidence she placed in him, and the language of a court of justice has in all times been that, if a man does not choose to act upon the confidence appearing in the course of the transaction to be so reposed in him, he ought to reject it as soon as proposed. This letter is, therefore, upon the answer to be taken as expressing her sentiments in his language. The effect of it is at least a communication to him of the information that she was unprotected by the death of her husband; that she wanted assistance for the purpose of advising her in the adjustment of her affairs; that she wanted that friend whom Providence had raised up for the purpose of kindly interposing in seeing that her property was managed to the best advantage and her affairs brought into such a plan that she could conduct them with facility to herself.

This letter produced from the solicitors, rather too hastily, a total severance of themselves from the concern; and Baseley entered to a certain degree at least upon the management of them. The purposes, expressed and alluded to in that letter, cannot mean that all her estate should be given away, that she was to be enabled to conduct her affairs with a facility by giving up all her title. The attorney, who states that he was satisfied that she had made up her mind as to all her affairs, prepared in June these two deeds, conveying this estate, worth, at that time, at the lowest calculation, £420 a year, which Annesley wished to purchase upon the supposition that it was worth £610 a year, subject to a rent-charge to herself, with a term in trustees to secure it to Baseley for life, with remainders to Mrs. Baseley for life, and to all their children, born or to be born, and the ultimate limitation to Mrs. Hill. A deed was prepared at the same time which appears intended to be a conveyance of all her property, which they were very much perplexed to describe, conveying all her freehold estates in the West Indies and everywhere, none of the parties knowing what they were, all the leaseholds for lives mentioned in a schedule, of which there is none, and all the leaseholds for years, of which there are some, to her, for her separate use for life, with remainders to the husband whom she should marry, surviving her, and to Mrs. Hindes and young Clarke and his children, and the ultimate limitation, for what reason is not explained, to Baseley and the attorney and a person resident in the West Indies, this co-temporaneous deed permitted to be made by her having in contemplation a second marriage, which appears upon the deed itself.

To the question whether, these instruments being such as I have represented them, the consequence is that this court shall undo them, I answer No, if they are the pure, voluntary, well understood, acts of her mind, but, if they have not that character, if they are the result of her notion that this is the true effect of that friendly assistance, that kind, providential, interference, to which she was looking for the management of her affairs with advantage and facility to herself, if the conveyance was executed under the effect of that which has always been considered in this court as undue influence, if the deeds themselves, which are the best evidence, demonstrate, and if that is confirmed by extrinsic evidence,

that they are not the pure, well understood, acts of her mind, this court will undo them.

Has an instance ever occurred that a person situated as this lady was permitted to execute such instruments as these with a purpose of marriage demonstrated upon one of them and having a mother, and other persons whom she regarded with affection and anxiety for their welfare in life? LORD HARDWICKE reasons with great force as to a voluntary deed upon the same principle, which induced me to ask how it happens that there is no power of revocation in this instrument. There was in that deed a power of revocation, but it was a power to revoke in the presence of three persons who perhaps never could be got together, which was, therefore, considered as if there had been no power of revocation, and the want of such power was considered strong evidence that the party did not understand the transaction; whence arose a strong inference of an undue purpose. There is in this case an attempt to show why there was not a power of revocation, and that is a part of the transaction, one of the most liable to objection. The evidence and answer of the attorney go to this distinctly—that she informed him she was to have all her affairs arranged. He was struck with the circumstance of her making an irrevocable deed, and told her that she should make a will. When she said that this was to be a permanent arrangement, is it too much to say that the attorney permitted himself to be surprised into an act depriving her of her property for the benefit of Baseley's family, and for no provident or wise purpose fettering all her other property by the various limitations in the other deed? I do not say that instruments are to be set aside by the want of great delicacy in the person who prepared them, but I am bound to look at all the circumstances that led to the execution of a voluntary instrument, and to observe, that the attorney did not state this improvident act to the brother of this lady, or, as WILMOT, C.J., says, go and talk both to the grantor and grantee upon it. What she said to him must have suggested to him a reason for resisting more strenuously. The court cannot pay attention to such circumstances as are alleged upon this part of the case.

The deed, being drawn by the attorney, was laid before a conveyancer, and the simple question put was whether a fine and recovery were necessary. Why that should be thought of I do not know, as she had the remainder in fee-simple vested in possession. Some observation occurs upon the contents of that instrument. Her annuity of £400 is merely reserved, payable quarterly, not secured by any personal obligation. The three trustees and the rentcharge were left in blank before the deed was laid before counsel, and the filling up those blanks was left to Baseley and herself. The power of changing the trustees does not depend upon her pleasure, but is only given in the cases of inability or refusal to act. The reason why there is no power of revocation is that the gentleman, before whom the draft was laid thought that his business was to execute the intention of the parties. There is a difference of opinion upon that, other gentlemen thinking some observation necessary. Upon the instructions for the other deed, however, they do not intimate that there is to be any power of revocation or that she is to have any power to alter the uses. Not a word is dropped upon the subject, but by that deed this lady, who was so shocked at the notion of having a provision that was not to be permanent, has the power of making a deed or will to alter completely these uses. Is there any evidence showing why that power should be there? A power not to revoke the uses, but much less convenient, yet open to all the objections, that she could have to a temporary instrument as not binding herself down.

Other observations occur upon these instruments. This latter deed in the limitation as to all the estates provides an interest to a husband surviving, and to her children. According to the instructions as to all the money property (and they settle property in the funds, though there was none), they omit the provision for the husband and children, which, however, they thought they had inserted as there is afterwards a provision upon failure of children. Another circumstance as

A to the instrument of June 21, 1804, is that the instructions as to the trustees' names mention Baseley, the attorney, Sleet, and Anderson, and the insertion of Anderson is material. It is proved that she frequently visited him, and he is named as a trustee, but his name is afterwards struck out. Clearly at the time of the instructions it was not intended that there should be an ultimate limitation to the trustees for their own use, but they were to be trustees for undefined purposes. B The deed was originally drawn so, expressing the trust to be for such uses as they should think necessary and proper, but that was afterwards struck out and the use for the benefit of the trustees themselves substituted.

It does not rest there. Suppose these transactions entirely separate. Proposing to put under the fetters of these limitations all her considerable West India and other property for the purposes of facility of management and putting it out of C her own reach, she is permitted to place her West India property under the care of a clergyman, and an attorney in England, and a person resident in the West Indies. The power of management is certainly stated to be for her life subject to her control: how efficacious, everyone knows: without any control whatsoever after her death. The management is perfectly ad libitum—to lease and carve out of the estates other interests, and they have all discretionary powers as to the children, D Mary Elliot and Clarke, and she could not change any of the trustees without executing that power which it is supposed she had determined not to have.

If such is the nature of these deeds, and the defendant, according to the letter that is in evidence, permitted her to suppose that he was to take the management for her benefit, without considering what an agent, engaged for reward, can do, the known doctrine is that the fruit of that relation, if it was not absolutely E dissolved, cannot be permitted to subsist. Was the relation dissolved? Look at the transactions from the date of the letter to the end of the year; possession taken, and her anxious wish that Baseley should be the occupier, proved, her satisfaction expressed at seeing the house repaired; her declarations that she could not possibly think of undertaking that trouble; and that it was with exultation and satisfaction, as some of the witnesses express it, that she got rid of the estate; that it was no F object to her; that she had so much property, it was a subject of delight to her that Baseley was to occupy that which was given to him. Take it that she intended to give it to him, it is by no means out of the reach of the principle. The question is not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced, whether all that care and providence was placed round her as against those who advised her, which, from their situation and G relation with respect to her, they were bound to exert on her behalf. Her situation, with reference to pecuniary circumstances during the whole period, must also be attended to, her husband a few weeks before having been relieved from distress by a sum of money, advanced by Baseley.

In that view of the case no evidence out of these instruments could satisfy me that Mrs. Huguenin understood them. I believe, further, that the parties to the H transaction did not understand it. Repeating, therefore, distinctly, that this court is not to undo voluntary deeds, I represent the question thus—whether she executed these instruments not only voluntarily, but with that knowledge of all their effect, nature, and consequences, which the defendants Baseley and the attorney were bound by their duty to communicate to her before she was suffered to execute them; and, though, perhaps, they were not aware of the duties which I this court required from them in the situation in which they stood, where the decision rests upon the ground of public utility for the purpose of maintaining the principle it is necessary to impute knowledge which the party may not actually have had. These parties, therefore, cannot possibly hold the benefit of these instruments.

As to the costs the same principles of public utility, that require me to decree that these instruments shall be delivered up, compel me to make that decree at the cost of the defendant. As to ordering the deeds and papers to be delivered

up, I have not, upon this form of the bill, authority to examine here the contents of the rest of the attorney's bill of costs. He, by happening to be engaged in a transaction that cannot be maintained, would not lose his lien upon the papers with reference to other transactions. If, however, Mrs. Huguenin ought not to have been permitted to execute the deeds, I am bound by the principle, established in *Bridgman* v. *Green* (11) and other cases, to hold that, if an attorney thinks proper to do no more than obey the instructions which he ought not to have permitted to take effect, the court has frequently said that is not sufficient, and, if he has not only carried into execution an intention which he ought not to have permitted to take effect, but has also taken to himself an advantage with respect to the property, persons not being consulted, who ought to have been consulted (alluding to the ultimate limitation to the trustees), it deserves serious consideration, whether he shall not pay the costs if the others cannot. If, however, these papers are to be delivered up on payment of the attorney's bill, he cannot be permitted to charge for drawing instruments, which the decree says ought not to have been executed.

One circumstance occurs to me, which I will notice so that it may not be supposed to have escaped me. If there is anything like consideration, it is the consideration that arises out of the circumstance that Baseley would repair, and lay out money upon the estate. If that had been expressed, it would have amounted to so little as valuable consideration that the court would not have been justified in paying much attention to it, but I cannot find in any of these cases in which a deed has been affected on account of undue influence, that the court has ever attended to anything supposed merely to oblige the parties, if not expressed.

Judgment for plaintiffs.

COLES *v.* TRECOTHICK AND OTHERS

[Lord Chancellor's Court (Lord Eldon, L.C.), January 24, 26, 27, 1804]

[Reported 9 Ves. 234; 1 Smith, K.B. 233; 32 E.R. 592]

Specific Performance — Sale of land — Contract — Inadequacy of price — Not amounting to fraud.

Inadequacy of price, unless amounting in itself to conclusive and decisive evidence of fraud, is not itself a sufficient ground for refusing an order for specific performance of a contract for the sale of land.

Trustee—Purchase of trust property—"Transaction of great delicacy"—Diligent scrutiny by court—Need to show no fraud, no concealment, and no advantage taken by trustee of information acquired by him in that character.

A trustee may purchase property from the cestui que trust, but, though permitted, it is a transaction of great delicacy which the court will watch with the utmost diligence—so much that it is very hazardous for a trustee to engage in such a transaction.

A trustee may buy from the cestui que trust provided that there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances showing that the cestui que trust intended that the trustee should buy, and that there is no fraud, and no concealment and no advantage taken by the trustee of information acquired by him in the character of trustee: per Lord Eldon, L.C.

Auction—Auctioneer—Agent of vendor—Form of agreement—When also agent of purchaser.

The appointment of an agent need not be in writing [subject to the special

requirements outlined in 1 HALSBURY'S LAWS (3rd Edn.) 153–156], and, therefore, a contract between a vendor and an auctioneer can be either verbal or in writing. **Semble,** when signing a contract for the sale of property or a memorandum thereof the auctioneer is the agent of the purchaser as well as that of the vendor.

Notes. Applied: *Randall* v. *Errington* (1805), 10 Ves. 423. Considered: *Morse* v. *Royal* (1806), 12 Ves. 355; *Copis* v. *Middleton* (1817), 2 Madd. 410. Applied: *Kenney* v. *Wexham* (1822), 6 Madd. 355. Distinguished: *Gosbell* v. *Archer*, [1835–42] All E.R. Rep. 394; *Strickland* v. *Turner* (1852), 7 Exch. 208. Considered: *Seal* v. *Claridge* (1881), 7 Q.B.D. 516; *Plowright* v. *Lambert* (1885), 52 L.T. 646; *Potter* v. *Peters* (1895), 64 L.J.Ch. 357. Referred to: *Buckmaster* v. *Harrap* (1807), 13 Ves. 456; *Emmerson* v. *Heelis* (1809), 2 Taunt. 38; *Peacock* v. *Evans*, *Evans* v. *Peacock* (1809), 16 Ves. 512; *Kemeys* v. *Proctor* (1813), 3 Ves. & B. 57; *Henderson* v. *Barnewall* (1827), 1 Y. & J. 387; *Graham* v. *Musson* (1839), 7 Scott, 769; *Re Robinson and Ferrand*, *Ex parte Holdsworth* (1841), 1 Mont. D. & D.G. 475; *Carter* v. *Palmer* (1841), 8 Cl. & Fin. 657; *Tottenham* v. *Green* (1863), 32 L.J.Ch. 201; *Coles* v. *Bristowe* (1868), L.R. 6 Eq. 149; *Luddy's Trustee* v. *Peard*, [1886–90] All E.R. Rep. 968; *Re Boles and British Land Co.'s Contract*, (1901), 71 L.J.Ch. 130.

As to specific performance of a contract for the sale of land, see 34 HALSBURY'S LAWS (3rd Edn.) 330, 331; as to acquirement by trustees of trust property, see ibid., vol. 38, pp. 961–966; and as to the authority of auctioneers, see ibid., vol. 2, p. 71. For cases see 44 DIGEST (Repl.) 57, 58; 47 DIGEST (Repl.) 257 et seq.; 3 DIGEST (Repl.) 4–12.

Cases referred to:

(1) *Jackson* v. *Lever* (1792), 3 Bro. C.C. 605; 29 E.R. 724, L.C.; 44 Digest (Repl.) 105, *850*.

(2) *Fox* v. *Mackreth*, *Pitt* v. *Mackreth* (1788), 2 Bro. C.C. 400; 2 Cox, Eq. Cas. 320; 29 E.R. 224, L.C.; on appeal, sub nom. *Mackreth* v. *Fox* (1791), 4 Bro. Parl. Cas. 258, H.L.; 40 Digest (Repl.) 53, *342*.

(3) *Simon* v. *Motivos* (1766), 3 Burr. 1921; 1 Wm. Bl. 599; 97 E.R. 1170; 3 Digest (Repl.) 7, *53*.

(4) *Walker* v. *Constable* (1798), 1 Bos. & P. 306; 2 Esp. 659; 126 E.R. 919; 3 Digest (Repl.) 7, *46*.

(5) *Payne* v. *Cave* (1789), 3 Term Rep. 148; 100 E.R. 502; 3 Digest (Repl.) 20, *148*.

(6) *Legal* v. *Miller* (1750), 2 Ves. Sen. 299; 28 E.R. 193; 44 Digest (Repl.) 109, *881*.

(7) *Bawdes* v. *Amhurst* (1715), Prec. Ch. 402; 1 Eq. Cas. Abr. 21; 24 E.R. 180, L.C.; 40 Digest (Repl.) 510, *212*.

(8) *Welford* v. *Beazely* (1747), 3 Atk. 503; 1 Ves. Sen. 6; 27 E.R. 855, L.C.; 40 Digest (Repl.) 510, *213*.

Bill to obtain an order for the specific performance of an agreement for the sale by the defendant to the plaintiff of a mansion-house, park, and other premises, at Addington in the county of Surrey for the sum of £20,000.

The defendant, Trecothick, being seised of very considerable estates at Addington, proposed to convey all his estates at Addington to the other defendants, William Coles and Westgarth Snaith, in trust to sell for payment of debts, and, accordingly, an agreement in writing was indorsed by way of defeasance upon a warrant of attorney to confess judgment in an action brought by Francis Thwaites and Charles Apthorpe Wheelwright against Trecothick upon bonds for the sum of £17,780 2s. 8d., by which it was declared that execution should not issue for two months upon condition, that Trecothick should within a month make out his title to the Addington estate and within the remaining month convey to William Coles and Westgarth Snaith in trust to sell and pay off the encumbrances affecting

the estate and the bonds, for which the action was brought, and pay the remainder to Trecothick. The judgment was to stand as a security, not only for the bonds, if the said acts should not be done at the end of one or two months, but also for the due performance of the covenants, and so much of the principal and interest secured by the judgment as should not within ten months be realised by the sale. William Coles and his father Thomas Coles, in partnership as sugar-brokers, and Snaith & Co., bankers, were holders of some of the bonds by assignment. No conveyance was executed, but preparations were made for the sale, and the estates were surveyed and valued by Smith, a surveyor and auctioneer under the sole direction of Trecothick with the approbation of the trustees. Trecothick gave a written authority by letter, dated June 26, 1802, to the trustees, for proceeding in the sale notwithstanding the conveyance was not prepared, desiring, that if a purchaser should not offer at £110,000, the estate should be bought in, and disposed of in lots. On July 7, the day before the estate was put up, he by letter directed Smith not to sell the estate for less than £109,500, but to sell to the highest bidder above that sum. There being no bidder at the sale, it was determined to sell the estate in lots, and Trecothick, with the consent of the trustees, took the whole management. The estate was divided into twenty-two lots, and the particulars prepared by Smith, under his sole direction and authority, and were settled and approved by his solicitors. Trecothick also, with the auctioneer, fixed the prices of the lots, and he appointed several persons to bid for him to prevent any sale under those prices. The trustees in no respect interfered.

The sale took place at Garraway's, on Oct. 22, 1802, and several lots were sold, but Lot 1, comprising the manor of Addington and the advowson, mansion-house, and park, was bought in for £19,350: the price fixed by Trecothick being £19,500. Several of the lots bought in were afterwards sold by private contract, the authority to Smith being generally to sell by auction or private contract. Trecothick appeared very anxious to find purchasers, and when Smith was leaving town inquired what was to be done in his absence, if purchasers should offer. Smith answered that he transacted a great part of his business through two confidential clerks, Phillips and Glover, who in his absence would enter into contracts. With this Trecothick expressed himself satisfied.

The evidence for the plaintiff stated that on Oct. 22, at a meeting for the purpose of considering what should be done with the lots unsold, the solicitor declared that Trecothick had desired him to offer Lot 1 to William Coles or his father, the plaintiff, for £20,000, and was very desirous that one of them should be the purchaser. The trustees not being present, their solicitor replied that William Coles could not, as standing in the character of trustee, and would not, become the purchaser, whatever his father, as an indifferent person, might do, observing also that the price proposed was more by £500 than it would have been sold for, to which Trecothick's solicitor said that that was true, but Trecothick thought it was worth more, but he had a real wish that the plaintiff should have it and desired him to signify such wish. On Nov. 6 William Coles informed Smith and Trecothick's solicitor, that his father agreed to take the lot at £20,000, when the solicitor expressed Trecothick's wish to reserve the advowson and some other things, and abate £4,000. William Coles said he was sure his father would not purchase anything short of the whole, and Trecothick must make up his mind, whether to part with it or not, and he said he would call again for his final answer. Soon afterwards Smith was offered £20,000 by Mr. Young, an auctioneer. Trecothick being informed that neither Young nor the plaintiff would buy if the lot was divided, gave up that intention, and agreed that it should be sold entire for £20,000, and, Smith asking whether the plaintiff or Young was to have it, Trecothick desired him do as he pleased. Smith said: "Then, Sir, it is Mr. Coles's," and Trecothick replied: "Then let Mr. Coles have it." The same afternoon William Coles called on Smith, and, being informed of what had passed and asked if the plaintiff was to be considered the purchaser, answered: "Certainly," saying that

A he should send the plaintiff's solicitor immediately who, accordingly, called that evening. Smith having left town, an agreement was written on one of the particulars and signed for the plaintiff by his solicitor and by Smith's clerk in this manner: "Witness Evan Phillips for Mr. Smith, agent for the seller." A deposit of £2,000 was at the same time paid to Phillips by the plaintiff's solicitor. On Nov. 8 and 9 Trecothick applied to William Coles, expressing his wish that the B plaintiff would give up his purchase on the ground that Young had offered £25,000 for the lot. The plaintiff refused to relinquish his purchase.

The defendant Trecothick by his answer stated that William Coles was not authorised by his father to offer £20,000, and relied upon the Statute of Frauds, insisting that Smith and Phillips were not authorised to sell and that the payment of £2,000 could not be considered a part-performance. The answer also stated C some circumstances, as instances of oppression, with a view to impose harsher terms upon him.

Phillips, by his deposition as to the execution of the contract, stated that "he signed or witnessed such contract" for Smith and as the agent for the seller in the absence of Smith, which he represented to be in the usual course of business. Trecothick's solicitor, by his depositions, stated that the solicitor for the Coles D first intimated to him that William Coles had some thoughts of purchasing part of the estate, but had declined bidding at the sale as improper, he being a trustee, but, as the sale was over and the trust deed not executed, there would be no impropriety. In consequence of that communication, the deponent by the direction of Trecothick made the offer at the meeting, to which the plaintiff's solicitor answered that he had no authority, but hoped the plaintiff would be prevailed on E to purchase it, adding that the plaintiff certainly would not give more than £19,500. On the morning of Nov. 6 Trecothick directed the deponent not to let it be sold for £20,000 at all events, till he was seen again upon the subject, which the deponent communicated to Smith, and the proposed alteration in the lot, and also to William Coles who said he could not make any alteration in the lot as it would interfere with his father's arrangements, and expressed considerable objection to F make any offer unless he was certain it would be accepted. Being urged by Smith, he said he was not authorised to give more than £19,500, but, being further pressed by Smith, who said, Young would certainly offer £20,000, he said, rather than any other person should have it, he would give £20,000.

The deponent William Coles, being examined as a witness for the plaintiff, by G his deposition stated that he was authorised by his father to offer £20,000. The receipt for the £2,000 was stamped as an agreement during the hearing of the cause, the objection for want of the stamp having been taken.

Mansfield, *Richards* and *Trower* for the plaintiff.
Romilly, *Stanley* and *Sir Thomas Turton* for the defendant Trecothick.

H **LORD ELDON, L.C.**— There are two questions in this cause (i) whether there is any such agreement as this court can carry into execution, and (ii) if there is, whether the circumstances which have led the parties, or either of them, to enter into that contract are such, not as to call upon the court to say that the contract does not bind them, but, that the court will refuse the plaintiff the relief beyond the law, of a specific performance, leaving him to make what he can of an action I for damages at law?

With regard to the circumstances, this case, as a contract in fact, is proved beyond all possibility of doubt—an agreement, not to be impeached nor sought to be impeached, upon any circumstance in evidence, and carried into execution from day to day and hour to hour by the active I may almost say the sole, interposition of Trecothick. According to all the evidence the trustees devolve altogether upon Trecothick and the auctioneer the duties of surveying the estate, drawing the particulars, fixing the value, etc. The trustees do not appear to have interfered

in the business up to the sale otherwise than that they sanctioned and authorised the acts of Trecothick and Smith. A

On the question as to a purchase by a trustee from the cestui que trust, I agree, the cestui trust may deal with his trustee, so that the trustee may become the purchaser of the estate. But, though permitted, it is a transaction of great delicacy which the court will watch with the utmost diligence—so much that it is very hazardous for a trustee to engage in such a transaction. Considering it with B reference to the delicacy of a purchase by a creditor, it is prayed that, though £19,500 was the sum for which this lot was to have been sold at the auction, £20,000 might reasonably be expected, and Trecothick thought he was settling an estate worth more, Trecothick, his solicitor, and Smith all knew the valuation of the surveyor at £23,000. There was complete knowledge, wherever it ought to be, that it was worth that sum. It is true that Coles, the son, declared that he was C not authorised to go farther than £19,500, swearing by his deposition, that he was authorised to go to £20,000. But it is too much to say he is not to be believed, because, when chaffering for the estate as a bidder, he made that representation. Is it possible under the circumstances from a subsequent offer, not going beyond the estimate by the vendor before the sale, and but £2,000 beyond the calculation of the surveyor, to hold, that upon inadequacy of price, a specific performance is D to be refused? If Smith had sunk any circumstances particularly with the knowledge of Coles which might have disarmed Trecothick, and lulled that sort of vigilance and caution to be expected from a man attentive to his affairs, that would have been a ground, perhaps for rescinding the contract, at least for refusing a performance, and leaving the plaintiff to an action. But Trecothick, speculating in that morning that the estate was worth £25,000, is distinctly informed that E two persons bid £20,000. So much being communicated to him, can a court of justice say he had not sufficient information that there was ground for competition? Young at first does not advance upon the offer of £20,000, but rather bids down upon it. Two days afterwards he bids £21,000. That was not thought enough to open a transaction all parties considered closed. Young's letter offering £25,000 was not sent till Nov. 15, but Trecothick was much sooner, on Oct. 30, informed F that he would bid that sum. Without the slightest doubts I am bound by every principle, upon which this court acts, to say Trecothick meant on that day to sell the lot for £20,000.

Inadequacy of price is quite out of the question. The cases of reversions and interests of that sort go upon very different principles. In some the whole duty of making good the bargain upon the principles of this court is upon the vendee, G as in the instance of heirs expectant. Inadequacy of price does not depend upon a person giving pretium affectionis from any peculiar motive beyond what any other man would give, the reasonable price. But, further, unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground H for refusing a specific performance. How upon these circumstances is there such inadequacy of price as to cut down the bargain or authorise the court not to complete it? Accidental subsequent advantage made of a bargain is nothing. It has been held upon true principles that, if a man contracts to sell an estate for a life-annuity, if the contract is signed and the party to have the annuity died before the end of the first half-year, the court must execute the contract: see *Jackson* v. *Lever* (1). I am, therefore, clearly of opinion, that the court must execute I this contract, if duly signed, unless there is infused into it some other character belonging to one of the parties, in respect of the principles, duties, and obligations arising out of which I am bound to withhold that equitable relief.

As to the objection to a purchase by the trustee, the answer is that a trustee may buy from the cestui que trust, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, that the cestui que trust intended that the trustee should buy,

A and there is no fraud, no concealment, no advantage taken, by the trustee, of information acquired by him in the character of trustee. I admit it is a difficult case to make out wherever it is contended that the exception prevails. The principle was clearly recognised in *Fox* v. *Mackreth* (2), and was established long before. The principle, upon which I ever held that case right stands upon this only—not, that Mackreth might not have purchased from Fox and would not have B been entitled to the increase, but that he had not been placed in circumstances to make that contract. If that was not the principle, LORD KENYON, LORD THURLOW, and the House of Lords, were wrong in refusing the issue whether he bought the estate at its worth. The ground is that it was not material whether it was bought at its worth. If an adventitious advantage accrued, yet, if the party had not divested himself of the character of trustee by an unqualified, authorised, con- C tract for liberty to buy, the cestui que trust is entitled to the most casual advantage that might arise. In that case Farrer's evidence, so far from that, went the other way, for Fox was so negligent that, when another person became trustee, he stipulated that he never should act upon Fox's consent unless sanctioned by the approbation of others.

In the present case you are not met by the danger that the trustee may buy D with knowledge acquired at the expense of the cestui que trust that the value may be considerably more than he is aware of. In the case of mines, for instance, the trustee must make out either that he had given all the information he had to the cestui que trust or that the cestui que trust had clearly renounced the right of objecting. But where there is a trustee, made so under such an instrument as this, the whole execution of the trust devolved upon the cestui que trust, and he takes E all upon himself with the auctioneer, if not chosen, at least approved, by him, makes surveys, settles the plans, modes of sale, and prices, and, therefore, has all knowledge what is the proper price. If any case can exist for relaxing the rule by consent of the parties, this is that case. Did they bargain that the rule should be relaxed? The evidence clearly proves that Trecothick, with this knowledge of the value of the estate, the only knowledge the trustees had, was F offering it at a sum less than he thought he ought to have. Nor do I feel the objection that Coles acts for his father, agreeing that, if the trustee is to be the agent of the buyer, there is as much hazard that the sale may turn out to be that which may be fraudulent, and, therefore, is not to be held good. But the same circumstances that would authorise the trustee to contract would authorise him to be the agent of the buyer, and cannot be carried higher against the agent. G There is clearly, therefore, nothing in the circumstances of this case, upon which a specific performance can be refused.

[HIS LORDSHIP dealt with a point which is now obsolete, and continued:] Much perplexity has arisen by the case of auctions, for in *Simon* v. *Motivos* (3) it was held, as to goods, that the auctioneer taking down the name was a signing within the statute [i.e., the Statute of Frauds, 1677], and it is very singular that after, H and without disturbing, that it was held at nisi prius by EYRE, C.J., that it would not do as to land. Why not? The form of the two clauses is not the same, but the terms as to the memorandum in writing are exactly the same [see now Law of Property Act, 1925, s. 40]. That case was followed, certainly without much argument or discussion upon the bench according to the report, in *Walker* v. *Constable* (4). Unless some distinction can be pointed out, the law is very incon- I venient as to sales by auction, particularly if the auctioneer is to be considered the agent of one only, and if, putting down the name, and ascertaining the sum, and putting that down upon the conditions of sale, which ascertain all the other terms, it is competent after that to the vendor to say, according to *Payne* v. *Cave* (5), that, though the other party is bound in a degree by knocking down the hammer, he may at that moment revoke the authority. Upon such terms mankind will not very readily engage in these transactions. If the putting down the name and the sum by the auctioneer is a signing, that would furnish a new class of cases,

that, the effect being to ascertain the terms of the agreement, it should be good both in law and equity. A

It is clearly settled now, that an agent need not be authorised in writing; also, that an agreement in writing may be dissolved by parol: *Legal* v. *Miller* (6). In *Bawdes* v. *Amhurst* (7) Lord Cowper, L.C., expressed a clear opinion that the party writing what the ecclesiastical courts call "olograph," and inserting his name, is not a signing, and so far *Simon* v. *Motivos* (3) goes along with that. In B *Welford* v. *Beazely* (8) also Lord Hardwicke professes not to disturb *Bawdes* v. *Amhurst* (7), but he proceeds to say, though he does not disturb it, the reason is that which is given in *Bawdes* v. *Amhurst* (7), which, however, is quite inconsistent with the decisions upon devises, that the party may be supposed making up his mind, while writing it, till he gets to the end, and may at the end mean something more to be added hereafter. But Lord Hardwicke distinguishes that C from the case before him: viz., that it is not necessary the identical agreement should be signed, but any note or memorandum will do, and puts a strong case of a letter afterwards. Though the agreement is not signed, if that letter contains all the terms, and describes the consideration and all the circumstances, so that by the contents of the letter it can be connected and identified with the agreement, that letter, which, not only is not a signature, but is the last of all things that can D be called signing the agreement, is a writing signed, which, ascertaining the contents of the agreement, amounts to a note or memorandum of it, and, therefore, satisfies the statute.

It is true that where a party or principal or person to be bound signs as, what he cannot be, a witness, he cannot be understood to sign otherwise than as principal. E As to that, Lord Hardwicke, whom I think it much better to follow, has said that his decision goes upon the assumption of the fact that the intention of that party was not to sign the instrument as an agreement that was to be binding upon her. His distinction is that in *Bawdes* v. *Amhurst* (7) there was no signature but that in the introduction, and the instrument might be not then completely contemplated. But in the other case she had signed it, and, though not meaning F to be a party, yet acknowledging there was an agreement, and, if she had not signed, but had written a letter acknowledging the terms, that would have been sufficient, and speaking of the certainty, as avoiding the mischief, he puts himself upon a principle that would support this case, if it can be made out, that Phillips was sufficiently authorised to sign as an agent and did so.

That brings it to the point whether these persons were sufficiently authorised. G With respect to that, the doctrine is very dangerous indeed that, if an auctioneer is authorised to sell, all his clerks, when he goes out of town, are in consequence of any usage in that business, agents for the person who authorised him. But it is proved by Smith and Glover, that Trecothick, pursuing his own purpose of bringing these sales to a conclusion, asks Smith whether delay will arise by his absence from town, and was told by him that he was in the habit of allowing H his clerks to sign contracts, witness instruments, and conduct his business. Upon the evidence it is impossible to say that Trecothick did not give his assent to that. In consequence of his own wish they agreed that the clerk should be considered an agent lawfully authorised to enter into the contract. The whole circumstances amount to this—that whoever was lawfully authorised by parol as the agent of Trecothick was authorised by him and the trustees and each of them, and the I sale is to be considered as made by a person lawfully authorised by the vendor, consisting of the three or the one. Certainly the manner of signing by these auctioneers is very slovenly. The circumstance that the language of the agreement is expressed in the singular number is not such proof of want of mutuality that will prevent an execution in this court. Independent of the objection of law upon the circumstances, it was immediately communicated to Trecothick and his solicitor, and was not objected to.

The receipt is now stamped. The objection to allowing that during the hearing

A was overruled in the Court of Common Pleas upon the authority of a former case, decided upon the ground of the Acts of Parliament imposing penalties, from which it was concluded the legislature looked to the circumstance. It was contended, on the one hand, that the receipt is an agreement in writing within the statute: on the other, that to have that effect the receipt must vi sua, by force of its own contents, state the terms of the agreement, describe the property sufficiently, B and state the price to be given for it and the terms upon which it is given and received; or, if its own inherent contents are not sufficient to evidence so much, it must by its contents so refer to some other instrument, containing the terms of the agreement, that by its contents that other agreement may be ascertained. Very nice and difficult questions may arise upon that: How far a paper of this sort will take a case out of the statute, if you are obliged to make out all these par- C ticulars by parol evidence. If it stood upon this alone, I should have great difficulty, and should reserve the question. The estates composing "Lot 1," are not described, and that must be made out by other evidence. Neither is it specified whose estates at Addington these were. The receipt, therefore, upon the face of it does not state the terms, and there is nothing upon the receipt necessarily referring to the particulars, so as to identify and incorporate it. I doubt extremely whether D this receipt is sufficient.

That brings it round to the signature by Phillips as to which, upon the whole case taken together, Smith was the agent for the trustees and Trecothick, and Trecothick had authority to decide for the trustees, what person's signature should be equivalent to the signature of Smith, and his agreement makes Phillips's signature, though in this form, equivalent. As to the objection of law, LORD E HARDWICKE has already decided that where either the party himself or a person duly authorised by him ascertains the agreement by a signature, not in the body of the instrument, which I represent to be doubtful, but in the form of addition, that signature of that instrument ascertains the agreement sufficiently within the statute, though not a signing as an agreement, yet sufficient to identify the agreement, the instrument itself containing the terms, and, therefore, sufficient F within the Statute of Frauds. Unless the objection as to signing can be maintained, the rest of the case does not form any reasonable doubt.

Decree of specific performance.

MORTLOCK *v.* BULLER

[Lord Chancellor's Court (Lord Eldon, L.C.), December 7, 10, 12, 24, 1804]

[Reported 10 Ves. 292; 32 E.R. 857]

Specific Performance—Refusal of decree—Surprise rendering application not fair and honest—Application founded on breach of trust or breach of duty as between principal and agent.

The court will not grant a decree for the specific performance of a contract if there has been any sort of surprise which makes it not fair and honest to call for such an order or if the application for the order is founded on a breach of trust or breach of duty, e.g., between principal and agent.

Specific Performance—Compensation—Vendor with partial interest in estate—Agreement to sell total interest—Right of purchaser to partial interest and abatement.

If a vendor who has a partial interest in an estate enters into a contract agreeing to sell the estate as if it were his own he cannot afterwards say that, though he has a valuable interest, he has not the entirety, and, therefore, the purchaser shall not have the benefit of the contract. He is bound by the assertion in his contract, and, if the purchaser chooses to take as much as he can have, he has a right to that and to an abatement, and the court will not hear the objection by the vendor that the purchaser cannot have the whole.

Notes. Approved: *Merediths* v. *Saunders* (1814), 2 Dow. 514. Applied: *White* v. *Cuddon* (1842), 8 Cl. & Fin. 766; *Wedgwood* v. *Adams* (1844), 8 Beav. p. 105; *Robinson* v. *Briggs* (1853), 1 Sm. & G. 188. Distinguished: *Salamon* v. *Sopwith* (1876), 35 L.T. 463. Applied: *Burrow* v. *Scammell* (1881), 19 Ch.D. 175. Distinguished: *Hopcraft* v. *Hopcraft* (1897), 76 L.T. 341. Considered: *Rudd* v. *Lascelles*, [1900] 1 Ch. 815. Referred to: *Hill* v. *Buckley* (1811), 17 Ves. 394; *Williams* v. *Edwards* (1827), 2 Sim. 78; *Thomas* v. *Dering*, [1835–42] All E.R. Rep. 711; *Baylies* v. *Baylies* (1844), 1 Coll. 537; *Bellringer* v. *Blagrave* (1847), 1 De G. & Sm. 63; *Marshall* v. *Sladden* (1849), 7 Hare, 428; *Millican* v. *Vanderplank* (1853), 11 Hare, 136; *Shrewsbury and Birmingham Rail. Co.* v. *London and North Western Rail. Co.*, *London and North Western Rail. Co.* v. *Shrewsbury and Birmingham Rail. Co.* (1853), 4 De G.M. & G. 115; *Wollaston* v. *Osborn* (1853), 20 L.T.O.S. 274; *Sneesby* v. *Thorne* (1855), 7 De G.M. & G. 399; *Eastern Counties Rail. Co.* v. *Hawkes* (1855), 5 H.L. Cas. 331; *Wolley* v. *Jenkins* (1856), 23 Beav. 53; *Wilson* v. *Williams* (1857), 3 Jur. N.S. 810; *Re Rolling Stock Co. of Ireland*, *Clack's Case* (1866), 14 W.R. 986; *Noble* v. *Edwardes*, *Edwardes* v. *Noble* (1877), 5 Ch.D. 378; *Re Cotton's Trustees and School Board for London*, [1881–5] All E.R. Rep. 926; *Thomas* v. *Williams* (1883), 24 Ch.D. 558; *Ecclesiastical Comrs.* v. *Pinney*, [1899] 2 Ch. 729; *Sun Building Society* v. *Western Suburban Building Society*, [1921] 2 Ch. 83.

As to specific performance when there has been misrepresentation, fraud, or mistake, and as to compensation, see 36 Halsbury's Laws (3rd Edn.), 303–308; and for cases see 44 Digest (Repl.) 58 et seq., 158 et seq.

Cases referred to:

(1) *Twining* v. *Morrice* (1788), 2 Bro. C.C. 326; 29 E.R. 182; 44 Digest (Repl.) 49, *356*.

(2) *Emery* v. *Wase* (1801), 5 Ves. 846; 31 E.R. 889; affirmed (1803), *post*; 8 Ves. 505, L.C.; 44 Digest (Repl.) 58, *443*.

(3) *Marquis of Townshend* v. *Stangroom* (1801), 6 Ves. 328; 31 E.R. 1076, L.C.; 40 Digest (Repl.) 303, *2516*.

(4) *Calcraft* v. *Roebuck* (1790), 1 Ves. 221; 30 E.R. 311, L.C.; 44 Digest (Repl.) 162, *1410*.

A (5) *White* v. *Damon* (1802), 7 Ves. 30, 34; 32 E.R. 13, L.C.; 44 Digest (Repl.) 6, *12*.

(6) *Jenkins* v. *Hiles* (1802), 6 Ves. 646; 31 E.R. 1238, L.C.; 44 Digest (Repl.) 138, *1142*.

Also referred to in argument:

B *Mortimer* v. *Capper* (1782), 1 Bro. C.C. 156; 28 E.R. 1051, L.C.; 44 Digest (Repl.) 53, *397*.

Griffith v. *Spratley* (1787), 1 Cox, Eq. Cas. 383; 2 Bro. C.C. 179, n.; 29 E.R. 1213; 44 Digest (Repl.) 56, *416*.

Betesworth v. *St. Paul's* (*Dean and Chapter*) (1726), Cas. temp. King, 66, L.C.; reversed sub nom. *Bettesworth* v. *St. Paul's* (*Dean and Chapter*) (1728),

C 1 Bro. Parl. Cas. 240; 2 Eq. Cas. Abr. 26; 1 E.R. 541, H.L.; 44 Digest (Repl.) 106, *857*.

Savage v. *Taylor* (1736), Cas. temp. Talb. 234; 25 E.R. 753; 44 Digest (Repl.) 49, *352*.

City of London v. *Nash* (1747), 3 Atk. 512; 1 Ves. Sen. 12; 27 E.R. 859, L.C.; 44 Digest (Repl.) 51, *372*.

D *Day* v. *Newman* (1788), 2 Cox, Eq. Cas. 77; 30 E.R. 36; 44 Digest (Repl.) 58, *438*.

Nott v. *Hill* (1683), 1 Vern. 167.

Berny v. *Pitt* (1686), 2 Vern. 14; 2 Rep. Ch. 396; 23 E.R. 620, L.C.; 25 Digest (Repl.) 296, *1018*.

Tilly v. *Peers* (1791), cited in 10 Ves. at p. 301; 32 E.R. 860; 44 Digest (Repl.)

E 57, *417*.

Kien v. *Stukeley* (1722), 1 Bro. Parl. Cas. 191; 1 E.R. 506; sub nom. *Keen* v. *Stuckley*, 2 Eq. Cas. Abr. 19; Gilb. Ch. 155, H.L.; 44 Digest (Repl.) 58, *437*.

Squire v. *Baker* (1726), 2 Eq. Cas. Abr. 58; 22 E.R. 51; 44 Digest (Repl.) 48, *340*.

F *Young* v. *Clerk* (1720), Prec. Ch. 538; 24 E.R. 241; 44 Digest (Repl.) 48, *339*.

Buxton v. *Lister* (1746), 3 Atk. 383; 26 E.R. 1020, L.C.; 44 Digest (Repl.) 24, *146*.

Bill to obtain an order for the specific performance of a contract for the sale of an estate at Isleham, in the county of Cambridge, to the plaintiff John Mortlock.

G By a settlement, dated Mar. 5, 1799, previous to the marriage of John Buller and Elizabeth Yorke, the estates at Isleham were limited, subject to a term of ninety-nine years in trust to raise £200 a year pin-money to be paid to the separate use of Mrs. Buller, to the use of John Buller for life without impeachment of waste, remainder to the use of Lord Hardwicke, Charles Yorke, James Buller, and their heirs, during his life in trust to preserve contingent remainders, remainder to

H Elizabeth Yorke for life without impeachment of waste, remainder to the same trustees for 2,000 years upon trust to raise portions for younger children, and, subject thereto, to the use of the first and other sons of the marriage in tail male, remainder to the use of John Buller, his heirs and assigns for ever. The settlement contained a power to the trustees at any time or times, at the request and with the approbation of Mr. and Mrs. Buller during their joint lives or the life of the

I survivor, to be testified by some deed or writing to be sealed and delivered by them, him, or her, in the presence of and attested by two or more witnesses, to sell or exchange, and it was declared that the trustees should, with the consent of Mr. and Mrs. Buller or the survivor of them, and after the decease of the survivor at the discretion of the trustees, apply the money arising from the sale, in the first place, in paying off the encumbrances, and afterwards lay out the residue in the purchase of other lands to be settled to the same uses.

In the summer of 1800 the trust estates were advertised for sale by auction

on Sept. 24, in fifteen lots, unless the whole should be disposed of by private contract before Sept. 8, and by the printed particulars it was declared that the purchaser should pay a deposit of £15 per cent. and sign an agreement for payment of the remainder of the purchase-money on Dec. 31 next. The plaintiff, John Mortlock, having applied to the auctioneer, a meeting took place with Mr. Buller, who asked £26,500 for the purchase. Mortlock offered £26,000, which was declined by Mr. Buller until he should have consulted his friends. By a letter, dated Sept. 3, the auctioneer informed Mortlock that no less sum would be accepted, in consequence of which Mortlock, the following day by a letter to the auctioneer declared himself ready to accede to the terms proposed. His agent, accordingly, on Sept. 9 paid the deposit to the auctioneer, and signed the contract for the completion of the purchase; and the auctioneer signed a receipt for £4,975, the deposit in part of £26,500, the purchase-money.

The answers of the trustees represented that, Mr. Buller expressing his wish that the Isleham estate should be sold, Mr. Yorke generally signified his inclination to concur in such a measure if it were thought advantageous for the trust. Mr. James Buller said that he should be ready to concur in the wishes of his brother upon the subject, and LORD HARDWICKE answered that, if Mr. Buller should think it advantageous to part with the estate at that time, there could be no difficulty in obtaining the consent of the trustees. The trustees did not any further interfere in the proceedings towards the sale, which was conducted under the sole authority of Mr. John Buller, but a draft of the conveyance was approved by Mr. James Buller on behalf of himself and Mr. John Buller and on behalf of the other trustees by their solicitor. The trustees, however, in December, 1800, being informed, that Mortlock had made a large profit by his bargain, and had actually contracted for the re-sale of parts of the estate for several sums amounting to £34,900, leaving a considerable part undisposed of, refused to concur in the conveyance. Upon that re-sale the purchasers were but seven in number, and the money was to be received by instalments in the course of the year 1801.

The circumstances under which the value of the estate was fixed, were these. In the spring of 1800 Mr. Buller applied to the auctioneer to survey the estate and advise him of the value and the best mode of selling. In June and July the auctioneer represented that he had surveyed the estate, and, according to his own evidence, considered that it was worth at least £28,000, but, if from £24,000 to £27,000 should be offered, a consultation should take place, and he would before the auction value it again as then divided into fifteen lots. In the beginning of September, 1800, the auctioneer again surveyed the estate in person, the former survey having been made by a clerk, and the amount of the second valuation was £33,386. That valuation was first produced to the solicitor of Mr. Buller in the beginning of 1801, the auctioneer having never before communicated the fact to Mr. Buller or any other person. After the answers were put in Mrs. Buller died, not leaving any children. A supplemental bill was filed, claiming the relief against Mr. Buller.

Sir Thomas Manners-Sutton, *Richards*, *Wilson*, and *Hart*, for the plaintiff.
Romilly and *Leach* for the defendant, James Buller.

LORD ELDON, L.C.— In this very important cause one or two cases may deserve consideration. In *Twining* v. *Morrice* (1) there was no pretence in the evidence of any contract by Blake that he should bid for the vendors. LORD KENYON said this court is not bound specifically to execute every contract, and, if there was any sort of surprise which made it not fair and honest to call for an execution, he would not give the extraordinary relief of a specific performance, neither would he order the contract to be delivered up, but would let the purchaser go to law. The only ground there was that Blake, who purchased for Twining, having been the solicitor for the vendors, LORD KENYON was satisfied that his bidding had damped

and chilled the sale, creating a suspicion that he was a puffer, and, though there was no evidence that the estate would have brought more, he thought that circumstance a very sufficient ground for refusing a specific performance. There is another case in which, I think, LORD ALVANLEY was right: *Emery* v. *Wase* (2). Upon the appeal I adopted LORD ALVANLEY'S opinion that it is not incumbent upon this court to decree a specific performance in a case where such a circumstance as a careless valuation was likely to lead to harsh consequences, upon that singular doctrine of this court that a husband must go to jail if he cannot procure his wife to concur to the act for which he had contracted. The case of *Marquis of Townshend* v. *Stangroom* (3) also contains something relative to this subject and upon all the cases there is not the least pretence for saying that this court must either execute the agreement or order it to be delivered up, for the whole doctrine of the court has gone upon the contrary of that. LORD THURLOW used to refer this doctrine of specific performance to this—that it is scarcely possible that there may not be some small mistake or inaccuracy, as that a leasehold interest, represented to be for twenty-one years may be for twenty years and nine months, some of those little circumstances that would defeat an action at law and yet lie so clearly in compensation that they ought not to prevent the execution of the contract: see *Calcraft* v. *Roebuck* (4). But that has been extended to a great length in this court. The rule is clear enough, but the application in each particular case must depend upon the discretion of the judge. It is like the case of fraud. The rule is that this court will set aside a bargain for fraud, but the court has never ventured to lay down as a general proposition what shall constitute fraud.

Dec. 12, 1804. **LORD ELDON, L.C.**—This case is extremely important, not only to the parties, but also to the general interests of justice, as administered in this court. There is nothing in the circumstances that could induce me to think that the plaintiff could be restrained from using all the remedies he might have at law if a bill had been filed to have the contract delivered up. It is much too late to discuss now whether this court ought to order a contract that it would not specifically perform to be delivered up, and to decree the performance of a contract, which it would not order to be delivered up, for the distinction is always laid down that there are many cases in which the party has obtained a right to sue upon the contract at law, and under such circumstances that his conscience cannot be affected here so as to deprive him of that remedy, and yet, on the other hand, the court, declaring he ought to be at liberty to proceed at law, will not actively interpose to aid him and specifically perform the contract. *Twining* v. *Morrice* (1) and many other cases, are of that sort.

It is necessary to advert very particularly to the circumstances of this case. In a trust of this nature the most improvident course that can be adopted is to entrust the tenant for life with the execution of such a power as this, for it is generally the interest of the tenant for life to convert the estate absolutely into money, either with a view to sell another estate to his family, or for the ordinary purpose of getting a better income during his life. The mode of settlement, therefore, in such a case is that the trustees are to sell, but not without calling to their aid all fair attention to the nature of the subject and the convenience of the family. They are to sell, therefore, with the consent of the husband and wife, and, as she is a purchaser for her future family, the providence of the settlement further requires that the fact of her consent and approbation shall be evidenced by deed with two witnesses. With that consent and approbation, necessary to protect the interest of the tenant for life, the trustees, bound to a due attention to the interests of the children, have the power of selling for such price as shall appear to them to be reasonable. That expression must be construed, at least in a question between the trustees and the cestuis que trust after they have with due diligence examined. The object of the sale must be to invest the money in the purchase of another estate to be settled to the same uses, and they are not to be satisfied

with probability upon that, but it ought to be with reference to an object, at that time supposed practicable, or, at least, this court would expect some strong purpose of family prudence, justifying the conversion, if it is likely to continue money. The character of the parties to this transaction is quite unimpeached. A

All the trustees, meaning to act properly, make Mr. Buller their agent: but, the trustees being interposed to guard against what the tenant for life may propose, he ought not to have been agent for them. The conduct of the agent to whom the trustees apply, through the medium of Mr. Buller, to sell by auction unless he could sell advantageously by private contract, is most unaccountable, but certainly the plaintiff is not concerned in that. The agent's advice, if an offer from £24,000 to £27,000 should be made, to have a consultation, also recommending a survey in the meantime—a declaration, therefore, that it would not be a provident act to carry the estate to sale without further examination of its value. But it does not rest there. He might afterwards have thought that the value had been satisfactorily ascertained and that the trouble and expense of a further survey was unnecessary. But that is not so. In the course of six days transactions take place, perfectly without example even in these cases where difficulties have been raised by the conduct of auctioneers. A valuation was actually made between Sept. 6 and 9, and that valuation raised the property up to £33,386. Was it not a most important part of the duty of that agent to submit that fact to the vendors, resting upon the sanctioned opinion of the very agent, to whose discretion and judgment they resorted, to direct the terms of the sale instead of letting them judge upon the speculations of another person, what more might be obtained? But it does not rest there. Of the fact of the valuation no communication was made until January or February following. B C D E

There is evidence of inquiries by the plaintiff as to the value from the tenants and all sources of information. He was at full liberty to do so, and, having by all just means informed himself that he could make a lucrative bargain, he might honestly contract with persons at arm's length and dealing for themselves. But, on the other hand, he is in the situation of a man, contenting himself with a contract instead of a conveyance, and it is to be considered whether he may have under the circumstances, not only relief at law, but the further relief afforded in this court by a specific performance. It is clear that a plaintiff, suing at law for damages or in equity for a specific performance, must allege a contract binding someone, and where a man is imprudent enough to deal with an agent for a third person without taking care to see that there is a written authority for sale, however great the hardship, the answer to his demand, both in law and equity, is that he has dealt with a person not legally authorised. The first consideration is whether this was a contract for the trustees upon anything antecedent to the date of it. Secondly, has it become their contract in this court, connecting that with what passed subsequent to the date? Thirdly, if it is the contract of the trustees in either view, is it possible for this court to execute it? Upon the first point, in order to make it the contract of the trustees, the plaintiff must prove that they did by parol authorise the agent without further consultation with them, to sell this estate in this manner, and at this price. Admitting that, if they left the price entirely to his discretion, in a question between them and the purchaser they have given authority. I must find that authority given specifically by all the trustees, or someone empowered expressly and clearly to pledge their authority. If I were to hold it given in this case, I should carry these circumstances to an extent that would make the doctrine that the authority may be by parol though the agreement must be by writing, the most mischievous evasion of the statute. This is only a declaration of the trustees that they are ready to concur in Mr. Buller's primary object, a sale, provided the estate should be duly and reasonably sold. It is in no way possible to say there was a parol authority in the sense required by the cases to enter into this written agreement. F G H I

Next, are they bound by their subsequent conduct as if there had been antecedent

A authority? Clearly they are not. The trustees never had the approbation of the husband and wife. They never can be said to be bound by the drafts settled by the solicitor, and in the very nature of the subject of sale there was a circumstance giving them locus pœnitentiæ, the moment they were informed there was a question, whether the price was reasonable. But, supposing them bound, that will not help the plaintiff to the relief prayed, for I am clearly of opinion that their conduct B was a breach of trust, not meaning to throw any imputation upon them as the transaction was very likely to happen, but their duty was not to execute their power of selling unless they knew a discretion had been wisely and fully exerted upon the point of reasonable price, unless they were satisfied that upon that point no reasonable objection could be made with reference to the interests of Mr. Buller, Mrs. Buller, or the children, who might come into existence. If the court had C been called upon in the life of Mrs. Buller for a specific execution, there is so little ground for it under these circumstances that on the contrary at the suit of the cestuis que trust the trustees would have been restrained from executing. The question as to the interposition of the court between the plaintiff and Mr. Buller would have been different. But it would be impossible to decree a specific performance, when in the very same day the court might be compelled to say, it D would be a breach of trust.

Next, this case may, I think, be determined upon the circumstances, without going very accurately into the doctrine as to inadequacy of value. I have looked into several of the cases upon that point, though I do not mean to decide upon it. Cases also may arise in which circumstances, having a different effect, and different in their nature from inadequacy, will require great consideration, upon E the question of specific performance. Lord Rosslyn, who had certainly great experience in this court, in *White* v. *Damon* (5), if he did not put the decision upon the inadequacy of the contract, still thought there were other circumstances in no manner connected with the conduct of the vendee which this court ought to attend to upon the subject of specific performance, and observed that the estate, situated at Gosport, and sold at Garraway's at a time, too, which of itself might F form an objection, deserving serious consideration, if the place had been proper. I do not go far into the discussion of the questions, the principles of that case, so put, may furnish. But, taking Lord Rosslyn to have been duly of opinion, that, if an auctioneer, called upon in that capacity to sell, so grossly forgot what was due to his employer by selling at a very improper time and place that by reason of that negligence the property sold for half its value, this court ought not to G decree a specific performance, so, on the other hand, you must consider in every case, constituted of circumstances, furnishing similar objections, how much is due to them, and upon the circumstances of this very case, supposing the plaintiff could have a decree, it must be considered whether a man is not bound by the contract of the auctioneer made without even advertising the property. The negligence may be more or less gross. Upon the principles that have been ably H pressed for the plaintiff, if a person is to have a specific performance under such negligence as this, where is it to stop? Upon that ground simply I should hesitate long, either with reference to the trustees, or Mr. Buller himself, before I should state as a clear proposition that where the title to a specific performance is founded in a gross breach of trust by an agent to his principal, a court of equity would assist the plaintiff in the purpose of availing himself of that breach of trust, and I whether the principle would not authorise the court to leave him to law and not to let him come here for a remedy beyond that. There are dicta enough well to authorise that.

Twining v. *Morrice* (1), before a judge, who understood the doctrine of courts of equity as well as anyone, is an authority that much less would do. There is no comparison between the circumstances of that case and this. That case was free from all imputation upon the party. It was no more than that the vendors had employed Blake as their solicitor. When the estate had been brought to sale,

he was in no sense their agent. They had never suggested to him, nor had he undertaken, to bid for them. The plaintiff, going into the room, bade Blake, as a friend and neighbour, bid for him. LORD KENYON said, as his bidding might appear to the persons present a bidding for the vendors and as that might damp the sale, that formed such an impediment to a specific performance, that the party should be left to law. I give no opinion upon that case, but it is infinitely short of this, which goes this length, that the vendor has by the silence of the agent with regard to the last survey lost all opportunity of dealing with the knowledge of that survey by the agent himself, and of the fact, excessively material, that the estate, if sold in lots, might probably produce so much more. The vendor is in all probability full as much prejudiced as the vendors in *Twining* v. *Morrice* (1) were by the accidents attending that sale. My opinion, therefore, is, (i) that this was a sale in which the trustees had not given lawful authority enough to contract on their behalf within the statute, and so are not bound; (ii) supposing they had given sufficient authority, still, considering the nature of their interest, this court could not have compelled an execution against the cestuis que trust if they had been living, not stating my opinion as to any remedy the plaintiff might in that case have against the trustees for damages.

If this contract cannot be executed against the trustees, can it against Mr. Buller? First, what decree would have been made if this cause had been heard, not under these circumstances, but, while Mrs. Buller was living, or any children, if she had any? The supplemental bill does not vary the statement of the original bill as to the nature of the contract. It might have been put as the contract both of the trustees and of Mr. Buller, but the supplemental bill was necessary supposing the contract originally to have been with the trustees only, for it might happen that, after the trustees in such a case had entered into a due contract binding all parties, circumstances might arise that might prevent them from carrying it into execution, and that is the very point contended by this supplemental bill, stating truly that they had only an estate to preserve contingent remainders during the existence of the marriage and in the event that has happened Mr. Buller's estate for life and his remainder in fee being brought together, in law the power of the trustees is in the language of the supplemental bill extinguished and gone. But, though the power is gone at law, yet, if the purchaser had entered into the contract with the trustees, with the approbation of Mr. and Mrs. Buller, according to the deed, that contract, once entered into and having bound the estate, though it could not be executed by the power of sale, should be made good by those who had got an interest by the effect to their interest, if not by the authority of the trustees, and that is the meaning of this bill.

I agree that, if a person carries an estate to market, not having any title at the time, it is much too late to discuss the question whether it would have been wholesome originally to have held that he should not have a specific performance: *Jenkins* v. *Hiles* (6). There is a difference between an estate subject to encumbrances and the case I put where the vendor at the date of the contract has not a title. Some authorities go the length of giving a specific performance if the vendor can even by an Act of Parliament obtain a title before the report. I also agree, that, if a man, having partial interests in an estate, chooses to enter into a contract representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say that, though he has valuable interests, he has not the entirety, and, therefore, the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction the person contracting under those circumstances is bound by the assertion in his contract, and, if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement, and the court will not hear the objection by the vendor that the purchaser cannot have the whole. That always turns upon this—that it is, and is intended to be, the contract of the vendor. My opinion is that this was not the contract of Mr. Buller, that it was not in the contemplation of the agent, the trustees, or anyone, excluding the

A plaintiff, that it should be the contract of Mr. Buller if it was not the contract of the trustees.

If I am wrong in this, that brings it to the effect of the agent's conduct. The objection is taken: How does that concern the plaintiff? Whether as between them it was his contract, or not, the plaintiff conceived it to be so. I do not enter into the question of fact, for the answer to the plaintiff is just as effectual whether B he conceived Mr. Buller to be dealing for his own estate or not. The plaintiff has no contract, but a contract signed by his agent, and upon his evidence the trustees were his principals and it was not the intention of Mr. Buller to give any authority, binding himself, that did not bind the trustees. It was for the sale of their inheritance, not his, including minor interests, if not affecting their's. It is impossible, therefore, to say it was the double contract—that of the trustees, C and, if not their's, his; and it was not his intention to part with his partial interest. His intention was to give, not his authority, but that of the trustees, to the agent, and, if their authority was not effectually given, whatever may be the remedy at law, it cannot be executed partially in equity, and it would be strange if that contract, which never could have been executed unless it was the contract of the trustees, for the substitution of other lands to be settled to the same uses, D should have been executed in this court by tearing to pieces the family property that was the subject of the contract.

The result is that nothing was intended to be bound but the inheritance of the trustees; that the trustees have not given such an authority as binds them within the statute; that, if they had, the execution of this contract would under the circumstances have been such a breach of trust that this court would not have E permitted them to carry it into execution; further, that under the circumstances, if the plaintiff cannot have a decree for the whole, he cannot for a part, and the subsequent event makes no alteration for the contract of the trustees, not of Mr. Buller, must have been the foundation of the decree, and, if so, it cannot become his contract by the event of the death of Mrs. Buller without children. These are the grounds upon which this case may be determined. Without saying more upon F the inadequacy, or the retention of that important fact by the agent, though that alone is a sufficient ground for a decree dismissing this bill.

Bill dismissed.

THELLUSSON AND OTHERS *v.* WOODFORD AND OTHERS WOODFORD AND OTHERS *v.* THELLUSSON AND OTHERS

[House of Lords (Lord Eldon, L.C., assisted by Sir A. Macdonald, C.B., Lord Ellenborough, C.J., Grose, Le Blanc, Heath, Rooke and Chambre, JJ., and Thompson and Graham, BB.), June 25, 1805]

[Reported 11 Ves. 112; 1 Bos. & P.N.R. 357; 32 E.R. 1030]

Perpetuities—Vesting—Life in being—Child en ventre sa mère—Period of suspension of vesting estate.

A child who is en ventre sa mère at the time of the creation of an estate or interest and is afterwards born alive is deemed, in relation to the law against perpetuities, to be a life in being in establishing the length of time during which the vesting in him of the estate or interest may be suspended: per Sir A. Macdonald, C.B.

Perpetuities—Vesting—Period of limitation—Any number of lives—Availability of evidence to determine when survivor drops.

Property may be so limited as to make it unalienable during any number of lives not exceeding that to which testimony can be applied to determine when the survivor drops: per Lord Eldon, L.C.

Power of Appointment—Limitation—Power conferred on survivor of number of persons living at creation of power.

A power of appointment conferred on the survivor of any number of persons living at the time of the creation of the power is valid: per Lord Eldon, L.C.

Will—Construction—Ambiguity—Construction supporting legal intention of testator to be adopted.

If the words of a will admit of more constructions than one, that which will support the legal intention of the testator is in all cases to be adopted: per Sir A. Macdonald, C.B.

Notes. The Accumulations Act, 1800 (repealed by the Law of Property Act, 1925, and replaced by Part VII of that Act), which is generally known among lawyers as the "Thellusson Act." was passed as the result of the decree originally made in this case.

Applied: *Doe d. Viney* v. *Perratt*, *Doe d. Slade* v. *Perratt* (1843), 6 Man. & G. 314; *Thellusson* v. *Rendlesham* (1859), 7 H.L. Cas. 429; *Villar* v. *Gilbey*, [1904–7] All E.R. Rep. 779. Referred to: *Beard* v. *Westcott* (1813), 5 Taunt. 393; *Southampton* v. *Hertford* (1813), 2 Ves. & B. 54; *Blackburn* v. *Stables* (1814), 2 Ves. & B. 367; *Leake* v. *Robinson*, [1814–23] All E.R. Rep. 363; *Cadell* v. *Palmer* (1833), 10 Bing. 140; *Cooke* v. *Turner* (1844), 14 Sim. 218; *Nightingale* v. *Goulbourn*, [1843–60] All E.R. Rep. 420; *Egerton* v. *Earl Brownlow*, [1843–60] All E.R. Rep. 970; *Turvin* v. *Newcome* (1856), 3 K. & J. 16; *Eastern Counties, etc., Cos.* v. *Marriage* (1860), 9 H.L. Cas. 32; *Re Burrows, Cleghorn* v. *Burrows*, [1895] 2 Ch. 497; *Re Wilmer's Trusts, Moore* v. *Wingfield*, [1903] 1 Ch. 874; *Re Stamford and Warrington, Payne* v. *Grey*, [1911] 1 Ch. 255; *Re Bourne's Settlement Trusts, Bourne* v. *Mackay*, [1946] 1 All E.R. 411.

As to the rule against perpetuities, see 29 Halsbury's Laws (3rd Edn.) 281 et seq.; and for cases see 37 Digest (Repl.) 55 et seq.

Cases referred to:

(1) *Harrison* v. *Harrison* (*or Re Lady Denison's Will*) (1787), cited in 4 Ves. at p. 338; 37 Digest (Repl.) 139, *641.*

(2) *Long* v. *Blackall* (1797), 7 Term Rep. 100; 101 E.R. 875; subsequent proceedings, 3 Ves. 486, L.C.; 37 Digest (Repl.) 66, *75.*

(3) *Lade* v. *Holford* (1763), 1 Wm. Bl. 428; Amb. 479; 3 Burr. 1416; 96 E.R. 244; 37 Digest (Repl.) 90, *262.*

(4) *Proctor* v. *Bishop of Bath and Wells* (1794), 2 Hy. Bl. 358; 126 E.R. 594; 37 Digest (Repl.) 109, *407.*

(5) *Duke of Norfolk's Case, Howard* v. *Duke of Norfolk* (1683), 3 Cas. in Ch. 1; 2 Swan. 454; Freem. Ch. 72, 80; Poll. 223; 2 Rep. Ch. 229; 22 E.R. 931, L.C.; reversed sub nom. *Duke of Norfolk* v. *Howard*, 1 Vern. 163; restored sub nom. *Howard* v. *Duke of Norfolk* (1685), 14 Lords Journals 49, H.L.; 37 Digest (Repl.) 78, *187.*

(6) *Child* v. *Baylie* (1622), Palm. 333; Cro. Jac. 459; 1 Eq. Cas. Abr. 192; W. Jo. 15; 2 Roll. Rep. 129; 81 E.R. 1109, Ex. Ch.; 37 Digest (Repl.) 76, *156.*

(7) *Gwynne* v. *Heaton* (1778), 1 Bro. C.C. 1; 28 E.R. 949, L.C.; 25 Digest (Repl.) 295, *1006.*

(8) *Bennett* v. *Honywood* (1772), Amb. 708; 27 E.R. 459, L.C.; 49 Digest (Repl.) 742, *6946.*

(9) *Humberston* v. *Humberston* (1716), 1 P. Wms. 332; 2 Vern. 737; 24 E.R. 412; sub nom. *Humerston* v. *Humerston*, Prec. Ch. 455; Gilb. Ch. 128; 1 Eq. Cas. Abr. 207, pl. 8, L.C.; 37 Digest (Repl.) 135, *608.*

(10) *Love* v. *Wyndham* (1669), 1 Mod. Rep. 50; 1 Eq. Cas. Abr. 191; 1 Lev. 290; 1 Sid. 450; 1 Vent. 79; 2 Keb. 637; 86 E.R. 724; sub nom. *Windham* v. Love, 2 Rep. Ch. 14; 37 Digest (Repl.) 61, *55.*

(11) *Scatterwood* v. *Edge* (1697), 1 Salk. 229; 1 Eq. Cas. Abr. 190; 12 Mod. Rep. 278; 91 E.R. 203; 37 Digest (Repl.) 62, *57.*

(12) *Hopkins* v. *Hopkins* (1738), 1 Atk. 581; West temp. Hard. 606; Cas. temp. Hard. 606; Cas. temp. Talb. 44; 26 E.R. 365; 37 Digest (Repl.) 62, *62.*

(13) *Gibson* v. *Rogers* (1750), Amb. 93; 27 E.R. 58; sub nom. *Gibson* v. *Lord Montfort*, 1 Ves. Sen. 485, L.C.; 48 Digest (Repl.) 643, *6196.*

(14) *Sheffield* v. *Lord Orrery* (1745), 3 Atk. 282; 26 E.R. 965, L.C.; 37 Digest (Repl.) 76, *159.*

(15) *Goodtitle d. Gurnall* v. *Wood* (1740), Willes, 211; 7 Term Rep. 103, n.; 2 Eq. Cas. Abr. 342; 125 E.R. 1136; 37 Digest (Repl.) 55, *2.*

(16) *Robinson* v. *Hardcastle* (1786), 2 Bro. C.C. 22; 29 E.R. 11; 37 Digest (Repl.) 62, *59.*

(17) *Luddington* v. *Kime* (1697), 1 Ld. Raym. 203; 91 E.R. 1031; sub nom. *Loddington* v. *Kime*, 1 Salk. 224; 3 Lev. 431; sub nom. *Lodington* v. *Kime*, 1 Eq. Cas. Abr. 183; 49 Digest (Repl.) 770, *7227.*

(18) *Northey* v. *Strange* (1716), 1 P. Wms. 340; 24 E.R. 416; 49 Digest (Repl.) 742, *6941.*

(19) *Burdet* v. *Hopegood* (1718), 1 P. Wms. 486; 24 E.R. 484, L.C.; 49 Digest (Repl.) 742, *6942.*

(20) *Wallis* v. *Hodson* (1740), 2 Atk. 114; Barn. Ch. 272; 26 E.R. 472, L.C.; 24 Digest (Repl.) 937, *9490.*

(21) *Beale* v. *Beale* (1713), 1 P. Wms. 244; 24 E.R. 373, L.C.; 40 Digest (Repl.) 654, *1473.*

(22) *Basset* v. *Basset* (1744), 3 Atk. 203; 26 E.R. 918, L.C.; 24 Digest (Repl.) 931, *9404.*

(23) *Roe d. Nightingale* v. *Quartley* (1787), 1 Term Rep. 630.

(24) *Gulliver* v. *Wickett* (1745), 1 Wils. 105; 95 E.R. 517; 37 Digest (Repl.) 66, *84.*

(25) *Doe d. Lancashire* v. *Lancashire* (1792), 5 Term Rep. 49; 101 E.R. 28; 49 Digest (Repl.) 742, *6948.*

(26) *Doe d. Clarke* v. *Clarke* (1795), 2 Hy. Bl. 399; 49 Digest (Repl.) 742, *6949.*

(27) *Griffiths* v. *Vere* (1803), 9 Ves. 127; 32 E.R. 550, L.C.; 37 Digest (Repl.) 155, *742.*

(28) *Longdon* v. *Simson* (1806), 12 Ves. 295; 33 E.R. 113; 37 Digest (Repl.) 155, *743.*

Appeals from the decree (see (1799), 4 Ves. 227) made in consequence of the judgment given by Lord Loughborough, L.C., Lord Alvanley (then Sir R. P. Arden, M.R.), and Buller and Lawrence, JJ. The decree dismissed the bill in the original cause so far as it prayed that the limitations and dispositions contained in the will of Peter Thellusson concerning his real estates and the general residue of his personal estate, and the rents, issues, and profits, of such estates, and concerning the estates directed to be purchased and the rents and profits thereof, and the trust thereof, might be declared void, and in the cross-cause declared that the will ought to be established and the trusts of it performed and carried into execution, and that the devises and limitations of the estates contained in the will were good and valid in law, and decreed and gave directions accordingly. Peter Isaac Thellusson, after the decree, had three sons born, viz., Edmund Thellusson, Alexander Thellusson, and Arthur Thellusson, and Charles Thellusson (the elder) also had one son born, viz., Thomas Thellusson; and Ann, one of the testator's three daughters, married William Lukin. All these persons were made parties.

The terms of the devise in question is set out in the questions to the judges at p. 39 post.

The appellants, the widow and children of the testator appealed from the decree for the following reasons: That the trust, attempted to be created by Mr. Thellusson's will, being of the class of executory trusts created by will, must depend for its validity on its being instituted for those purposes, and limited within those boundaries which the law prescribed for trusts of that description, but it was neither instituted for those purposes nor limited within those boundaries.

The reasons continued: (i) It is not instituted for the purposes, which the law prescribes for those trusts. The nature of it is to create an equitable estate of inheritance, commencing at a future time, without limiting an intermediate equitable estate, commensurate with the interval. By the old law limitations of this kind were illegal. For the purpose of enabling parties to provide for those reasonable occasions of families, which could not be provided for, except by allowing future estates of freehold to be limited without a limitation of such a previous intermediate estate, they were first admitted into wills; and afterwards, when uses were introduced, the uses raised by them were admitted among those, which on account of the fairness and utility of their object courts of equity thought binding on the consciences of trustees and the performance of which they would on that ground compel by a subpœna. Thus the circumstance of their being created for the meritorious purpose of providing for the reasonable occasions of families was the ground, on which the uses raised by these limitations were admitted among those, which courts of equity would execute; and of course, when they are not created for a purpose of that nature, the ground for interference of courts of equity does not arise. In the present case there is no such ground. Mr. Thellusson's will is morally vicious, as it was a contrivance of a parent to exclude every one of his issue from the enjoyment even of the produce of his property during almost a century; it is politically injurious as during the whole of that period it makes an immense property unproductive both to individuals and the community at large, and by the time, when the accumulation shall end it will have created a fund the revenue of which will be greater than the Civil List, and will, therefore, give its possessor the means of disturbing the whole economy of the country. The probable amount of the accumulated fund, in the events, which have happened, is stated in the appellant's bill, and admitted in the answer, to be £19,000,000, and in case any of the persons, answering the description of heir male, when the period of suspense ends, should be a minor, and his minority should continue ten years, it would increase the amount of that third to the sum of £10,802,373, so that, if the whole property should centre in one person and that person should have a minority of ten years, after the end of the period of suspense (a circumstance by no means improbable, particularly as Mr. George Woodford Thellusson has been long married and has no son) the whole accumulated fund will amount to £32,407,120.

(ii) The trust is not confined within that boundary which the law prescribes for trusts of that description: (even though it be admitted that all the lives during which the accumulation is to be carried on were in existence at the time of Mr. Thellusson's decease) as one circumstance, which materially affects the period of suspense and enters into every case in which the suspense of property has been held legal, does not enter into the present case. In examining the cases, decided on limitations of this kind, it will appear that in every one of them all the lives, during which the period of suspense is directed to be carried on, are evidently the lives of persons, immediately connected with or immediately leading to the person, in whom under the trust, first limited to take effect at the end of the suspense, the property was to vest. Thus (to instance the two cases, in which the accumulation was supposed to have been furthest carried on) in that on Lady Denison's will [*Harrison* v. *Harrison* (1)] Miss Midgley, during whose life the property might be in suspense, was the mother of the second son, to whom the property was devised; and in *Long* v. *Blackall* (2) the testator's posthumous son was immediate ancestor to the heir, in whom the property was directed to vest, but in the present case not one of the first lives has an immediate connection with, or immediately leads to, the person benefited. In the sense we are speaking of the life of any stranger was equally connected with, and would equally lead to, "the respective male descendant of the testator's sons," as the lives assigned by him for the period of suspense. A material difference, therefore, in a point, considerably influencing the purpose and boundary of the suspense, exists between the present and all the decided cases.

(iii) The use made by Mr. Thellusson of the rule allowing a suspense of the absolute ownership of property to be carried on for any number of lives in being is a fraud on the rule. It is a maxim of law, which admits of no exception, that nothing shall be effected by indirect means which cannot be done in a direct manner. A possible suspense of property for twenty-five years was held to be void in *Lade* v. *Holford* (3), and in *Proctor* v. *Bishop of Bath and Wells* (4) the Court of Common Pleas unanimously decided against the legality of a possible suspense of property for twenty-four years. Where property is suspended through the medium of lives, if the lives be those of persons connected with the ultimate owner, the persons, whose lives form the period of suspense, will generally be the parents of the parties ultimately benefited; and will not, therefore, be more than one or two lives at the utmost. The probable duration of one or two such lives falls short of twenty-one years, but, if an unlimited number of lives be taken, they will reach a century. It is observable that the probable duration of the lives assumed by Mr. Thellusson reaches seventy-five years. Thus, therefore, if the rule be taken to extend to any number of lives, it will follow, that though, where a number of years directly constitute the term of suspense, property cannot be suspended from vesting absolutely during twenty-five years, according to the determination in *Lade* v. *Holford* (3) or during twenty-four years, according to *Proctor* v. *Bishop of Bath and Wells* (4), yet by assigning for the period of suspense a number of lives, whose average duration is equal to a given number of years, and thus indirectly making years not lives to constitute the period of suspense, property may be suspended for a whole century; and the present will be cited on future occasions, as a case in point for extending the period of suspense to seventy years. Thus Mr. Thellusson's will is a fraud on the rule. When, in the *Duke of Norfolk's Case* (5), Lord Nottingham pronounced for the legality of an executory limitation which kept the absolute ownership of a term of years in suspense for one whole life, and thereby extended the period allowed for the suspense of a term beyond what had been settled for it in the preceding case of *Child* v. *Baylie* (6), the possibility of the abuse of that extension of executory limitation was strongly pressed upon him, and he answered it in these remarkable words:

"It has been urged at the Bar, where will you stop, if you do not stop at the

case of *Child* v. *Baylie* (6)? I answer, I will stop everywhere, when any inconvenience appears; nowhere, before. It is not yet resolved, what are the utmost bounds of limiting a contingent fee upon a fee; and it is not necessary to declare, what are the utmost bounds to a springing trust of a term: whenever the bounds of reason or convenience are exceeded, the law will quickly be known."

The use made by Mr. Thellusson of the rule is, both in a private and public view, unreasonable and inconvenient, and is still more objectionable, as by carrying on indirectly an accumulation for seventy years which directly could not be carried on for one third of such a number of years, it is a fraud on the rule itself. Thus, therefore, the time pointed out by LORD NOTTINGHAM is come, and it is necessary that it should be known that the rule is to be understood with this limitation—that, whenever from the number or quality of the lives chosen it is evident, that accumulation, and not a family purpose, is the object of the trust, the bounds of the reason and convenience of the rule are exceeded; and a fraud has been practised on the rule. It is objected to this conclusion, that any inquiry into the reasonableness, convenience, or fairness, of the use made of the rule must lead to uncertainty, and to an exercise of discretion, which the Bench has always disclaimed, but this does not follow. As much uncertainty and as great an exercise of discretion attend all decisions upon unconscionable contracts, as will attend decisions on the reasonableness, convenience, and fairness, of the use made of the rule in question. A contract may be objectionable for its unreasonableness and unfairness without being objectionable on the ground of either to such a degree as will induce a court of equity to rescind it, but still there is a degree in which equity will interfere. LORD THURLOW said in *Gwynne* v. *Heaton* (7) (1 Bro. C.C. at p. 9):

"To set aside a conveyance, there must be an inequality so strong, gross, and complete, that it must be impossible to state it to a man of common sense without producing an exclamation of the inequality of it."

So, in respect to the rule in question, it may be much abused without a court's being justified in taking notice of the abuse, but when the abuse is so strong, gross, and complete that every man of common sense, to whom it is stated, must exclaim against it, the case, supposed by LORD NOTTINGHAM, is come; and equity will interfere to set it aside. That the rule has been strongly, grossly, and completely, abused in the present case, appears not to be doubted.

(iv) The trust is not limited within those boundaries which the law requires for trusts of this description, because the will attempts to protract the accumulation during the lives of persons unborn at the time of the testator's decease, the testator having selected for that purpose the lives of such persons as might not be born till within due time after his decease, and the persons thus described cannot be considered as persons actually born in his lifetime. It is true that for some purposes, as at the common law to take by descent and by Will. 3, c. 22, 1698, [relating to posthumous children: repealed by Law of Property (Amendment) Act, 1924], to take by way of remainder, a child who is en ventre sa mère when the estate designed for him would devolve upon him, if he were born, becomes entitled to it, after he is born; and may then enter upon it and divest it from the first taker. But his title to enter upon the estate after his birth is not a consequence of his supposed existence during the time he was en ventre sa mère, but because in the case of his taking by descent the law at the instant of his birth invests him, though a posthumous child, with the character of heir, and, consequently, with all the rights of heirship, and because, when he claims by way of remainder, it is expressly provided by 10 Will. 3, c. 22, that the remainder shall vest in him upon his birth. If the law considered him to exist before his birth, the freehold, during the time of his being en ventre sa mère would be vested in him in the eye of the law, and for the purposes of law, but that clearly is not the case, for while he is en ventre sa mère the law vests the freehold in the intermediate taker as heir with every right and burden of heirship, so that

after the birth of the nearer heir he even retains the profits of the estates against him. That class of lives, therefore, which is now the subject of observation, neither had nor could have an existence, either in fact or in law, in the lifetime of Mr. Thellusson. It follows that by the admission of them into the term of suspense, the boundary, prescribed by law for the suspense of real property, has been exceeded. No cases, the subject of which is real property, can be mentioned, in which a child en ventre sa mère has been held to be in existence for any purpose except to limit the estate of the first devisee, or for the actual benefit of the child himself, being the substituted devisee. In *Bennett* v. *Honywood* (8) Lord Bathurst declared that the court had never construed a child en ventre sa mère to be actually born at the time of the death of the testator, except in the case of a devise to the children. Cases upon trusts of personal estates are not applicable to cases of the present description, arising on devisees of real estates, for those rules of law, respecting real estates, which require, that an estate of freehold should be actually vested in some person, and, therefore, deny a legal existence to a child en ventre sa mère, even for his own benefit, are in no wise applicable to trusts of personal estate. *Long* v. *Blackall* (2) is the only case where the lawfulness of making a child en ventre sa mère a life for the purpose of suspense, appears to have been admitted; but that was a case of personal estate. As there is no law which denies a legal existence to a child en ventre sa mère where personal estate is concerned, it seems (especially where, as in *Long* v. *Blackall* (2), it gives effect to a provision made by a parent for a child) that there is strong ground to contend that a child en ventre sa mère shall, in the eye of the law, be supposed to exist for his own benefit, and that there should be a strong disposition in the courts to favour such an argument, but in the present case, from the impossibility of supposing the freehold to be in the child while en ventre sa mère, the argument is wholly inadmissible.

Admitting, however, that the lives in question were, for some purposes of law, in existence in the lifetime of Mr. Thellusson, they certainly were not in existence for the use he made of them. In the cases where the nine months have been mentioned as a period allowed for protracting the suspense of property, it is generally added, that the nine months were allowed for the sake of the posthumous child, intended to be benefited by the protraction, but a single instance cannot be produced where the nine months have been added for any other purpose, and perhaps an instance cannot be brought where the courts have had occasion to mention the nine months, without adding at the same time, that they were allowed merely for the benefit of the posthumous child. Then how does the argument stand? A posthumous child is in fact unborn at the testator's decease. The law allows that, when after his birth he answers the character of heir, taking by descent, and also in some cases, especially provided for by Act of Parliament, his being en ventre sa mère shall not deprive him of an estate to which, if actually born at the time of its devolution, he would have been entitled. To argue from this that for all purposes, and particularly for purposes which, as in the present case, operate to their prejudice, posthumous children shall, in the supposition of law, be thought in existence, is unjustifiable.

(v) In other respects the suspense evidently extends beyond the lives of persons in being at the testator's decease. The classes of lives are described by the testator in the following words: (a) "During the natural lives of my sons Peter Isaac Thellusson, George Woodford Thellusson, and Charles Thellusson." (b) "And of my grandson John Thellusson son of my said son Peter Isaac Thellusson." (c) "And of such other sons as my said son Peter Isaac Thellusson now has or may have." (d) "And of such issue as my grandson John Thellusson son of my said son Peter Isaac Thellusson, may have." (e) "And of such issue as any other sons of my said son Peter Isaac Thellusson may have." (f) "And of such sons as my said sons George Woodford Thellusson and Charles Thellusson may have." (g) "And of such issue as such sons may have as shall be living at the time of my decease or born in due time afterwards." The question is whether all the lives mentioned in this part of the will must necessarily have been in existence in the lifetime of the testator, or

whether some of them might come into existence after his decease. On the last supposition the devise is evidently too remote. Unless the words in (c), (d), (e), (f), and (g), are restrained by the qualifying words "as shall be living at the time of my decease, or born in due time afterwards," which are introduced at the end of (g), they manifestly extend to persons who might be born after Mr. Thellusson's decease. But the qualifying words cannot, upon any principle either of grammatical or legal construction apply to them. In common sense, by every rule of grammar, and according to every principle and precedent of legal construction, words of relation are always exclusively referred to the next immediate antecedent unless such exclusive reference embarrasses the sentence. But in the present case the sentence will not only not be embarrassed by confining the reference in the last member of the sentence to the next immediate antecedent in that sentence, but the sentence will be embarrassed in an extreme degree by extending the reference to any prior member of it. It will not be embarrassed by confining the reference to the last antecedent in the last member of the sentence, for every member of the sentence will then be complete in itself, every member will have its word of relation, and an antecedent word, to which it explicitly refers, but it will be embarrassed in an extreme degree by extending the reference to the prior members of the sentence. The restrictive words cannot be applied to the first or second members of the sentence without making them absolute nonsense. This alone leads to the conclusion that they were not to be referred to the other members of the sentence, especially as without them, and standing by itself, each of those members is perfect. If the restrictive words are referred to the third and fourth members of the sentence, one half of them must be omitted, or the reference will make them perfect nonsense, for the words "born in due time afterwards" can never be referred to the words "now has" as it is impossible that a testator, speaking of sons living when his will is made, can describe them as sons born in due time after his decease. The member of the sentence (e) is complete without the restrictive words. They do not, however, make nonsense of it, but then they leave it altogether open to the full force of the objection as by every rule of construction the restrictive words if they are applied to that member of the sentence, must be referred to the "sons" mentioned in it, and not to the "issue of the sons." It is impossible to suppose that a testator of the age of sixty-four at the time he made his will should have had it in his contemplation to provide for the event of their being in existence at the time of his decease a son of an unborn grandson of his body, yet to that supposition the reference of the restrictive words to the word "issue" in the sentence (e) necessarily leads. If they are referred to the word "sons," the word "issue" is left unqualified, and then among the lives during which the period of suspense is to be carried on must be reckoned all the issue of the sons, whenever such issue is born. It is apprehended that this is the only admissible construction, and that the legal boundary of suspense is, therefore, exceeded.

(vi) Finally, the testator exceeds the bounds prescribed by law for the suspense of property in the clause by which he directs the property to be invested in the funds till purchases can be found. The proper and only legal mode of declaring the trusts of these investments for the purpose probably in the contemplation of the testator is directing the dividends and annual produce of them to be applied to the persons, and in the manner, in which, if lands were actually purchased and settled, conformably to the trusts, the rents of them would be applicable. This the testator does not, but on the contrary expressly directs the accumulation to be carried on till the purchases are actually made so that the beneficial ownership of the property will be suspended, not only till the lives during which it is directed to be accumulated shall expire, but during such further period of time as may elapse between the decease of the last surviving life and the completion of the last purchase.

The respondents, the devisees in trust, insisted, that the decree ought to be affirmed, for the following reason: The validity of the disposition made by the late Mr. Thellusson of that part of his real and personal estate which is the subject of the

present appeal depends solely on the question whether the period during which he directed the enjoyment of the property to be suspended, and the accumulation of the rents and profits of it to be carried on and continued exceeds the bounds allowed and established by the laws of England for the suspension of the beneficial dominion of property and the complete and absolute power of disposing thereof. As the law stood at the time of Mr. Thellusson's decease it was perfectly settled that the absolute vesting of property might be postponed, and the accumulation of it continued, during the lives of persons in being and the life of the survivor of them, and for twenty-one years after the survivor's decease, and a further number of months, equal to the duration of pregnancy. The term of suspense and accumulation directed by Mr. Thellusson is confined to the lives of persons in being at the time of his decease, or born in due time afterwards, i.e., en ventre sa mère at his decease, and the life of the longest liver of them, and thus, being confined to lives in existence within the period of gestation immediately after his death, without any reference to any further number of years, it not only does not exceed, but it falls short of, that boundary, to which, according to established rules, it might have been lawfully protracted.

The respondents, William Thellusson, Frederick Thellusson, Edmund Thellusson, Alexander Thellusson, Arthur Thellusson, and Thomas Thellusson, being infants, submitted their rights and interests under the will, so far as they were or might be affected by the appeal to the consideration of their Lordships, and, in case their Lordships should be of opinion that the limitations in the will might be modified and altered in such a manner as to give effect to the general intent of the testator those respondents submitted that they might eventually be entitled to the whole or to a share in the testator's devised estates.

The respondent, the Attorney-General, trusted that the said decree would be affirmed for the following, among other, reasons:

(i) The only question is whether the testator has transgressed any of those rules of law or equity, which were sanctioned and established by decisions of courts of justice at the time when he made his will. That an executory devise is good which is to take effect in possession after the determination of any number of lives of persons actually born and after the death of a child en ventre sa mère (allowing for the period of gestation of such child) is a rule which cannot now be shaken without shaking the foundation of the law. In the present case on the determination of only nine lives there will be a vested estate in possession, and the vesting, therefore, of the property in question is not postponed for a longer period than the law allows. There is nothing in this case, which in technical language tends to a perpetuity. An estate may be limited to one for life, remainder to another for life, remainder to a third, and so on to twenty persons for life, nay, a settlement has by the directions of a court of equity been made limiting an estate to fifty persons in being for their successive lives: see *Humberston* v. *Humberston* (9), and no inconvenience has ever been apprehended from such limitations. The rule has been laid down in plain and intelligible terms, with reference to the very circumstance of the number of lives, that it does not signify how great the number of lives is, for it is but for the life of the survivor, and, therefore, but for the life of one person. A man may appoint 100 or 1,000 trustees, and that the survivor shall appoint a life estate. That would be within the line of a perpetuity. The judges have never been aware of the difference between one life and twenty lives. Every executory devise is good that does not tend to make an estate unalienable beyond the period allowed by law as to legal estates which cannot be rendered unalienable beyond the time, at which the remainderman, who was not in existence at the time of the limitation of the estate, would arrive at the age of twenty-one. The court has no criterion to judge of the inconvenience arising from restraining the alienation of property by executory devise, except by analogy to the restraint which the common law allows to be put on the alienation of real property: *Love* v. *Wyndham* (10); *Humberston* v. *Humberston* (9); *Scatterwood* v. *Edge* (11).

(ii) The notion that an executory devise is good or bad according to the number of lives after which it is to take effect never occurred to any judge or lawyer until the present case, nor can such a notion be supported unless it shall be determined that a judge is to decide upon the particular circumstances of each particular case, and that he is not to look for a general rule, but for particular instances, in which the general rule has been acted upon. In the *Duke of Norfolk's Case* (5) LORD NOTTINGHAM, so far from deciding upon the principle that executory devises must depend upon the rule of convenience or inconvenience, has positively declared that he intended to confine executory devises and trusts within the limits of estates tail, and without any exception he gave the same limitation to executory devises and trusts. The extent of the property, the cruelty or kindness of the disposition, cannot be permitted to operate upon the decision of a court of justice. The intention of the testator in this case is clear and certain. It is consistent with the rule of law. That intention cannot be controlled by ideas of its fitness or unfitness, of its policy or impolicy. The intention of the testator is consistent with the settled rules of law at the time, when his will was made; and, therefore, the will must be established.

(iii) The objection that the doctrine of executory devises is not applicable to a trust of accumulation is totally unfounded. The attention of a court of equity has been frequently directed to a trust of accumulation. There are many cases, in which accumulation has been directed by the court because the testator has expressly directed it: *Hopkins* v. *Hopkins* (12); others in which it has been directed because the will contained indications of such an intention: *Gibson* v. *Lord Montfort* (13); and others in which the attention of the court has been so particularly called to the legality of the accumulation directed as to fix the period beyond which such accumulation was not to extend. The objection has never been before made, even in argument, except in the case of Lady Denison's will when it was raised in argument, but without success: *Harrison* v. *Harrison* (1). It has always been considered in the power of a testator to direct an accumulation of the rents and profits of his estates for the same period of time, during which the law allows a testator to render his estate unalienable. If that is not the period during which the trust of accumulation is to continue, what other period is to be substituted? May the accumulation be permitted for one life, or for three lives, or for twenty? Different judges may entertain very different opinions upon the subject. One good life may be more than equal to fifty bad lives. The rule, therefore, which can neither be extended nor contracted is laid down by the law, and is that accumulation may go on during that period of time during which the law permits the estate to remain unalienable. The law does not regard the quantity of property accumulated, but anxiously provides that, when accumulated, it shall not remain unalienable beyond a period clearly marked out and defined.

(iv) With respect to the objection that a child en ventre sa mère is not a life in being for the purpose of suspending the absolute vesting of an estate, it is clear that such children are considered by law as in being for a variety of purposes. They are considered as in being at the death of an intestate in order to be entitled to take under the statute for distribution of intestates' estates. They are capable of taking by descent estates in fee simple or in fee tail. It is admitted that they are to be considered as in being for such a purpose as the present. The whole foundation for the argument that such children are to be considered as in being for their own benefit only, rests upon some words which some reporters of decisions have ascribed to judges when delivering their opinions upon claims made by such children. But these words, if they were used in those cases, by no means negative the proposition that such children are in being for all purposes. There is no reason for confining the rule. They are entitled to all the privileges of all persons, and it is reasonable that they should be the means of conferring privileges upon other persons. But the law considers such children are in being in cases in which they may be prejudiced. They may be vouched in a recovery (Co. LITT. 390 a.),

though such voucher is for the purpose of making them answerable over in value. They may be executors. Such a child has been considered in being for such a purpose as the present in *Long* v. *Blackall* (2), which is a complete decision on the very point. Supposing, that *Long* v. *Blackall* (2) has not settled the point, the words in the testator's will "born in due time afterwards" afford a principle of construction sufficient to maintain the point. These words must be taken in construction of law as describing that period during which persons may come in esse, for whose lives according to law the accumulation may go forward.

(v) With respect to the objection that the words of restriction in the will "as shall be living at the time of my decease or born in due time afterwards" are, according to just construction, to be confined to the last class of persons during whose lives the accumulation is to be, and cannot, according to the rules of construction, be carried back to any of the preceding classes, it is submitted that the clause of restriction cannot be disconnected from all the descriptions of persons whose lives are specified. It is one sentence; and the qualification is applicable, and must be applied, to the whole. Strict grammatical construction is not the rule which governs in wills if the intention of the testator requires a different construction, and this sort of construction applies to all cases, whether the testamentary disposition be contrary to, or consistent with what may be considered as worthy of favour, that the intention of the testator, if it is not inconsistent with the rules of law, is alone to be attended to. It is impossible to read the clause in question with a view to discover the meaning of the testator without being convinced that the testator meant to apply the restrictive words to all the members of the clause, that should require such restriction. The adding the restriction after the enumeration of the last class of persons was not because it was intended to apply to that only, but in order to avoid the frequent repetition of it.

(vi) As to the objection that the testator has exceeded the bounds prescribed by law for the suspense of property in the clause by which he directs the property to be invested in the funds until purchases can be found, if such objection is now to be repeated the answer is that such is the case in every will where there is a direction to lay out an accumulating fund of principal and interest in lands. It is always in this way—that, until the purchase can be made, the money is to be accumulated. Where an accumulating fund is to be made the ground of purchase, the interest and dividends, until the purchase is made, are never directed to be paid to the person who would be entitled to the rents and profits of the lands to be purchased.

On the argument of the appeal,

Mansfield and *Romilly* for the appellants.

The Attorney-General (*Spencer Perceval*), *the Solicitor-General* (*Sir T. M. Sutton*), *Piggott*, *Richards*, *Alexander* and *Cox* for the respondents.

After the argument the following questions were put to the judges:

(i) A testator by his will, being seised in fee of the real estate therein mentioned, made the following devise:

> "I give and devise all my manors, messuages, tenements, and hereditaments, at Brodsworth in the county of York after the death of my sons Peter Isaac Thellusson, George Woodford Thellusson, and Charles Thellusson, and of my grandson John Thellusson, son of my son Peter Isaac Thellusson, and of such other sons as my said son Peter Isaac Thellusson may have, and of such sons as my said sons George Woodford Thellusson and Charles Thellusson may have, and of such issue as such sons may have, as shall be living at the time of my decease or born in due time afterwards, and, after the deaths of the survivors and survivor of the several persons aforesaid, to such person as, at the time of the death of the survivor of the said several persons, shall then be the eldest male lineal descendant of my son Peter Isaac Thellusson and his heirs for ever."

At the time of the testator's death there were seven persons actually born answering the description mentioned in the testator's will, and there were two en ventre sa mère answering the description, if children en ventre sa mère do answer that description. All the said several persons, so described in the testator's will, being dead, and at the death of the survivor of such several persons there being living one male lineal descendant of the testator's son Peter Isaac Thellusson, and one only: Is such person entitled by law, under the legal effect of the devise above stated and the legal construction of the several words in which the same is expressed, to the said manors, messuages, tenements, and hereditaments, at Brodsworth?

(ii) If at the death of the survivor of such several persons as aforesaid such only male lineal descendant was not actually born, but was en ventre sa mère, would such lineal descendant, when actually born, be so entitled?

June 25, 1805. The unanimous opinion of the judges was pronounced by Sir A. Macdonald, C.B. The other judges present were Lord Ellenborough, C.J., Grose, Le Blanc, Heath, Rooke, and Chambre, JJ., and Thompson and Graham, BB.

SIR A. MACDONALD, C.B.—The first objection to the will is that the testator has exceeded that portion of time within which the contingency must happen upon which an executory devise is permitted to be limited by the rules of law, for three reasons: First, because so great a number of lives cannot be taken as in the present instance to protract the time during which the vesting is suspended, and, consequently, the power of alienation is suspended; secondly, that the testator has added to the lives of persons who should be born at the time of his death the lives of persons who might not be born; thirdly, that, after enumerating different classes of lives during the continuance of which the vesting is suspended, the testator has concluded with these restrictive words "as shall be living at the time of my decease or born in due time afterwards," and that, as these words appertain only to the last class in the enumeration, the words which are used in the preceding classes being unrestricted, they will extend to grandchildren and great-grandchildren and their issue, and so make this executory devise void in its creation, as being too remote.

With respect to the first ground, viz., the number of lives taken, which in the present instance is nine, I apprehend, that no case or dictum has drawn any line as to this point which a testator is forbidden to pass. On the contrary, in the cases in which this subject has been considered by the ablest judges they have for a great length of time expressed themselves as to the number of lives, not merely without any qualification or circumscription, but have treated the number of co-existing lives as matter of no moment, the ground of that opinion being that no public inconvenience can arise from a suspension of the vesting and thereby placing land out of circulation during any one life, and that in fact the life of the survivor of many persons named or described is but the life of someone. This was held without dissent by Twisden, J., in *Love* v. *Wyndham* (10), twenty years before the determination of the *Duke of Norfolk's Case* (5), who says that the devise of a farm may be for twenty lives, one after another, if all be in existence at once. By this expression he must be understood to mean any number of lives, the extinction of which could be proved without difficulty. When this subject of executory trusts came to be examined by the great powers of Lord Nottingham as to the time within which the contingency must happen, he thus expresses himself:

> "If a term be devised, or the trust of a term limited, to one for life with twenty remainders for life successively, and all the persons are in existence and alive at the time of the limitation of their estates, these, though they look like a possibility upon a possibility, are all good, because they produce no inconvenience: they wear out in a little time."

With an easy interpretation we find from Lord Nottingham what that tendency to a perpetuity is which the policy of the law has considered as a public inconvenience, namely, where an executory devise would have the effect of making lands unalienable beyond the time which is allowed in legal limitations, that is, beyond the time at which one in remainder would attain his age of twenty-one if he were not born, when the limitations were executed. When he declares, that he will stop where he finds an inconvenience, he cannot, consistently with sound construction of the context, be understood to mean where judges arbitrarily imagine they perceive an inconvenience, for he has himself stated where inconvenience begins, namely, by an attempt to suspend the vesting longer than can be done by legal limitation. I understand him to mean that, wherever courts perceive that such would be the effect, whatever may be the mode attempted, that effect must be prevented, and he gives the same, but no greater, latitude to executory devises and executory trusts as to estates tail.

This has been ever since adopted. In *Scatterwood* v. *Edge* (11) the court held that an executory estate, to arise within the compass of a reasonable time, is good, as twenty or thirty years, so is the compass of a life or lives, for let the lives be never so many, there must be a survivor, and so it is but the length of that life. In *Humberston* v. *Humberston* (9), where an attempt was made to create a vast number of estates for life in succession, as well to persons unborn as to persons in existence, Lord Cowper restrained that devise within the limits assigned to common law conveyances by giving estates for life to all those who were living (at the death of the testator), and estates tail to those, who were unborn, considering all the co-existing lives (a vast many in number) as amounting in the end to no more than one life. His Lordship was in the situation alluded to by Lord Nottingham, where a visible inconvenience appeared. The bounds prescribed to limitations in common law conveyances were exceeded, the excess was cut off, and the devise confined within those limits. Lord Hardwicke repeats the same doctrine in *Sheffield* v. *Lord Orrery* (14), using the words "life or lives" without any restriction as to number. Many other cases might be cited to the like effect, but I shall only add what is laid down in two very modern cases. In *Goodtitle d. Gurnall* v. *Wood* (15) Willes, C.J., speaks of a life or lives without any qualification; and Lord Thurlow, in *Robinson* v. *Hardcastle* (16), says that a man may appoint 100 or 1,000 trustees and that the survivor of them shall appoint a life estate.

It appears, then, that the co-existing lives at the expiration of which the contingency must happen are not confined to any definite number. But it is asked: Shall lands be rendered unalienable during the lives of all the individuals who compose very large societies or bodies of men, or where other very extensive descriptions are made use of? It may be answered that, when such cases occur, they will, according to their respective circumstances, be put to the usual test whether they will or will not tend to a perpetuity by rendering it almost, if not quite, impracticable to ascertain the extinction of the lives described, and will be supported or avoided accordingly. But it is contended that in these and other cases the persons, during whose lives the suspension was to continue were persons immediately connected with or immediately leading to the person, in whom the property was first to vest, when the suspension should be at an end. I am unable to find any authority for considering this as a sine qua non in the creation of a good executory trust. It is true that this will almost always be the case and mode of disposing of property, introduced and encouraged up to a certain extent, for the convenience of families, in almost all instances looking at the existing members of the family of the testator and its connexions. But when the true reason for circumscribing the period during which alienation may be suspended is adverted to, there seems to be no ground or principle that renders such an ingredient necessary. The principle is the avoiding of a public evil by placing property for too great a length of time out of commerce. The length of time will not be greater

or less whether the lives taken have any interest, vested or contingent, or have not, nor whether the lives are those of persons immediately connected with or immediately leading to that person in whom the property is first to vest, terms, to which it is difficult to annex any precise meaning. The policy of the law, which, I apprehend, looks merely to duration of time, can in no way be affected by those circumstances. This could not be the opinion of LORD THURLOW in *Robinson* v. *Hardcastle* (16), nor is any such opinion to be found in any case or book upon this subject. The result of all the cases upon this point is thus summed up by WILLES, C.J., in *Goodtitle d. Gurnall* v. *Wood* (15) (Willes, at p. 213) with his usual accuracy and perspicuity:

> "Executory devises have not been considered as bare possibilities, but as certain interests and estates; and have been resembled to contingent remainders in all other respects: only they have been put under some restraints to prevent perpetuities. As at first it was held that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years; at length it was extended a little further, namely, to a child en ventre so mère at the time of the father's death; because, as that contingency must necessarily happen within less than nine months after the death of a person in being, that construction would introduce no inconvenience; and the rule has in many instances been extended to twenty-one years after the death of a person in being; as in that case likewise there is no danger of a perpetuity."

Comparing what the testator has done in the present case with what is above cited, it will appear, that he has not postponed the vesting even so long as he might have done.

The second objection which has been made in this case is that the testator has added to the lives of persons in being at the time of his decease those of persons not then born. It becomes, therefore, necessary to discover in what sense the testator meant to use the words "born in due time afterwards." Such words, in the case of a man's own children, mean the time of gestation. What is to be intended by these words in this will must be collected from the will itself. It may be collected from the will itself that by those words the testator meant to describe the period of time within which issue might be born during whose lives the trust might legally continue, or, in other words, whom the law would consider born at the time of his decease. These could only be such children of the several persons named as their respective mothers were enceinte with at the time of his death. He may have meant to use the word "due" as denoting that period of time, which would be the necessary period for effecting his purpose. This is probable from his using the same word as applied to the time during which the presentation to the living of Marr might be suspended without incurring a lapse. That a child en ventre sa mère was considered as in existence so as to be capable of taking by executory devise, was maintained by POWELL, J., in *Luddington* v. *Kime* (17), upon this ground, that the space of time between the death of the father and the birth of the posthumous son was so short that no inconvenience could ensue. So in *Northey* v. *Strange* (18), SIR JOHN TREVOR, M.R., held that by a devise to children and grandchildren an unborn grandchild should take. Two years after LORD MACCLESFIELD in *Burdet* v. *Hopegood* (19) held that, where a devise was to a cousin, if the testator should leave no son at the time of his death, a posthumous son should take as being left at the testator's death.

In *Wallis* v. *Hodson* (20) LORD HARDWICKE held that a posthumous child was entitled under the Statute of Distribution, and his reason deserves notice. He says (2 Atk. at p. 117):

> "The principal reason that I go upon, is, that the plaintiff was en ventre sa mère at the time of her brother's death, and consequently a person in rerum natura; so that by the rules of the common and civil law she was, to all intents and purposes, a child, as much as if born in the father's lifetime."

Such a child, in charging for the portions of other children living at the death of the father, is included as then living: *Beale* v. *Beale* (21), and so in a variety of other cases. In *Basset* v. *Basset* (22) LORD HARDWICKE decreed rents and profits, which had accrued at a rent-day preceding his birth, to a posthumous child, and since the statute 10 Will. 3, c. 22, such children seem to be considered in all cases of devise and marriage or other settlement to be living at the death of their father, although not born till after his decease.

It is otherwise considered in the case of descent. In *Roe d. Nightingale* v. *Quartley* (23) the devise was to Hester Read for life, daughter of Walter Read, and to the heirs of her body, and for default of such issue to such child as the wife of Walter Head is now enceinte with and the heirs of the body of such child, then to the right heirs of Walter Read and Mary his wife. It was contended that the last limitation was too remote as coming after a devise to one not in being and his issue. But the court said that since the statute of King William, which puts posthumous children on the same footing with children born in the lifetime of their ancestor, this objection seemed to be removed, whatever was the case before. In *Gulliver* v. *Wickett* (24) the devise was to the wife for life, then to the child, with which she was supposed to be enceinte, in fee, provided that, if such child should die before twenty-one leaving no issue, the reversion should go to other persons named. The court said that, if there had been no devise to the wife for life, which made the ulterior estate a contingent remainder, the devise to the child en ventre sa mère, being in futuro, would have been a good executory devise. In *Doe d. Lancashire* v. *Lancashire* (25) the Court of King's Bench has held that marriage and the birth of a posthumous child revoke a will in like manner as if the child had been born in the lifetime of the father. In *Doe d. Clarke* v. *Clarke* (26) EYRE, C.J., holds, that independent of intention an infant en ventre sa mère by the course and order of nature is then living, and comes clearly within the description of a child living at the parent's decease, and he professes not to accede to the distinction between the cases in which a provision has been made for children generally and where the testator has been supposed to mark a personal affection for children who happened to be actually born at the time of his death. The most recent case is that of *Long* v. *Blackall* (2). There the Court of King's Bench had no doubt that a devise to a child en ventre sa mère in the first instance was good, and a limitation over was good also on the contingency of there being no issue male or descendant of issue male living at the death of such posthumous child. It seems, then, that, if estates for life had been given to the several cestuis que vie in this will and after their deaths to their children, either born or en ventre sa mère at the testator's death, they would have been good. No tendency to perpetuity then can arise in the case of such lives being taken, not to confer on them a measure of the beneficial interest, but to fix the time, during which the vesting of the property, which is the subject of this devise, shall be protracted, inasmuch as the circulation of real property is no more fettered in one case than in the other. It is, however, observable that this question may never arise, if it shall so happen that the children in ventre matris at the death of the testator shall not survive those who were then born.

The third ground of objection depends upon the application of the restrictive words which are added to the enumeration of the different classes of persons during whose lives the restriction is suspended. This objection, I conceive, will be removed by the application of the usual rules in construing wills to the present case. First, where the intention of the testator is clear, and is consistent with the rules of law, that shall prevail. His intention evidently was a prevent alienation as long as by law he could. If then it is to be supposed that the restrictive words are to be confined to the last of seven different descriptions of persons and that the testator intended to leave the four descriptions of persons which immediately preceded this seventh class without the benefit of such restriction, although they equally stand in need of it, we must do the utmost violence to all established rules on this head.

That construction is to be adopted which will support the general intent. The grammatical rule of referring qualifying words to the last of the several antecedents is not even supposed by grammarians themselves to apply when the general intent of a writer or speaker would be defeated by such a confined application of them. Reason and common sense revolt at the idea of overlooking the plain intent which is disclosed in the context, namely, that they should be applicable to such classes as require them, and as to the others to consider them as surplusage. If words admit of more constructions than one, that which will support the legal intention of the testator is in all cases to be adopted. I do not trouble your Lordships with any observation upon the objections arising from the magnitude of the property in question, either as it now stands or may hereafter stand, or as to the motives which may have influenced this testator, or his neglect of those considerations by which I or any other individual may or ought to have been moved. That would be to suppose that such topics can in any way affect the judicial mind. For these imperfect reasons I concur with the rest of the judges in offering this answer to your Lordships' first question.

With respect to your Lordships' second question the objection to such child being entitled must arise from an allowance having been made for the time of gestation at the end of the executory trusts. It seems to be settled that an estate may be limited in the first instance to a child unborn, and, I apprehend, to the first and other sons in fee, as purchasers. *Long* v. *Blackall* (2) seems to have decided that an infant in ventre matris is a life in being. The established length of time during which the vesting may be suspended is during a life or lives in being, the period of gestation, and the infancy of such posthumous child. If, then, this time has been allowed in some cases at the beginning and in others at the termination of the suspension, and if such children are considered by the construction of the statute of 10 Will. 3, c. 22, as being born to such purposes, what should prevent the period of gestation being allowed both at the commencement and termination of the suspension, if it should be called for?

In those cases, where it has been allowed at the commencement, and particularly in *Long* v. *Blackall* (2), it must have been obvious to the court that it might be wanting at the termination, yet that was never made an objection. In *Gulliver* v. *Wickett* (27) the child, who was supposed to be en ventre sa mère, might have married and died before twenty-one, and have left his wife enceinte. In that case a double allowance would have been required, yet that possibility was never made an objection, although it was obvious. In *Long* v. *Blackall* (2), according to the printed report, the precise point was not gone into. But it is plain that the attention of the court must have been drawn to it, for the learned judge who argued that case in support of the devise [CHAMBRE, J., then at the Bar] expressly stated that every common case of a limitation over, after a devise for a life in being, with remainder in trust to his unborn issue, includes the same contingency as was then in question, for the devisee for life may die leaving his wife enceinte, and the only difference is that the period of gestation occurs at the beginning instead of the end of the first legal estate. It must have been palpable that it might possibly occur at both ends. Every reason, then, for allowing the period of gestation in the one case seems to apply with equal force to the other, and leads the mind to the conclusion that it ought to be allowed in both cases or in neither case. But, natural justice in several cases having considered children en ventre sa mère as living at the death of the father, it should seem that no distinction can properly be made, but that in the singular event of both periods being required they should be allowed, as there can be no tendency to a perpetuity.

LORD ELDON, L.C.—The learned judges having given their opinion upon the points of law referred to them, no question remains to which the attention of the House should be particularly called except the point, arising out of this will, which could not be referred to the judges, with regard to the accumulation of the rents

A and profits. When this cause was decided in the Court of Chancery, it was decided by Lord Rosslyn, with the assistance of Lord Alvanley, Buller, J., and Lawrence, J., and it is well known that the late Chief Justice of the Court of King's Bench, Lord Kenyon, could hardly be brought to think any of the questions in this case fit for argument, conceiving it dangerous to give so much of serious agitation to them as has been had, considering what had been settled with respect to executory B devise and accumulation. Some of your Lordships have had the advantage of hearing the opinion of Lord Thurlow, which cannot be doubted upon this point after his Lordship has laid down in *Robinson* v. *Hardcastle* (16), what is unquestionable law, that it is competent to a testator to give a life estate to be appointed by the survivor of 1,000 persons. That estate would be to commence at the death of the last of those 1,000 persons. Upon the questions of law your Lordships C have had the unanimous opinion of the several learned judges. As far as judicial opinion can be collected, there is, therefore, the testimony of all the judicial opinion I have detailed, concurrent upon this great case: great, with reference, not to the questions arising out of it, but to that circumstance of which, whatever attention your Lordships may think proper to give it in your legislative capacity, you cannot, exercising the function of judges, take notice, for the question of law D is the same upon a property of £100 or a million. If it were possible, speaking judicially, to say, you entertain a wish upon the subject, your Lordships may all concur in the regret that such a will should be maintained. But that goes no further than as a motive to see whether it contains anything resting upon which we may as judges say it is an attempt to make an illegal disposition.

E When this was put originally as a case, representing that it was monstrous to tie up property for nine lives, it seemed to me a proposition that is incapable of argument as lawyers, for the length of time must depend, not upon the number, but upon the nature, of the lives. If we are to argue upon probability, two lives may be selected, affording much more probability of accumulation and postponement of the time of vesting than nine or ninety-nine lives. Look at the obituary of this F House since the year 1706 when this will was made. Suppose the testator had taken the lives of so many of the peers as have died since that time, that would have been between twenty and thirty lives, and yet that number has expired in a very short period. It cannot, therefore, depend upon the magnitude of the property, or the number of lives, but the question always is whether there is a rule of law fixing a period during which property may be unalienable. The language G of all the cases is that property may be so limited as to make it unalienable during any number of lives, not exceeding that to which testimony can be applied to determine when the survivor of them drops.

If the law is so as to postponing alienation, another question arises out of this will, which is a pure question of equity: Whether a testator can direct the rents and profits to be accumulated for that period during which he may direct that the H title shall not vest, and the property shall remain unalienable, and, that he can do so, is most clear law. A familiar case may be put. If this testator had given the residue of his personal estate to such person as should be the eldest male descendant of Peter Isaac Thellusson at the death of the survivor of all the lives mentioned in this will, without more, that simple bequest would in effect have directed accumulation, until it should be seen what individual would answer the I description of that male descendant, and the effect of the ordinary rule of law, as applied in equity, would have supplied everything, that is contained in this will as to accumulation, for the first question would be: Is the executory devise of the personal estate to the future individual, so described, good? If it is, whether a residue of personal estate is given, the interest goes with the bulk, and there is no more objection to giving that person that which is only forming another capital than to giving the capital itself. But the constant course of a court of equity is to accumulate interest from time to time without a direction, and to hand over the accumulation to that person who is to take the capital. Take

another instance of accumulation. Suppose the nine persons, named in this will had been lunatics: without any direction there would have been an accumulation of the interest and profits of all these estates. In truth, there is no objection to accumulation upon the policy of the law, applying to perpetuities, for the rents and profits are not to be locked up and made no use of for the individuals or the public. The effect is only to invest them from time to time in land so that the fund is not only in a constant course of accumulation, but also in a constant course of circulation. To that application what possible objection can there be in law?

This is not new, for in the case upon Lady Denison's will [*Harrison* v. *Harrison* (1)] Lord Kenyon, who saw great danger in permitting argument to go too far against settled rules, held most clearly that the testatrix had well given her property to such second son of her infant niece as should first attain the age of twenty-one, and directed accumulation through the whole of that period, following Lord Hardwicke and his predecessors and taking the rule to be perfectly clear that, so long as the property may be rendered unalienable, so long there may be accumulation—that in common sense it is only giving the accumulation to the person who is to take the fund itself if it could be foreseen, who that person would be. Therefore, as to giving the property at the expiration of nine lives and the accumulation, I never could doubt upon those points. The latter could not be a subject of dispute before the late Act of Parliament [Accumulations Act, 1800], which has been sometimes, though without foundation, attributed to me, and which in some respects I would have corrected if it had not come upon me rather by surprise. That Act, however, expressly alters what it takes to have been the former law upon the subject, admitting the right to direct accumulation and reducing that right in given cases to the period of twenty-one years. The amount of accumulation, even through the provisions of that Act, though only to endure for twenty-one years, might in many instances, by giving the son a scanty allowance, be enormous. I do not think it was intended, but the accumulation directed by this will must under that Act have gone on for twenty-one years. In the construction of that Act it has been held that it only makes void so much of the disposition as exceeds twenty-one years, leaving it good for that period: *Griffiths* v. *Vere* (27); *Longden* v. *Simson* (28). Upon the old rule also accumulation for particular purposes might have gone on for nine lives, or more.

The only points that appeared to me fairly to bear argument are the critical discussion upon the word "as," as a relative term, and that with reference to the double period of gestation. As to the former, if your Lordships could from dislike to such a will refuse that construction which will consider that word as a word of reference to each preceding description of persons, grounding that construction upon the manifest intention of the testator upon the whole will to make the property unalienable as long as he could, you would gratify that inclination at the expense of overturning all the rules of construction, that have been settled and applied for ages to support wills. If your Lordships will give any relief by legislative interference against this will, that is a very bold proposition, but not so bold as that, because you dislike the effect of the will, you will give a judgment wrong in point of law.

As to the other point, upon the words "born in due time afterwards," I observe that Lawrence and Buller, JJ., afford each a construction of these words—the one that they mean children en ventre sa mère, while the other held them a declaration of the testator's will that the property shall be unalienable and the accumulation go on, during the lives of all the persons, born or unborn, whom the law would authorise him to take as the lives for restraint of alienation, and for the purpose of accumulation. In my opinion, either of those constructions may be taken to be the intention consistently with the rules of law, but consistently with the rules of law your Lordships cannot reject both but must give the words such a construction as will support the manifest intention of the testator. It is,

A therefore, beside the point to ask what child shall take or when a child shall take, for the testator is describing, not the object to take, but the lives of persons, in order to define the period during which the power of alienation shall not exist and the accumulation shall go on. But, if it is necessary, I have no difficulty in stating, as a lawyer, that the rule of law has been properly laid down that the time of gestation may be taken both at the beginning and the end, and that is what was meant in B *Gulliver* v. *Wickett* (24), in which case the devise was to a child en ventre sa mère, and to go over, if that child should die under the age of twenty-one, leaving no issue. In the construction of that limitation expressly to a child en ventre sa mère, suppose that child had at the age of twenty married and died six months afterwards, leaving his wife enceinte, that property, absolutely given to him, would not be divested merely because the child was not born till three months after his death. In fair C reasoning, therefore, that is the construction of the words.

Of the case of *Long* v. *Blackall* (2), in which I was counsel, I can give a faithful history. It was my duty to submit to the Lord Chancellor the point that the allowance was claimed at both ends of the period. His Lordship treated the point not with much respect, but I prevailed with him against his inclination to send it to the Court of King's Bench. Upon the report of the case in that court the point did D not appear to have been discussed. I, therefore, pressed the Lord Chancellor to send the case back. His answer was as rough as his nature, which was very gentle, would permit, and shows the clear opinion he had upon the point. He said distinctly he was ashamed of having once sent it to a court of law, and would not send it there again. I know, Lord Kenyon's opinion upon the subject was clear, so were those E of Buller, J., and Lawrence, J., as may be collected from the report of these causes.

This case, therefore, comes to this, and this only. The legal and equitable doctrine is clear; and then the question is with whatever regret we may come to the determination: Is it not our duty to determine according to the rules of law and equity? Upon the question whether this judgment ought to be reversed, I am bound F to say, it ought not; but that it ought to be affirmed.

Appeal dismissed.

ANGEL *v.* SMITH

[Lord Chancellor's Court (Lord Eldon, L.C.), February 23, 24, 25, 1804]

[Reported 9 Ves. 335; 32 E.R. 632]

Execution -Receiver Receiver appointed by court—Sequestrators Action for possession—Need for leave of court.

Without the leave of the court an action for possession cannot be brought against a receiver appointed by the court, nor proceedings against sequestrators in possession under a writ of sequestration, since such possession is in each case that of the court.

Contempt of Court—Sequestrators in possession—Disturbance.

It is a contempt of court to disturb sequestrators in possession.

Notes. Followed: *Brooks* v. *Greathed*, [1814–23] All E.R. Rep. 768. Applied: *Musadee Mahomed Cazum Sherazee* v. *Meerza Ally Mahomed Shoostry* (1854), 6 Moo. Ind. App. 27. Referred to: *Johnes* v. *Claughton* (1822), Jac. 573; *Johnson* v. *Chippindall* (1828), 2 Sim. 55; *Empringham* v. *Short* (1844), 3 Hare, 461; *Lane* v. *Capsey*, [1891] 3 Ch. 411; *Whatcoat* v. *Shropshire Rail. Co.* (1893), 37 Sol. Jo. 650; *Hipkin* v. *Hipkin*, [1962] 2 All E.R. 155.

As to the status of a receiver appointed by the court, see 32 Halsbury's Laws (3rd Edn.) 384; and for cases see 39 Digest (Repl.) 49 et seq. As to the claims by third parties against a receiver appointed by the court, see 32 Halsbury's Laws (3rd Edn.) 420; and for cases see 39 Digest (Repl.) 52 et seq. As to proceedings against sequestrators, see 16 Halsbury's Laws (3rd Edn.) 72–74; and for cases see 21 Digest (Repl.) 698 et seq.

Cases referred to:

(1) *Anon.* (1801), 6 Ves. 287; 31 E.R. 1055, L.C.; 21 Digest (Repl.) 700, *2016.*

(2) *Phipps* v. *Bishop of Bath and Wells* (1783), 2 Dick. 608; 21 E.R. 408, L.C.; 35 Digest (Repl.) 592, *2647.*

Application for further directions.

An ejectment had been brought without leave of the court, and had nearly proceeded to trial, for lands in the possession of a receiver under the appointment of the court.

LORD ELDON, L.C., said that the practice when the receiver was in possession was that an ejectment should not be brought without leave of the court: but in a former instance (*Anon.* (1)) it was permitted to go on under the circumstances, having gone so far. His Lordship, however, cautioned the solicitor that he would proceed at his peril.

Mansfield and *Richards* agreed that the practice was settled as stated by the Lord Chancellor; and *Richards* mentioned an instance in which the party was very nearly committed by Lord Thurlow.

In consequence of this, a motion was brought the next day for liberty to try the ejectment.

W. Agar, in support of the motion: This person claims under a devise to the heirs male of one, Angel, and their heir for ever: a title merely at law; and he is no party. It has never been decided, that, where a receiver has been appointed, a person, claiming under a legal title, not derived in the cause, may not bring an ejectment. The case of a person claiming by an adverse title is quite different from that of a mortgagee; and the examination pro interesse suo does not apply to a claim of the whole. *Phipps* v. *Bishop of Bath and Wells* (2) is the case of a mortgagee, in which there is less reason, for his only interest is a security for money; and the equity of redemption is a valuable interest. But in this instance it is assumed that the other persons have no interest whatsoever.

LORD ELDON, L.C.—It is clearly a contempt of this court to disturb sequestrators, and the party cannot claim, though by an adverse title, in any other way than by coming to be examined pro interesse suo. Consider the consequence. How are sequestrators to defend their possession against an ejectment? The Court of King's Bench have decided, that where a sequestration is awarded to collect money to pay a demand in equity, if it is not executed, that is, if the sequestrators do not take possession, and a judgment creditor takes out execution, notwithstanding the sequestration awarded, there may be a levy under the execution; intimating, that, if the sequestration is executed, the other, though prior, must come here. How can any of these parties defend as landlord? After the tenants have attorned to the receiver, the court is the landlord.

Mansfield, *Richards* and *Leach*, opposed the motion: It is established that when once the court has taken possession by putting a receiver upon the estate, no person can disturb that possession without leave: and upon a very clear reason, the danger of collusion; by which the very person, from whom the possession had been taken by the court, might again get possession. The consequence also might be an action for mesne profits, to recover the very rents paid by the tenants by the order of this court to its officer, for the argument is just as favourable to that action as to an ejectment. Will the court suffer persons to be placed in that situation? What is the difference for this purpose between a receiver and sequestrators? In the cases of privileged persons and corporations, sequestration is the process of course; and it is the ordinary process issuing against every person, who stands out process to that extent. The appointment of a receiver is not so much of course; but in either case the estate is taken into the hands of the court, and is not to be disturbed; and the officer is liable to account to the court.

LORD ELDON, L.C.—This case involves a very considerable question of practice. With regard to a sequestration I have no doubt, having in my former practice had considerable occasion to consider that; and I am of opinion that, where sequestrators are in possession under the process of the court, but especially, where they are in possession for the purpose of raising a duty, that is, a sum decreed, their possession is not to be disturbed, even by an adverse title, without leave; upon this principle, that the possession of the sequestrators is the possession of the court. The court, being competent to examine the title, will not permit itself to be made a suitor in a court of law; but will itself examine the title; and the mode is by permitting the party to come in to be examined pro interesse suo, the practice being to go before the Master to state his title; and there is the judgment of the Master, and afterwards, if necessary, of the court upon it.

On the other hand, there is obvious convenience and justice, where the question to be tried is pure matter of title, that can be tried in ejectment, in saying, the mode of examining him pro interesse suo should be by giving leave to bring an ejectment: the court taking care to protect the possession by giving proper directions; and that case has gone upon this: that it would be the easiest thing for the very party, from whom the possession was taken at the instance of the plaintiff by the sequestration, to harass the sequestrator, so as to make it impossible for the court to execute its duty; for, if the court does not take upon itself to examine the title of the plaintiff, many nominal plaintiffs may be set up.

As to receivers, I am very sure, though I cannot refer to the case, that the same rule has obtained, wherever a receiver has been put upon the estate. I am also very confident, that I have heard that motion for leave to bring an ejectment against the receiver more than once, since I have sat here. The register also apprehends, such motions have been made. There may be inconvenience in that: but the inconvenience the other way is enormous. If it is necessary to ask leave, the court must have credit for never refusing it where it ought to be granted; and, if so, very great purposes of convenience may be answered, by putting the party to ask it. In a case of pedigree, an ejectment is the best mode of establishing, if I may so express it, the

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interesse suum. It is not to be understood, that, because there have been instances of forged tombstones and false registers, an ejectment will not be permitted in any case. The court certainly would not require a man to disclose all his evidence in the Master's office. That would be a very oppressive mode. A

Feb. 25, 1804. The motion was renewed, and it was insisted that the possession of the receiver was to be considered as the possession of the party, not of the court. B

LORD ELDON, L.C., asked counsel whether he had not often moved for liberty to bring an ejectment against a receiver. He answered that he had; and also against sequestrators: and that in a very late proceeding upon sequestration, the court directed that the party should go before the Master, to be examined pro interesse suo; and witnesses to be examined before the master and upon commission.

LORD ELDON, L.C.—Suppose a bill filed by bond creditors for administration of personal estate and legal and equitable assets, the tenant for life, or the tenant in fee, though representing the whole value, may not have an interest worth anything after the debts are paid. When you come to raise the demand, which the decree makes a duty, there the court says, and I understand the courts of law have admitted it lately, that, when sequestrators are once in possession, that will protect the sheriff returning that he can do no act. If the court will permit its decree to be disturbed by persons having, or pretending, title, nothing could be more easy than to prevent the execution of the decree. It will permit it, wherever there is a legal right to disturb it: but it will examine that right. The only question is whether the court, having taken possession, should not be informed whether it is a proper case; and I desire it to be considered as my opinion, that an ejectment cannot be brought without leave of the court, where there is a receiver. C D E

This motion was also resisted upon the particular circumstances, as evidence of surprise, and the laches of the lessor of the plaintiff, who, having brought and abandoned several actions of ejectment, had renewed the attempt just at the expiration of the twenty years.

THE LORD CHANCELLOR, after hearing discussion upon these points permitted the ejectment to proceed. F

ALDRICH *v.* COOPER
DURHAM *v.* LANKESTER AND ANOTHER

[Lord Chancellor's Court (Lord Eldon, L.C.), November 24, December 7, 8, 10, 1802, April 26, 1803]

[Reported 8 Ves. 382; 32 E.R. 402]

Equity—Marshalling—Creditor with security of two funds—Limitation of remedy against one fund—Avoidance of disappointment to less secured creditor—Application of doctrine as between legatees, legatees and creditors, creditors and a widow regarding paraphernalia, and mortgagees.

A creditor having the security of two funds shall not by his election disappoint another creditor having the security of only one fund. Equity, to satisfy both, will throw him who has two funds on that which can be affected by him only, to the intent that the only fund to which the other has access may remain clear to him. The doctrine applies also as between legatees, legatees and creditors, creditors and a widow with regard to her paraphernalia, and mortgagees where a mortgagor has mortgaged two properties to a mortgagee and one of those properties only to another mortgagee.

Guarantee—Surety—Right against creditor—Marshalling—Creditor with claim on two funds—Surety with claim on one fund.

Where, in a case of guarantee, the creditor has a claim on two funds in respect of the guaranteed debt and the surety can look to only one of those funds, the surety can invoke the equitable doctrine of marshalling and require the creditor first to satisfy himself from that fund on which the surety has no claim.

Notes. Copyhold tenure was abolished by the Law of Property Act, 1922 (see 8 Halsbury's Laws (3rd Edn.) 270), and parts of the judgments in this case have, therefore, no modern application. In the administration of assets the distinction between specialty and simple contract debts has been abolished: see 14 Halsbury's Laws (3rd Edn.) 497–499.

Considered: *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1. Referred to: *Sproule* v. *Prior* (1836), 8 Sim. 189; *Tombs* v. *Roch* (1846), 2 Coll. 490; *Re Stephenson, Ex parte Stephenson* (1847), De G. 586; *Webb* v. *Smith* (1885), 30 Ch. 192; *Re Stokes, Parsons* v. *Miller* (1892), 67 L.T. 223; *The Chioggia*, [1898] P. 1; *Re Cohen, National Provincial Bank, Ltd.* v. *Katz*, [1959] 3 All E.R. 740.

As to the equitable doctrine of marshalling, see 14 Halsbury's Laws (3rd Edn.) 611–615, and in the case of the rights of a surety, see ibid., vol. 18, p. 467–469. For cases see 20 Digest (Repl.) 526 et seq., 26 Digest (Repl.) 113, 114.

Cases referred to:

(1) *Robinson* v. *Tonge* (1739), 1 P. Wms. 679, n., L.C.

(2) *Lanoy* v. *Duke and Duchess of Athol* (1742), 2 Atk. 444; 9 Mod. Rep. 398; 26 E.R. 668, L.C.; 20 Digest (Repl.) 526, *2394*.

(3) *Tipping* v. *Tipping* (1721), 1 P. Wms. 729; 24 E.R. 589, L.C.; 23 Digest (Repl.) 535, *5998*.

(4) *Lutkins* v. *Leigh* (1734), Cas. temp. Talb. 53; 25 E.R. 658, L.C.; 23 Digest (Repl.) 535, *6000*.

(5) *Forrester* v. *Lord Leigh* (1753), Amb. 171; 27 E.R. 114, L.C.; 23 Digest (Repl.) 535, *5999*.

(6) *A.-G.* v. *Tyndall* (1764), Amb. 614; 2 Eden, 207; 27 E.R. 399, L.C.; 8 Digest (Repl.) 405, *970*.

Appeals from decrees made in actions for an account of what was due to the plaintiff, Aldrich, a simple contract creditor of the intestate John Cooper, and all other

the creditors. In case the creditors by specialty should exhaust any part of the personal estate it was declared that the simple contract creditors were entitled to stand in their place.

The Master's report stated that the testator died seised of freehold estates of inheritance subject to a mortgage made by the intestate by indentures dated Oct. 6, 1791, for £1,300, by which indentures also for better securing the payment he covenanted with the mortgagee to procure himself to be admitted to copyhold estates, that he would surrender them to the mortgagee, and that until such surrender he would stand seised of the premises in trust for the mortgagee. The intestate died in June 1792, not having been admitted to the copyhold estates, and leaving five sisters his co-heiresses at law who in September, 1792, were admitted to the copyhold estates as co-heiresses of the intestate and immediately afterwards surrendered to the mortgagee for securing what was due upon the mortgage and two bonds by the intestate to the mortgagee. The widow of the intestate took out administration; and paid out of the personal estate £767 in part payment of the mortgage and bonds. The personal estate being exhausted, when the cause came on for further directions a question arose whether the creditors by simple contract were entitled to stand in the place of the specialty creditors in respect of what they had drawn from the personal estate against the copyhold as well as the freehold estates.

Romilly and *Stratford* for the plaintiffs: *Robinson* v. *Tonge* (1) cannot be distinguished from this case, but it is impossible to support that case upon the principles upon which the court has always acted as to marshalling assets. That case is not reported upon this point, except in Mr. Cox's note, though it is in several books, upon others, nor has the point been before the court in any other case nor the ground taken by Lord Hardwicke ever been acted upon in any other instance. The principle as to marshalling assets is stated in *Lanoy* v. *Duke and Duchess of Athol* (2), viz., that if a creditor has two funds he shall take his satisfaction out of that fund upon which another creditor has no lien. If it is sufficient to say that the creditor disappointed had no claim in law or equity upon the fund, that would be an answer in every case. In the instance of a simple contract creditor, disappointed by the specialty creditors taking payment out of the personal estate, he has no claim in law or equity upon the real estate. So a legatee, where the creditors exhaust the personal estate, has no claim but what the testator gives him. In *Lanoy* v. *Duke and Duchess of Athol* (2) the case is put of a mortgagor of two estates and a subsequent mortgage of one of them to another person. If that estate is insufficient to pay both, the first mortgagee shall be compelled to take satisfaction out of the other estate in order to leave to the second mortgagee that, upon which alone he can go. The same argument would occur that the second mortgagee had contracted only for a security upon the one estate, and had no claim upon the other. So a widow is entitled to her paraphernalia, though not against creditors, but if a mortgagee chooses to take them in satisfaction of his debt by bond or covenant, a court of equity will ascertain the value, and make her a creditor for that upon the mortgaged estate: *Tipping* v. *Tipping* (3). Upon what ground, if *Robinson* v. *Tonge* (1) is right, can she stand as a mortgagee upon the real estate? The distinction is clear upon *Lutkins* v. *Leigh* (4) and *Forrester* v. *Lord Leigh* (5) that, though the court will marshal for legatees against a descended estate, they will not against a devised estate, but they shall stand in the place of a mortgagee for what he takes out of the personal estate. It would be very extraordinary if the court would marshal by placing a legatee in the situation of a mortgagee against the copyhold estate, and would not do that for creditors.

Piggott and *Fonblanque* for the defendants: These are the copyhold estates of an intestate; no intention demonstrated to subject them to debts by any testamentary disposition. They are not assets either at law or in equity; not liable to debts further than by express contract. *Robinson* v. *Tonge* (1) is not inconsistent

with the cases, considering the subjects, to which they apply. Marshalling is confined to assets, and goes no further than the jurisdiction over them. Copyhold estate is not a subject of that jurisdiction. Specialty creditors have no claim upon that, as they have upon freehold estate, which, therefore, is marshalled. The distinction is that the specialty creditors have resort to the one fund and not to the other. To the effect of making the copyhold estate bear its proportion of the mortgage the heir is bound by *Robinson* v. *Tonge* (1), but the court will not go further than to prevent an election to the prejudice of other claims upon the freehold estate. It is safer to adhere to a case so precisely in point than to unsettle this question after such a length of time because in other cases there is an apparent contrariety of principle. There is no case in which that has been brought again before the court: much less has that authority been impugned. In all the cases that have been put, the court was applying the principle of marshalling assets. That phrase implies an equitable arrangement of two funds of the description of assets. This sort of case must have arisen repeatedly, and yet there is no instance of a determination the other way; which is evidence of the general understanding.

LORD ELDON, L.C.—I cannot find *Robinson* v. *Tonge* (1) among LORD HARDWICKE'S notes. I feel it to be my duty to understand the principle of the case before I confirm it, or to decide against it upon a principle, stated from this place, so clear, that there can be no doubt upon it. I was surprised at the case when it was stated. Suppose there was no freehold estate, but there was a copyhold estate, which the owner had subjected to a mortgage, and died. It is clear, the mortgagee having two funds, might, if he pleased, resort to the copyhold estate. But would this court compel him to resort to it? If so, the court marshals by the necessary consequence of its act. If the court would not compel him, is it not clear that it is purely matter of his will whether the simple contract creditors shall be paid or not?

That at least contradicts all the authorities that, if a party has two funds (not applying now to assets particularly) a person having an interest in one only has a right in equity to compel the former to resort to the other, if that is necessary for the satisfaction of both. I never understood that if A. has two mortgages and B. has one, the right of B. to throw A. upon the security which B. cannot touch, depends upon the circumstance whether it is a freehold or a copyhold mortgage. It does not depend upon assets only, a species of marshalling being applied in other cases, though technically we do not apply that term except to assets. So, where in bankruptcy, the Crown by extent laying hold of all the property, even against creditors the Crown has been confined to such property as would leave the securities of encumbrancers effectual. So, in the case of the surety, it is not by force of the contract, but that equity, upon which it is considered against conscience that the holder of the securities should use them to the prejudice of the surety, and, therefore, there is nothing hard in the act of the court placing the surety exactly in the situation of the creditor. So, a surety may have the benefit of a mortgage of a copyhold estate exactly as of freehold. It is very difficult to reconcile this with the principle of all those cases between living persons.

So, also, in a case which this court calls a just distribution of the effects of a deceased person, a simple contract creditor has no manner of hold upon the freehold estate. How, then, is he allowed in this court effectually to apply it for his satisfaction? Not upon the ground that it is assets, either by will or by contract inter vivos, but upon the ground that the specialty or mortgage creditor having two funds shall not by his will resort to that, by going to which he will disappoint as just a creditor, who cannot resort to any other. The principle in some degree is that it shall not depend upon the will of one creditor to disappoint another. Then what is the distinction as to the copyhold estate? The question is whether the debtor has not subjected the copyhold estate to the extent of the

mortgage imposed upon it—whether he has not decided that his property to that extent shall be liable to some debt; and the court will extract this further principle that a creditor, who can make it liable to that extent, shall not by his will defeat another, the former having two funds, the latter only one. The principle is further demonstrated by the cases of contracts by specialty that do not affect the real estate, as a bond not mentioning heirs. There, according to LORD HARDWICKE, there is no marshalling, as there are not two funds, and, therefore, no one is disappointed by the option of another, the act of the creditor's will necessarily originating out of the security he has. *Robinson* v. *Tonge* (1) to a certain degree relieves the simple contract creditor. The estate is charged expressly with the payment of that debt, and, therefore, if the freehold and copyhold estates go to different heirs, that charge is the foundation of this court's applying the principle of contribution, not because it is assets, but, because it is charged, not being assets. The effect of that as to simple contract creditors is that resort may be given to them upon the unexhausted part of the freehold estate as the specialty creditors are to a certain degree thrown upon the copyhold.

Dec. 10, 1802. **LORD ELDON, L.C.**—I have looked into every book; and can find nothing material upon this point either in print or manuscript. No book notices that there was any such point in *Robinson* v. *Tonge* (1), but it is clear from the Register's Book by the arrangement of the decree, that the point must have occurred. The specialty creditors insisted that they had a right to have the whole copyhold estate applied to the mortgage in order to leave the freehold estate as assets for debts. Upon that case, if that decision had not been made, I should have thought they would have had that right. I cannot conceive the principle upon which that decision stands. MR. COX had it from a book of LORD REDESDALE'S, a notebook of SIR THOMAS SEWELL, who, I have no doubt, took the note himself and preserved it as a special case. No case, therefore, can be entitled to more respect. The difficulty is this. Suppose the personal estate to be £1,500, and simple contract debts to that value, and a mortgage of that amount upon freehold and copyhold estates. The mortgagee, if he pleases, may call for payment out of the estate pledged. It is clear, if no third persons are concerned, the court would arrange between the two estates, if they went to different persons. In that case, if no third persons were concerned, and the estates were of equal value, that sum would be divided between them, and the simple contract creditors would receive the whole personal estate. If the mortgagee chose to exhaust the whole personal estate, the consequence, if that doctrine is right, is that the simple contract creditors would stand in his place against the freehold estate at least for the proportion of the mortgage that estate ought to bear. Why? That is not the act of the testator, nor of the law. There is no more a lien for them upon the freehold estate than upon the copyhold. But the court has said, and the principle is repeated very distinctly in *A.-G.* v. *Tyndall* (6), that, if a creditor has two funds, the interest of the debtor shall not be regarded, but the creditor having two funds shall take to that which, paying him, will leave another fund for another creditor. If that is so as to simple contract creditors having no connection with the freehold estate except that principle of equity, why is not the same principle to apply to copyhold estate? Copyhold estate is not chargeable with debts: neither is freehold estate charged with simple contract debts, but this copyhold estate is expressly charged with a debt, and, if freehold estate is applied to simple contract debts because charged with another debt, why is not copyhold estate?

April 26, 1803. **LORD ELDON, L.C.**—This instrument, as far as it respects the copyhold estate, is certainly an inaccurate security, for the mortgagor, covenanting to procure himself to be admitted and to surrender, and in the meantime to stand seised to the use of the mortgagee, not being himself admitted, could not with propriety be said in the meantime to stand seised as after admission in

A a sense he might. The effect of the deed is an agreement in equity pledging the copyhold estate for the payment of that sum together with the freehold estate, and I state it in these terms as I do not understand it to be an instrument of mortgage of the freehold estate with no more than a covenant that, if the freehold estate should be deficient, the copyhold should be a security in aid, but I look upon it as giving the mortgagee a legal estate in the freehold and an equitable B estate in the copyhold, thereby giving him recourse to two funds for the payment of his debt.

The question is whether for the sake, if it is necessary, of discharging the debts, and, particularly, the simple contract debts, of the mortgagor the court will go further than it appears to have done in a case, which I found I confess very much to my surprise in MR. COX'S note [i.e., *Robinson* v. *Tonge* (1)]. I never C had heard of it before. I do not find either in print or manuscript, that it has found its way to the notice of the public except through the channel from which MR. COX derived his information. There is no other note of it. Yet there is no doubt of the authenticity of that note, for MR. COX has in this, as in all other cases (which makes his work of so much value in the library of a lawyer) examined the Register's Book which corresponds with the note. At the same time no D notice is taken of that case or any other of that date in LORD HARDWICKE'S notes. In fact, however, the records of the court prove that there was such a case. I understand by the note that, there being no fund but the freehold and copyhold estates, and the mortgage creditor having both those estates in his mortgage, it was desired that equity, in order to satisfy the specialty creditors, would require him to take his satisfaction out of the copyhold estate alone. The principle stated E by the court in answer that copyhold estates are not liable either in law or equity to the testator's debts further than he subjected them thereto is undeniably true. But the question is how it is to be applied when the testator has by contract subjected his copyhold estate to the whole of the debt, though at the same time subjecting an estate of another species also to the whole debt. I understand the opinion of the court to have been, considering it a due application of the F principle, stated by MR. COX, that none of the rules subjects any fund to a claim to which it was not before subject, but they only take care that the election of one claimant shall not prejudice the claims of others; that there were a freehold and a copyhold estate, both liable to the whole mortgage by the contract and act of the testator in his life; that though the specialty creditors could not be wholly paid unless the mortgage was thrown upon the copyhold estate to the intent that G the freehold might be open to the specialty creditors, yet the copyhold should only bear its proportion, that is, that a value should be set upon each estate, and, if that distribution of the two funds left any specialty creditors unpaid, they must abide by the loss. It is quite clear that this case is by no means a due application of that principle stated by MR. COX. Both the copyhold and the freehold estates were before subject to the claim, and the converse of that proposition H seems in some degree to follow from making the election of the mortgagee determine, how far the specialty creditors shall or shall not be paid.

I have had an opportunity of communicating with LORD REDESDALE upon this case, and have his Lordship's authority to say that he can reconcile it with no principle; that it was as great a surprise upon him, as it was upon me; and he considers it as a case standing altogether by itself, and not reconcilable to the I principles which govern the court in a great variety of other instances. I have also the full concurrence of LORD REDESDALE'S opinion that he would not determine according to that authority. In the consideration of this subject the word "assets" has been very frequently used. But when you come to look at the case of marshalling, though that term so frequently occurs, the operation is upon the principle that the party has a double fund. It is said, copyhold estate is not assets. Clearly it is not assets for specialty debts—not even for the debts of the Crown. But is freehold estate assets for simple contract debts? It is not either in law or

equity. Upon what ground then does the court say in given cases simple contract debts shall be paid out of the real estate? Not upon the ground of assets, but upon this; that, not every creditor having a pledge of land, but a specialty creditor, has a double fund to resort to. There may be a mortgage, for instance, where the instrument in none of its parts or obligations would affect the heir. Though he has a pledge of the land, it is not as assets, or as a specialty creditor. But, if he has a bond, or a covenant in the deed, he is a specialty creditor whose demand after the death of the mortgagor would affect the heir. In that case, then, the court says, as that specialty creditor by his specialty contract can affect the land, he has two funds—the freehold and the personal estate—and he shall not by his election disappoint the natural and moral equity of the creditor by simple contract to be paid out of the single fund which his debt affects. The simple contract creditor, therefore, has no more in law any claim against the freehold estate than the specialty creditor in *Robinson* v. *Tonge* (1) had upon the copyhold estate. But in the former case the court has said, the caprice or election of a bond creditor shall not operate to the prejudice of the simple contract creditor, and how can a due application of that principle be made, if it is not applied, where the specialty creditor has a claim against the freehold estate, but not against copyhold estate as any creditor of any sort, but both estates being pledged and made a double fund by the act and deed and contract of the mortgagor.

Suppose another case. Two estates mortgaged to A.; and one of them mortgaged to B. He has no claim under the deed upon the other estate. It may be so constructed, that he could not affect that estate after the death of the mortgagor. But it is the ordinary case to say that a person having two funds shall not by his election disappoint the party having only one fund, and equity, to satisfy both, will throw him, who has two funds, upon that which can be affected by him only, to the intent that the only fund, to which the other has access may remain clear to him. This has been carried to a great extent in bankruptcy, for a mortgagee, whose interest in the estate was affected by an extent of the Crown, has found his way, even in a question with the general creditors, to this relief, that he was held entitled to stand in the place of the Crown as to those securities which he could not affect per directum, because the Crown affected those in pledge to him. Another case may be put that a man died having no fund but a freehold and a copyhold estate; that they were both comprehended in a mortgage to A., and the freehold estate only was mortgaged to B.; and that B. was not only a mortgagee of the freehold estate, but also a specialty creditor by a covenant or a bond. In that case as well as in this it might be said that the mortgagee of both estates might, if he thought proper, apply to the freehold estate, and exhaust the whole value of it. The other would then stand as a naked specialty creditor, the fund being taken out of his reach; and there is no doubt that, being both a specialty creditor and a mortgagee of the freehold estate, but not having any claim as mortgagee upon the copyhold estate, the same arrangement would take place, that he in equity should throw the prior encumbrancer upon the estate to which the other has no resort.

The cases with respect to creditors and other classes of claimants go exactly the same length. In the cases of legatees against assets descended a legatee has not so strong a claim to this species of equity as a creditor. But the mere bounty of the testator enables the legatee to call for this species of marshalling, that, if those creditors, having a right to go to the real estate descended will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not. That in some measure is upon the doctrine of assets, but with relation to the fact of a double fund. Both are in law liable to the creditors, and, therefore, by making the option to go against the one they shall not disappoint another person who the testator intended should be satisfied. That is not so strong as where it is not bounty, but the party has by his own act in his life made liable to the whole of the debt a copyhold estate, not in law liable,

and who, having also a freehold estate, must be understood to mean that the freehold estate shall be liable according to law to his specialty debts.

The case is exactly the same with reference to the distinction taken that, where lands are specifically devised, the legatees shall not stand in the place of the creditors against the devisees, for that is upon the supposition that there is in the will as strong an inclination of the testator in favour of a specific devisee as a pecuniary legatee, and, therefore, there shall be no marshalling. But if, though specifically devised, the land is made subject to all debts, that distinguishes the case, for there is a double fund, and as by that denotation of intention the creditor has a double fund, the land devised and the personal estate, he shall not disappoint the legatee. The case is also the same, where, instead of the case of a mere specialty creditor, the land specifically devised is subject to a mortgage by the testator, as in *Lutkins* v. *Leigh* (4). There he shall not disappoint the legatee. So the case of paraphernalia is very strong for the proposition that, wherever there is a double fund, though this court will not restrain the party, yet he shall not so operate his payment as to disappoint another claim, whether arising by the law or by the act of the testator.

The conclusion, therefore, is that *Robinson* v. *Tonge* (1) is not reconcilable with the general classes of cases, and, therefore, if it is necessary for the payment of the creditors that the mortgagee should be compelled to take his satisfaction out of the copyhold estate, if he takes it out of the freehold, those who are thereby disappointed must stand in his place as to the copyhold estate.

Order accordingly.

HALL *v.* WARREN

[Rolls Court (Sir William Grant, M.R.), June 29, July 4, 1804]

[Reported 9 Ves. 605; 32 E.R. 738]

Mentally Disordered Persons—Contract—Knowledge of other contracting party—Lucid intervals — Onus of establishing sufficient mental capacity when contract entered into.

Where a contract has been entered into by a person whose general lunacy has been established, a party aware of this fact and seeking specific performance of the contract, which he alleges has been entered into during a lucid interval, must discharge the onus of proving, not merely a cessation of violent symptoms, but a restoration of the mind of the lunatic sufficient to enable him to judge soundly what he was doing.

Specific Performance—Contract—Competent parties—Contract unobjectionable—Decree as of course.

Specific performance of a contract entered into by a competent party, the nature and circumstances of the contract being unobjectionable, is decreed as a matter of course.

Notes. Referred to: *Milnes* v. *Gery* (1807), 14 Ves. 400; *Agar* v. *Macklew* (1825), 4 L.J.O.S.Ch. 16; *Re Walker* (1904), 74 L.J.Ch. 86.

As to mental incapacity and legal responsibility, see 29 Halsbury's Laws (3rd Edn.) 404–406; and for cases see 33 Digest (Repl.) 588 et seq. As to onus of proof in rebutting presumption of lunacy, see 29 Halsbury's Laws (3rd Edn.) 419–422; and for cases see 33 Digest (Repl.) 618 et seq. As to the nature of the decree of specific performance, see 36 Halsbury's Laws (3rd Edn.) 263–266; and for cases see 44 Digest (Repl.) 6 et seq.

Cases referred to:

(1) *A.-G.* v. *Parnther* (1792), 3 Bro. C.C. 441; 29 E.R. 632, L.C.; 33 Digest (Repl.) 621, *430.*

(2) *Owen* v. *Davies* (1748), 1 Ves. Sen. 82; 27 E.R. 905, L.C.; 33 Digest (Repl.) 669, *1150.*

(3) *White* v. *Damon* (1802), 7 Ves. 30, 34; 32 E.R. 13, L.C.; 44 Digest (Repl.) 6, *12.*

Bill for specific performance of an agreement dated Mar. 9, 1802, executed by the defendant, for the sale of an advowson and estate to the plaintiff Hall, in trust for the second plaintiff Hanson, at such price as the advowson should be valued at by one Morgan, and the other premises by persons to be nominated. On May 8 following under a Commission of Lunacy the defendant was found a lunatic as from May 1, 1792, with lucid intervals.

Two grounds of defence were taken by the answer of the lunatic, by his committee: (i) That he was insane at the time of the execution of the contract; (ii) that the plaintiffs knew his situation, and took advantage of it to induce him to sell to Hall, concealing the circumstance that Hanson was the real purchaser; being aware, that from a former quarrel the defendant would not sell to him. A great deal of evidence was gone into on both sides as to his state of mind.

Romilly, *Stanley* and *Sir Thomas Turton* for the plaintiffs, pressed for an issue, insisting on their right to a decree upon the ground either, that the defendant was not a lunatic when he entered into the contract; or, that it was executed in a lucid interval. They had not traversed the inquisition.

Piggott, *Fonblanque* and *Cooke* for the defendant: The rule, as laid down by Lord Thurlow in *A.-G.* v. *Parnther* (1), is, that where a person seeks to avoid his own act, by alleging incompetence at the time, the proof is incumbent upon him. But where it has been previously found that the party to be affected by the transaction was not competent at a previous date, those who seek to bind him must show his competence at the time. It is difficult to determine the degree of capacity necessary to characterise a lucid interval. Lord Thurlow seems to think it sufficient that any man would suppose him capable of transacting for himself. This plaintiff has had the opportunity of traversing the inquisition. In *Owen* v. *Davies* (2) Lord Hardwicke takes the distinction between the case of an estate vested in trustees, and in the lunatic himself; observing, that in the latter case that circumstance may prevent the remedy in equity and leave it at law.

SIR WILLIAM GRANT, M.R.—The object of this bill is to obtain the specific performance of an agreement. Supposing the contract to have been entered into by a competent party, and to be in the nature and circumstances of it unobjectionable, it is as much of course in this court to decree a specific performance, as it is to give damages at law: *White* v. *Damon* (3). The contract is produced and proved. Upon the face of it nothing appears to prevent execution. There is nothing unreasonable, as between the parties, upon the face of it. It fixes no value upon the estate: but it provides a mode, in which the value is to be ascertained, that is perfectly fair and equal between them. It must be supposed, that if competent, they had taken the proper means of getting at the real value, by employing persons of skill to value the advowson and the farms.

The first objection against carrying this agreement into execution is, that in consequence of some dispute with Hanson, the defendant had an objection to dealing with him. But the evidence does not bring it up to that; showing, not that he made any declaration to that effect, but only that some quarrel had taken place, totally unconnected with the subject of the contract. The circumstance, therefore, that Hall is a nominal contractor, is immaterial; for it happens in a vast proportion of cases, that the contract is entered into in the name of a trustee.

But the principal objection to the performance is that the defendant was not competent, having been insane at the time the contract bears date. That is matter of fact. In support of that fact alleged the inquisition is produced, by which the defendant is found a lunatic from a period long antecedent, but with lucid intervals. That inquisition, having been taken in the absence of the plaintiff, is not conclusive upon him. But it is evidence prima facie of the lunacy. It is, however, competent to third parties to dispute the fact; and to maintain, that, notwithstanding the inquisition, the object of it was of sound mind at any period of the time, which it covers.

An opportunity, it is said, has been already afforded of traversing the inquisition; and undoubtedly, if it would have answered the plaintiff's purpose merely to have traversed and contradicted the finding, by showing that the defendant was not a lunatic, he ought to have embraced that opportunity; and it was unnecessary to come here in the first instance. But if, as it is said, he may have been a lunatic with reference to the general state and habit of his mind during a considerable space of time, but with lucid intervals, and the contract was executed during one of those lucid intervals, I doubt very much whether that could have been got at by a traverse; whether upon that proceeding it could have been ascertained that upon a given day he had a lucid interval; which might come to be a material inquiry with reference to the execution of this contract; for though the plaintiff wishes for an issue upon both points, he seems from the general tenor of his statement to confide more in establishing a lucid interval than in negativing the fact that the defendant ever was deranged. It was not, therefore, improper for the plaintiff under these circumstances to waive the opportunity of traversing, and to come here for an issue; upon the supposition that the contract was entered into, either by a person who was not a lunatic or in a lucid interval. In the latter case it would be equally binding; for the law upon this subject is, that all acts done during a lucid interval are to be considered done by a person perfectly capable of contracting, managing, and disposing of, his affairs, at that period. This has more frequently occurred upon wills. A multitude of questions has been raised upon the execution of a will during a lucid interval; and, that being proved, the will has been held valid and effectual to all intents and purposes for the conveyance of real and personal estate; as if the testator had never been deranged. It must be the same as to contract or any disposition of property. If he had made an absolute conveyance, it would have been good, if made in a lucid interval.

The question, therefore, being reduced to the fact, there is no circumstance to prevent the execution of the contract, supposing the party to have been competent; and the fact of his competence ought to be put in a course of inquiry. I should certainly refuse upon the evidence before me to determine that he was not a lunatic; and as to a lucid interval upon this evidence I should hesitate considerably; not being sufficiently apprised of all the circumstances of his life at that particular period. The history of the contract itself is not brought forward. The circumstances of the negotiation do not appear. Something material to the competence might arise or result from the very mode, in which the negotiation was conducted. In one case, I remember, the manner in which the will was written and executed went a great way towards showing it was in a lucid interval, the mode of the act being part of the evidence of the testator's sanity.

There is some general evidence with reference to his situation for some considerable time previous to the contract, and very little negative evidence, none applying exactly, or approaching nearly, to the period, except the servant's; and that not of a nature to be conclusive, supposing the evidence strong about the period. But it is for a jury to determine what was the degree of efficiency and competence of his mind at the time. All the difficulties suggested by the defendant, the plaintiffs will have to struggle with; for if general lunacy is established, they will be under the necessity of showing, according to *A.-G.* v. *Parnther* (1) that

there was, not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind, sufficient to enable the party soundly to judge of the act. That is an inquiry much more fit for examination vivâ voce before a jury than upon written depositions. A

There is nothing, therefore, to prevent my sending it to that inquiry. Difficulties indeed are suggested, supposing even, that it should be found that the contract was made in a lucid interval, as to the mode in which it is to be carried into execution; for it is said as to that, that there are provisions in it which cannot now be executed. I do not see those difficulties so strong as to be convinced that it is impossible to execute it; that the previous inquiry is not to be made, and would be nugatory, for if there was a valid and binding contract, the supervening incapacity of one party cannot deprive the other of the benefit. Nothing appears in the acts to be done so purely personal, that they cannot be supplied without the intervention of the mind and the act of the party; for they are to be done with reference to a given mode, and with regard to ascertaining the value, a mode equivalent, and as effectual and fair, may be found. So, as to the objection from the difficulty of making the conveyance, the difficulty, that struck LORD HARDWICKE in *Owen* v. *Davies* (2), was avoided there, as there were trustees. But it does not appear to me that if the plaintiff is satisfied with that, which is in truth no title, but only an enjoyment under this court, he ought not to have all the court can give him. It is a disadvantage to him, of which the other cannot complain, that he cannot get a good title; but must rest an indefinite period without a title, having only the enjoyment. These difficulties are not so strange as to preclude the previous inquiry, before we can ascertain the precise mode in which the subsequent parts are to be carried into execution. Therefore, take an issue. B C D E

Issue as to whether defendant was a lunatic at time of execution of contract; whether he had lucid intervals; and whether contract executed during a lucid interval.

PRICE *v.* DYER

[Rolls Court (Sir William Grant, M.R.), November 29, December 3, 1810]

[Reported 17 Ves. 356; 34 E.R. 137]

Specific Performance—Contract—Waiver—Variation of terms—Circumstances otherwise unaltered.

Specific performance of a written contract will not be granted where a parol waiver, clearly proved, amounts to a complete abandonment of the contract, or where parol variations have been so acted upon that the original agreement can no longer be enforced, but variations verbally agreed between the parties whose situation otherwise remains unaltered will not be a bar to a decree of specific performance.

Landlord and Tenant—Lease—Option to determine—No reference by whom exercisable—Lease given for "seven fourteen or twenty-one years."—Exercisable by lessee.

A memorandum of agreement for a lease which stated that the defendant granted certain property to the plaintiff "on lease of seven fourteen or twenty-one years" **held** to give an option to the lessee alone in respect of the length of the term so granted.

Notes. Applied: *Vezey* v. *Rashleigh*, [1904] 1 Ch. 634. Considered: *Morris* v. *Baron*, [1918] A.C. 1. Referred to: *Robinson* v. *Page* (1826), 3 Russ. 114; *Stowell* v. *Robinson* (1837), 3 Bing. N.C. 928.

As to variation of a contract, as distinguished from rescission, which does not prevent a decree of specific performance, see 36 Halsbury's Laws (3rd Edn.) 320; and for cases see 44 Digest (Repl.) 107 et seq. As to who may exercise an option to determine a lease, see 23 Halsbury's Laws (3rd Edn.) 474; and for cases see 31 Digest (Repl.) 596 et seq.

Case referred to:

(1) *Legal* v. *Miller* (1750), 2 Ves. Sen. 299; 28 E.R. 193; 44 Digest (Repl.) 109, *881.*

Also referred to in argument:

Dann v. *Spurrier* (1803), 3 Bos. & P. 399; 127 E.R. 218; 31 Digest (Repl.) 597, *7152.*

Doe d. Webb v. *Dixon* (1807), 9 East, 15; 103 E.R. 478; 31 Digest (Repl.) 597, *7153.*

Vere v. *Loveden* (1806), 12 Ves. 179; 33 E.R. 69; 31 Digest (Repl.) 122, *2609.*

Jones v. *Jones* (1803), 12 Ves. 186; 33 E.R. 71; 31 Digest (Repl.) 120, *2591.*

Buckhouse v. *Crossby* (1737), 2 Eq. Cas. Abr. 32; 22 E.R. 28; sub nom. *Backhouse* v. *Mohun*, 3 Swan. 434, n., L.C.; 44 Digest (Repl.) 107, *860.*

Bell v. *Howard* (1742), 9 Mod. Rep. 302; 88 E.R. 467; 44 Digest (Repl.) 50, *359.*

Goman v. *Salisbury* (1684), 1 Vern. 240; 23 E.R. 440; 12 Digest (Repl.) 397, *3077.*

Marquis of Townshend v. *Stangroom*, *Stangroom* v. *Marquis of Townshend* (1801), 6 Ves. 328; 31 E.R. 1076, L.C.; 35 Digest (Repl.) 143, *350.*

Woollam v. *Hearn* (1802), 7 Ves. 211; 32 E.R. 86; 44 Digest (Repl.) 149, *1304.*

Gunter v. *Halsey* (1739), West. temp. Hard. 681; Amb. 586; 27 E.R. 381; 12 Digest (Repl.) 191, *1312.*

Wills v. *Stradling* (1797), 3 Ves. 378; 30 E.R. 1063, L.C.; 30 Digest (Repl.) 409, *533.*

Coles v. *Trecothick* (1804), 9 Ves. 234; 1 Smith, K.B. 233; 32 E.R. 592, L.C.; 44 Digest (Repl.) 57, *421.*

Bill for specific performance of an agreement for a lease.

The agreement, which was signed by the defendant Dyer, was in the following terms:

"Memorandum of Agreement between John Dyer of East Ham in the County of Essex and Daniel Price of Cornhill, London, wherein I do agree to let unto the said Daniel Price the house stabling gardens and field at the net rent of sixty guineas per annum on lease of seven fourteen or twenty-one years Daniel Price paying all taxes to commence at Lady Day next and Daniel Price does agree to take the fixtures as stated on the other side at a fair valuation. (signed) John Dyer, East Ham, Mar. 8, 1809."

About ten days after that agreement, the defendant by parol agreed to demise to the plaintiff an additional piece of land; and the rent was to be increased to £65. The plaintiff took possession on Mar. 25, 1809.

The defendant set up a parol agreement, on April 2, 1809, made at the office and in the presence of his solicitor, by which the parties mutually abandoned the terms of the written agreement; and agreed, that the lease should not be for the term of twenty-one years absolute in all events but should be determinable by Dyer at the expiration of seven or fourteen years, unless the plaintiff should within the first seven years build two good rooms southward of the dwelling-house; but, if the plaintiff did build the said two rooms within that time, then the lease was to be absolute for the whole term of twenty-one years; but the precise sum, to be laid out in building the said rooms, was not then finally agreed upon. It was also at the same time agreed between the plaintiff and the defendant that the annual rent should be £65; and that the plaintiff should insure the premises against fire; and should not under-let or assign without a written licence from the lessor; and that the field should not be broken up or ploughed; and that all the usual covenants should be inserted in the lease. The defendant's solicitor took a note of the new agreement in the following words:

"Lease for seven fourteen or twenty-one years in consideration of Mr. Price laying out the sum of £ in building two rooms southward of the dwelling-house within the first seven years then the lease to be absolute for twenty-one years rent £65 per annum—Mr. Price to insure the premises—not to let or assign without leave in writing of the lessor; and that the field should not be broken up or ploughed."

The defendant insisted that the possession had been retained by the plaintiff, not upon the terms of the original agreements but upon the terms and conditions of the last verbal agreement.

Sir Samuel Romilly, *Sugden* and *Garratt* for the plaintiff.
Sir Arthur Piggott and *Horne* for the defendant.

SIR WILLIAM GRANT, M.R.—There are two things to be considered in this cause: first, whether the agreement of Mar. 8, 1809, was originally such as this court would have carried into execution: if it was, then whether what passed subsequently ought to prevent a specific performance. The answer does not state any objection to the agreement as being unfair or incorrect. It was indeed contended in argument that the parties did not mean it to be, what it is admitted to be in legal operation, an agreement for a lease for seven, fourteen, or twenty-one years at the option of the lessee; and that inference is drawn from the plaintiff's willingness to comply with certain additional terms upon which he was to have a lease for twenty-one years absolutely. Upon that it is enough to say, it is by no means a necessary inference; and I do not see how it is possible to deny effect to a written agreement upon the ground that it does not fairly state the meaning of the parties; where the defendant does not allege that to be the case in fact, or even according to his own conception of it. This agreement must, therefore, be taken to have been originally unexceptionable.

It is then said that the agreement was waived; and that a written agreement may be so far waived by parol, that the court will refuse the interposition of its equitable jurisdiction to enforce it. Not conceiving that there was in this case any waiver

A within the meaning of the dicta or decision upon this subject, it is not necessary for me to give a precise opinion upon the point. As at present advised, I incline to think that upon the doctrine of this court such would be the effect of a parol waiver, clearly and satisfactorily proved; but here was no such waiver. The waiver, spoken of in the cases, is an entire abandonment and dissolution of the contract, restoring the parties to their former situation. No such thing was for a moment in the con-
B templation of these parties. From the history of the transaction, in the answer and the evidence of the solicitor, all they at any time meant was to add to or modify the terms of the original agreement.

The question then is upon the effect of the variations said to be agreed upon. Variations so acted upon that the original agreement could no longer be enforced without injury to one party, would be a bar to a specific performance of that
C original agreement. Such was the case of *Legal* v. *Miller* (1). The original agreement was unexceptionable: but the execution of it under the new circumstances would have been a fraud upon the landlord; he having re-built instead of repairing the houses; and the tenant having agreed to pay an additional rent in consideration of the additional expense. But variations verbally agreed upon supposing any to have been so agreed upon in this case are not sufficient to prevent the execution of
D a written agreement: the situation of the parties in all other respects remaining unaltered. The defendant has expended nothing upon the faith of having the added stipulations performed. He has sustained no positive loss. He will only be disappointed of that advantage which he expected to derive from the gratuitous covenants of the plaintiff. Gratuitous they clearly are, as it cannot be seriously represented that the obligation to build can be considered a privilege conferred upon
E him.

I am not, therefore, warranted upon authority or principle to refuse a specific performance of the written agreement, but under the circumstances of the case, I do not think the plaintiff entitled to the costs of the cause.

Specific performance granted.

A

SHANNON *v.* BRADSTREET

[Lord Chancellor's Court in Ireland (Lord Redesdale, L.C.), January 26, 31, 1803]

[Reported 1 Sch. & Lef. 52]

B

Power to Lease—Contract by tenant for life to grant lease under a power —Enforcement against remainderman.

An agreement entered into by a tenant for life to grant a lease under a power conferred on him by a will binds and is enforceable against the remainderman.

Power to Lease—Defective execution—Defect remedied in equity—Delay—Expenditure by tenant on demised premises.

C

The defective execution of a power to lease by a tenant for life who has entered into an agreement to grant a lease under the power may be remedied and the remainderman compelled to grant the lease. Even where relief might otherwise be refused it will be granted if the remainderman delays and allows the lessee to spend money on the demised premises.

D

Infant—Contract—Benefit to infant—Enforcement against other party.

"It is the peculiar privilege of infants for their protection that, though they are not bound, yet those who enter into contracts with them shall be bound if it be prejudicial to the infant to rescind the contract": per Lord Redesdale, L.C. (post p. 67).

E

Notes. As to powers of leasing and remedying defective exercise, see 30 Halsbury's Laws (3rd Edn.) 220–226, 272–275; and for cases see 30 Digest (Repl.) 771 et seq., and 37 Digest (Repl.) 371–375.

Cases referred to:

F

(1) *Countess of Coventry* v. *Earl of Coventry* (1724), 2 P. Wms. 222; 1 Stra. 596; Gilb. Ch. 160; 9 Mod. Rep. 12; 1 Eq. Cas. Abr. 348, pl. 19; 2 Eq. Cas. Abr. 660, pl. 8; 24 E.R. 707, L.C.; 40 Digest (Repl.) 642, *1344*.

(2) *Alford* v. *Alford* (1709), cited in 2 P. Wms. at p. 230; cited in 1 Stra. at p. 604; 93 E.R. 727; sub nom. Allford v. Allford, Gilb. Ch. 167; 40 Digest (Repl.) 642, *1340*.

(3) *Campbell* v. *Leach* (1775), 2 Amb. 740; 27 E.R. 478, L.C.; 40 Digest (Repl.) 784, *2671*.

G

(4) *Clere's Case* (1600), 6 Co. Rep. 17 b; Jenk. 260; 77 E.R. 279; sub nom. *Cleer* v. *Parker*, Cro. Eliz. 877; sub nom. *Parker* v. *Clere*, Moore, K.B. 567; sub nom. *Clere* v. *Parker*, Cro. Jac. 31; 37 Digest (Repl.) 324, *713*.

(5) *Stiles* v. *Cowper* (1748), 3 Atk. 692; 26 E.R. 1198, L.C.; 40 Digest (Repl.) 830, *3060*.

H

(6) *Smith* v. *Low* (1739), 1 Atk. 489; West temp. Hard. 669; 26 E.R. 310, L.C.; 30 Digest (Repl.) 383, *266*.

(7) *Evelyn* v. *Evelyn* (1731), 2 P. Wms. 659; 2 Barn. K.B. 118; 24 E.R. 904; on appeal (1733), 6 Bro. Parl. Cas. 114, H.L.; 40 Digest (Repl.) 670, *1651*.

(8) *Mosely* v. *Virgin* (1796), 3 Ves. 184; 30 E.R. 959, L.C.; 40 Digest (Repl.) 390, *3114*.

I

(9) *Tollet's Case* (1728), Mos. 46; 25 E.R. 262; sub nom. *Tollet* v. *Tollet*, 2 P. Wms. 489; 2 Eq. Cas. Abr. 663, pl. 10; 40 Digest (Repl.) 643, *1348*.

(10) *Wilkie* v. *Holme* (1752), 1 Dick. 165; 9 Mod. Rep. 485; 21 E.R. 232, L.C.; 37 Digest (Repl.) 372, *1075*.

(11) *Jackson* v. *Jackson* (1793), 4 Bro. C.C. 462; 29 E.R. 988; 40 Digest (Repl.) 643, *1347*.

(12) *Stamford* v. *Omly*, unreported.

(13) *Zouch* v. *Woolston* (1761), 1 Wm. Bl. 281; 2 Burr. 1136; 96 E.R. 157; 40 Digest (Repl.) 641, *1334*.

(14) *Weakly d. Yea* v. *Bucknell* (1776), 2 Cowp. 473; 98 E.R. 1193; 30 Digest (Repl.) 404, *479.*

(15) *Goodtitle d. Edwards* v. *Bailey* (1777), 2 Cowp. 597; 98 E.R. 1260; 30 Digest (Repl.) 381, *240.*

(16) *Rattle* v. *Popham* (1734), Cunn. 102; 2 Stra. 992; 94 E.R. 1089; 40 Digest (Repl.) 641, *1331.*

Bill for an injunction.

Sir Simon Bradstreet, Baronet, by his last will devised the lands of Portmahon, to the use of his second son, Samuel (afterwards Sir Samuel) Bradstreet, for his life without impeachment of waste, remainder to trustees to preserve contingent remainders, and from and after the decease of Samuel to the use of his first and other sons, and the heirs male of their bodies, with several remainders over. The testator gave and reserved

> "a power to the said Samuel, only when in possession of such lands, to make any lease or leases of the said lands and tenements, or any part thereof, except the mansion-house, etc., but without fine, and to take effect in possession and not in reversion, for any term not exceeding three lives or thirty-one years, at the best improved yearly rent that could be had at the time of making the said lease, and without any clause of being dispunishable of waste."

Sir Samuel Bradstreet, having become seised of a life estate under this devise, in the year 1790 entered into a treaty with the plaintiff to demise to him the lands in question, and an agreement was made for a lease to the plaintiff for the term of thirty-one years from Nov. 1, 1790, at the yearly rent of £7 per acre, for such number of acres as the lands should upon a survey be found to contain, the lease to contain the usual covenants between landlord and tenant and also a covenant that the plaintiff should within the first three years lay out £200 in buildings and permanent improvements. A draft of a lease pursuant to this agreement was prepared by the plaintiff and laid before Sir Samuel, who made some few alterations therein and returned it with the following endorsement in his own handwriting:

> "I approve of this draft: until a survey can be had, so as to ascertain the rent, Mr. Shannon may execute a short memorandum to me according to the terms of this draft, and may have the immediate possession."

A memorandum was accordingly prepared (but whether by Sir Samuel or by the plaintiff did not appear). It was signed by the plaintiff and delivered to Sir Samuel who delivered a copy or abstract of it in his own handwriting to the plaintiff, the original remaining in the custody of Sir Samuel. The memorandum was as follows:

> "I, Peter Shannon, of the city of Dublin, tanner, do hereby agree with Sir Samuel Bradstreet, to take a lease for thirty-one years from the first day of November, 1790, of the lands of Portmahon, in the county of Dublin, late in the possession of Michael Kane, and his representatives and under tenants, at the yearly rent of £7 for every acre the said lands upon a proper survey to be had shall appear to contain, and so in proportion for every lesser quantity than an acre. I also agree to lay out in the first three years in houses, buildings, and permanent and useful improvements the sum of £200. Leases to be drawn as usual between landlord and tenant."

Immediately after execution of this memorandum the plaintiff entered into possession and laid out considerably more than £200 in improvements, but no leases were ever executed. Sir Samuel died on May 2, 1791, leaving the defendant, Sir Simon Bradstreet, his eldest son, entitled under the limitations in his grandfather's will to an estate tail in the lands in question. The defendant did not attain his full age until November, 1792, till which time the plaintiff's rent, at the rate of £7 per acre for ten acres, was received by Lady Bradstreet, the mother and guardian of the defendant, and it continued afterwards to be regularly paid by the plaintiff and received by the agents of defendant until November, 1801, when a notice to quit

was served, on which an ejectment was brought as of Easter Term, 1802, shortly after which plaintiff filed this bill, and obtained an injunction. The defendant by his answer admitted that both before and after attaining his full age he had notice of the agreement, but insisted that his estate was not bound thereby and that he had never acted on it, but had always treated and considered the plaintiff as tenant from year to year. The case was fully argued upon a motion to continue the injunction to the hearing upon equity confessed, it being agreed by the parties, that the opinion of the LORD CHANCELLOR upon this motion should decide the cause.

Saurin, C. S. Williams and *Redford* for the plaintiff: (1) It is established by numerous cases that agreements to perform acts under powers have been held binding against remaindermen: *Countess of Coventry* v. *Earl of Coventry* (1), reported in MAXIMS OF EQUITY: *Alford* v. *Alford* (2), 2 EQ. ABR. 659; *Campbell* v. *Leach* (3); and though there is no case precisely establishing that an agreement for a lease in pursuance of a power shall bind, yet the principle which governs those cases, applies equally to this. The tenant in this case is a purchaser for valuable consideration, and he contends with a mere volunteer, for the defendant who disputes the due execution of this power enjoys his estate under the very same instrument by which the power is created. The power exercised by a tenant for life is not exercised by him in virtue of his life estate; it is a power derived from the fee, and only entrusted to the tenant for life by the owner of the fee, in like manner as, where a man makes a feoffment to the use of his will, he has the use in the meantime, and, if in such case the feoffor, by his will, limits estates according to the power reserved to him on the feoffment, the estates shall take effect by force of the feoffment: *Clere's Case* (4). (2) If the agreement in this case was a good execution of the leasing power, there is no pretence to say that that power was transgressed, unless it be so by the covenant to lay out £200, but this sum was to be laid out for the benefit of the inheritance and was not to go into the pocket of the tenant for life. Suppose the covenant had been that the tenant should expend £200 in draining bog and making it valuable land, it would not be contended that such a covenant would avoid the lease, and yet the covenant here is precisely to the same effect. (3) Admitting that this agreement was originally impeachable, yet equity will now consider it as confirmed by the tenant for life accepting rent under it with full notice of its existence for so many years after he arrived at his full age, more particularly as he stood by during the whole period from 1792 to 1801, and suffered the tenant to expend large sums in improvements on the faith of the agreement without any objection: *Stiles* v. *Cowper* (5); *Smith* v. *Low* (6).

Burston, Plunket, Conmee and *Yelverton* for the defendant: (1) The creation of leasing powers in the tenant of the particular estate, was intended not only for the benefit of the estate, but for the protection of the remainderman, and where his interest is invaded by the act of the tenant for life in order to benefit his own estate, the court is bound to give the strictest possible construction to the power: see argument of DE GREY, C.J., in *Campbell* v. *Leach* (3), Amb. at p. 748. Cases have been cited of agreements under jointuring powers, etc., but there is a distinction between a power of jointuring, of charging for younger children, etc., and a power of leasing. The latter is to be construed more strictly than the former; jointuring or charging powers relate merely to the tenant for life himself; they are encumbrances laid on the estate before the remainderman can take anything whatever; they are, as it were, limitations of the estate, prior to the limitation to the remainderman, and it is immaterial to him in what form they are exercised, provided he is not charged beyond a certain amount: *Evelyn* v. *Evelyn* (7). But a leasing power is a mixed power, in the manner of exercising which the remainderman is interested, and the form of the instrument is provided for his benefit. The language of the maker of this power is that tenant for life may make any lease or leases, and that without fine, to take effect in possession and not in reversion;

in all these particulars the power is exceeded. First, the word lease has a definite meaning both in legal and in common parlance, quite distinct from an executory contract of this nature; it is applicable only to cases of actual demise, and to say that such a contract was within the intention of the maker of the power is to strain his language beyond its meaning to defeat his intention. It cannot be presumed that he meant to throw upon the remainderman the onus of becoming a plaintiff in equity to enforce his agreement against a litigious tenant instead of having the short and effectual remedies provided for landlords at law. On this construction a remainderman might, by the misconduct of the tenant for life, be exposed to a variety of litigation. For instance, suppose the tenant for life makes an agreement first with A. and then changes his mind and enters into another with B., both of them according to his power, and dies, the remainderman is obliged to litigate the right to a lease both with A. and B. Again, suppose the tenant for life makes an agreement within the Statute of Frauds, but which by some personal act he takes out of the statute quoad himself (as for instance a parol agreement in part performed by the tenant for life), shall the remainderman be bound in such a case? Many other cases of inconvenience arising from this construction might be put, whereas the meaning and intent of the maker of the power was, not to impose any inconveniences on the remainderman, but to provide that he should always know what the charges were which had been made for his benefit. Besides, this power is exceeded by the covenant to lay out the sum of £200 in improvements. This is in effect a fine, and has the injurious operation with respect to the remainderman which the maker of the power designed to guard against. Its operation must necessarily be to diminish the rent reserved below what the power requires, for it cannot be imagined that the tenant would give the best improved rent to pay this sum also. Again, this is an agreement for a lease not taking effect in possession, but to commence at a future day, and, therefore, void under the power.

(2) Contracts of this nature to be valid, ought to be mutually binding, but it follows from the opinion of DE GREY, C.J. (*Campbell* v. *Leach* (3), Amb. at p. 749) that the remainderman could not on his part enforce the contract of the tenant for life.

[**LORD REDESDALE, L.C.,** having expressed some doubt whether the expression here referred to had not been improperly ascribed to DE GREY, C.J., it was observed at the Bar that in a former part of the same report (Amb. at p. 746), his Lordship is made to put the question:

> "Whether the remainderman could compel the lessee to perform such a lease to the extent of the power, and in the manner prayed by the bill in that case?"

in answer to which it was said not to be an objection to that bill if he could not, and the instance of a contract between an infant and an adult was cited, in which the latter is bound though the former was not. HIS LORDSHIP said:

> "That case is no answer to the difficulty raised; it is the peculiar privilege of infants for their protection that, though they are not bound, yet those who enter into contracts with them shall be bound, it is be prejudicial to the infant to rescind the contract."]

(3) There is such a vagueness and uncertainty in this contract that it cannot be carried into specific execution in all its parts, and is, therefore, wholly void. The rent, on the face of the agreement is uncertain, and to this day nothing has been done to reduce it to certainty. Then the covenant to lay out money in houses, buildings and permanent and useful improvements is so loose and uncertain that it is impossible for the court to decree a specific execution of it: *Mosely* v. *Virgin* (8). This is, therefore, not merely a defective execution of the power (which under circumstances, equity would relieve) but a non-execution which equity will not help: *Tollet* v. *Tollet* (9).

LORD REDESDALE, L.C.—I have looked into the pleadings in this cause and the cases which were cited, and I am of opinion that I ought to continue the injunction to the hearing. This is the only order that I can regularly make now; the parties will act on it as they see fit. [His Lordship stated the facts and observed that the endorsement on the draft of the lease by Sir Samuel Bradstreet was a complete approbation of the lease, and a direction that possession should be given in conformity to it, provided Shannon entered into the short memorandum required; that all the terms of the agreement were thus completed except the ascertaining the rent by an admeasurement of the lands; and that the memorandum was completely accepted by Sir Samuel Bradstreet; and continued:]

The first and most important question in this case is whether a contract of this description binds the remainderman, for that it bound Sir Samuel cannot be controverted. There can be no doubt of that; it is as complete an agreement as can be made, completed by the possession in pursuance of the contract. If Sir Samuel had been living at this day, and there had been an enjoyment of the plaintiff, and the other circumstances as stated here, there is no doubt that, if he had served such a notice in ejectment, he would have been restrained and compelled to execute the lease. If he had been seised in fee, no doubt Sir Simon would be bound as his heir, and the court would make a decree against him, but the question is, as Sir Samuel was only tenant for life with a leasing power (though he himself was bound, and though his assets would be bound to make recompense) whether the remainderman be bound? This brings the question to one of great importance, namely, whether a remainderman be bound by the contract of a tenant for life to make a lease pursuant to his power? This question is of importance in many points of view. If the remainderman be not bound in such cases the tenant for life is put into a very awkward situation. A contract of some kind he must make before he can make an occupation lease. He must agree with the tenant upon the terms; the tenant must prepare himself to take possession, for no lease can be made but in possession; so that the whole contract must be complete on both sides before a lease can be made. It is evident, therefore, that some contract must precede, and, if that is to be subject to the uncertainty of not being carried into execution if the tenant for life should die in the meantime, it will be very disadvantageous to the letting of estates under such powers.

It is decided in cases almost without number that contracts for jointures will bind the remainderman, though made only in pursuance of a power to make jointures. Contracts for valuable consideration to execute a power to make a charge of any description under a power are also binding on the remainderman. Voluntary executions, if one may so term them, where there has been an imperfect execution, but upon a meritorious consideration, have been also held to bind, as in the case of provision for wife or children, or for payment of debts. So in the case of a will where it was executed in the presence of two witnesses and where three were necessary it has been held to be good in equity in *Wilkie* v. *Holme* (10), decided in 1752, which has been acted upon ever since.

It is objected that a leasing power differs from all these cases of powers, and the difference is said to consist in this, that in the other cases the remainderman has no interest in the mode in which the power is executed, he claims nothing under it, but that under the leasing power he claims the rent reserved. On what ground can it be contended that that which is a mere charge upon a remainderman is to receive a more liberal construction than what is not a mere charge upon him, but may be much for his benefit? In the case of powers to make leases at the best rent that can be obtained it is evident that the author of the power looks to the benefit of the estate and that the power is given for the benefit both of the tenant for life and of all persons claiming after him, for where the tenant for life can give no permanent interest and his tenant is liable every day to be turned out of possession by the accident of his death, it is hard to procure substantial tenants, and, therefore, it is beneficial to all parties that the tenant for

life should have a power to grant such leases. It is evident that the occupying tenant can afford to give a better rent under such circumstances than if he were only to have a precarious tenure. We see from the lettings for three years in this court, and under custodians in the Exchequer how disadvantageous short and precarious lettings are, but, if the letting be for twenty-one or thirty-one years, the tenant does not consider the amount of the profits for the first years so much as the profit during the term, and can afford to be out of pocket by expenditure for the first years because in the subsequent years he will make it up by the improvements the estate receives in consequence of his expenditure.

This, therefore, is a power which is calculated for the benefit of the estate. Other powers, generally speaking, such as jointuring powers and powers to make provision for younger children are calculated for the benefit of the family. They may be indirectly beneficial to the remainderman, in some respects, but they are no direct benefit to him, nor can I conceive why these powers should be construed more liberally than powers to make leases, except where it is evident that such power is abused, and in case of letting leases the power is certainly more liable to be abused than in making provisions for wife or children. In these latter cases the sum to be raised is generally limited and cannot be exceeded, but a power of leasing is to a certain extent a power of charging. If a fine is taken, it is unquestionably so, and even where no fine can be taken it is to a certain degree a charge and for the benefit of tenant for life as well as the remainderman, for the tenant for life will get a better rent than if he had no such power. I cannot conceive, therefore, what distinction there is between a leasing power and the other powers before noticed. They are all powers given to a tenant for life for his benefit to enable him to charge the estate, and in the case of a rack-rent the power of leasing is also a benefit to the remainderman. In the case of a jointuring power, and in all the other cases, a contract has been held sufficient to enable a party to have the power executed in equity.

It has been contended that there is a difference between what is called a non-execution and a defective execution, and that, though in the case of a defective execution of a power the court will execute it, yet where there is a non-execution (which this is contended to be) the court will not execute it. I apprehend this is founded upon a mistake of the meaning of non-execution. A power is said to be not executed where nothing is done; but a defective execution is where the power has not been executed according to the terms of the power (for if it were executed according to the terms there would be nothing to be supplied), but where it has been intended to execute it, and that intention is sufficiently declared, but the act declaring the intention is not an execution of the power in the form prescribed, there the defect shall be supplied in equity. What stronger declaration of an intent to execute a power can there be than a contract which makes the party liable to damages for not executing it, which may be enforced against him, and by which he may be compelled to execute the power in his lifetime? It strikes me to be beyond the case of a voluntary charge for younger children, or for a wife, which, if for meritorious consideration, have always been enforced against the remainderman. In cases without number, upon jointuring powers particularly: see *Jackson* v. *Jackson* (11); it has been determined that a covenant is a sufficient declaration of intent to execute, even when made before the power arose, as where a power is limited to be exercised by a tenant for life in possession, and he covenants that when he comes into possession he will execute. In all these cases courts of equity have relieved.

The grounds on which *Countess of Coventry* v. *Earl of Coventry* (1) was decided are stated in the decree in that cause, 2 P. Wms. 233 (note to Cox's edition), which declares that the articles executed by Gilbert, Earl of Coventry were a lien on the estate. If so, the consequence is that the party on whose estate they were a lien could have the benefit of them just as much in the form of articles as in the form of an actual deed. Suppose a power to make a jointure not exceeding

£1,000 a year with a proviso that, if there were no execution of the power, and if the tenant for life should die leaving a widow, she should have £500 a year, and suppose a contract made upon the marriage of the tenant for life to charge £400 for her under the power, which would be a less provision than she would have if the power had not been executed. I conceive the widow could not say that she was not bound. So in the case of an actual lease made under a power containing covenants on the part of the tenant. The lease being a lien on the lands by virtue of the power, the remainderman has the benefit of all the covenants, because they are part of a contract which creates a lien on the lands. Yet they are mere contracts; they are no part of the demise under the power, but are stipulations entered into by the tenant for life with the lessee for the benefit of the remainderman, as, for instance, in the case of a covenant on the part of the tenant to repair, supposing it a covenant not required by the power.

If Sir Samuel had actually executed this lease and died, the covenant for laying out the £200 might unquestionably, I apprehend, have been enforced by Sir Simon as a covenant going with the land. After the death of Sir Samuel, suppose the rent had proved too high, the tenant could not have said: "I will abandon the lease." He must have paid the rent to the remainderman under the covenant. If he could enforce the covenant upon a lease executed, what reason is there why he should not enforce the contract if the contract be binding upon him? Therefore, it necessarily follows that, if a contract be binding on a remainderman, it is binding on the lessee, and the remainderman can enforce performance. It is a mistake to say that there is no privity; there is a privity arising from the subject-matter of the contract. The contract is to bind both the tenant for life and the remainderman, and, therefore, the remainderman has a right to have the benefit of the stipulations made for his benefit.

In *Campbell* v. *Leach* (3) De Grey, C.J., says (Amb. at p. 749):

> "As to the lessee's power of enforcing the contract against the remainderman, this is a new point, but though new I think upon principle it is to be enforced. The ground of the objection is that the remainderman is neither party nor privy to the lease, which would hold in one made by bare tenant for life; but under the power for leasing, there is a referable privity given by the settlement, and such tenant has a qualified power of contracting to bind the remainderman; *and I do not know that the remainderman could on his part enforce the contract of such tenant for life. I had at first some doubt of this point, but own myself satisfied by what was said in answer.*"

These additional words, I suspect, were not uttered by De Grey, C.J., but, if they were, they were probably suggested by *Stamford* v. *Omly* (12), of which I have a slight note. In that case the tenant for life, having power to make leases, made a contract for a lease, taking a sum of money (£71) and died without executing the lease. The lessee went to the remainderman, agreed with him for the same lease, and then brought his bill against the representative of the tenant for life to get back the £71 from him. Lord Hardwicke did not wish to decide that case, and it was compromised, and it appears by the note which I have that the Bar were dissatisfied because he did not decide it, but I daresay something of that case was floating on De Grey, C.J.'s mind when he gave his opinion in *Campbell* v. *Leach* (3), for how he could follow up what he had before said by the words attributed to him by the reporter, I cannot conceive. However, in that case Smyth, C.B., thought with him that the remainderman was clearly bound by the act of the tenant for life.

That case was decided long after *Zouch* v. *Woolston* (13). Mr. Dunning had said in *Zouch* v. *Woolston* (13) "that the execution of a power should have the same construction in courts of law and of equity." This position is perfectly correct. Lord Mansfield had on his mind prejudices derived from his familiarity with the Scottish law, where law and equity are administered in the same courts

A and where the distinction between them which subsists with us is not known, and there are many things in his decisions which show that his mind had received a tinge on that subject not quite consistent with the constitution of England and Ireland in the administration of justice. It is a most important part of that constitution that the jurisdictions of the courts of law and equity should be kept perfectly distinct. Nothing contributes more to the due administration of B justice. [Since 1874 law and equity have been concurrently administered by courts: see Judicature Act, 1873, s. 24, re-enacted by Judicature (Consolidation) Act, 1925, s. 36.] Though they act in a great degree by the same rules, yet they act in a different manner, and their modes of affording relief are different. Anybody who sees what passes in the courts of justice in Scotland will not lament that this distinction prevails. But Lord Mansfield seems to have considered C that it manifested liberality of sentiment to endeavour to give the courts of law the powers which are vested in courts of equity, that it was the duty of a good judge ampliare jurisdictionem. This I think is rather a narrow view of the subject. It is looking at particular cases rather than at the general principles of administering justice, observing small inconveniences and overlooking great ones.

On this argument of Mr. Dunning, Lord Mansfield said that "there was good D sense in what he said," and that "whatever is a good power or execution in equity, the Statute of Uses makes good at law." Very true, but the statute does not make good at law what was not good in equity, but which a court of equity by its peculiar mode of acting will make good. This distinction Lord Mansfield was much disposed to overlook. For example, he considered contracts for leases to be leases: see *Weakley d. Yea* v. *Bucknell* (14), *Goodtitle d. Edwards* v. *Bailey* E (15); and was followed by Buller, J. Great inconveniences ensued, which are now happily got rid of. A court of equity makes good a contract by decreeing an actual lease; a court of law cannot do so. Lord Mansfield inclined to hold a party bound by a contract not to set up his legal title in ejectment, and so in many other instances, forgetting what he himself had been familiar with in his practice in equity and that he would endanger half the titles in the kingdom.

F Buller, J., held that, when a mortgage term had been once assigned in trust to attend the inheritance the owner of that term could not make it a mortgage term again, and in consequence he drove the mortgagee into a court of equity and produced that very mischief which Wilmot, J., in *Zouch* v. *Woolston* (13) considered to be a very grievous one. Lord Mansfield is represented by the reporter in *Zouch* v. *Woolston* (13) as having said (2 Burr. at p. 1147) that after the Statute G of Uses,

> "Courts of equity reasoned as they would have done if that statute had not been made. And yet, whatever is an equitable ought to be deemed a legal execution of a power, for there can be no circumstance to affect a remainderman personally in conscience, when a power is not duly executed, any more H than the issue in tail or the successor of an ecclesiastical person if a lease is not duly made."

If these words really dropped from Lord Mansfield he must have totally forgotten all that passed while he was in practice in courts of equity. This would overturn *Countess of Coventry* v. *Earl of Coventry* (1) and all the cases on jointuring powers.

I The cases of tenant in tail and of ecclesiastical persons are totally different. There was no power to bind a remainderman arising from the nature of a use previous to the Statute of Uses, and, as to ecclesiastical persons, they are prevented by statute from making leases except pursuant to the statute, and all leases not made pursuant thereto, are expressly made void against the successors to all intents and purposes. The same reporter makes Wilmot, J., say:

> "it is much to be lamented that after the Statute of Uses, the courts of common law had not adopted all the rules and maxims of courts of equity."

It is scarcely to be believed that this could have fallen from WILMOT, J., and if LORD MANSFIELD found fault with the decision in *Rattle* v. *Popham* (16), as he is represented to have done, I think with deference that there was no ground for the remark. I must, therefore, consider what is thus attributed by the reporter to LORD MANSFIELD and WILMOT, J., in *Zouch* v. *Woolston* (13), as of no authority on this subject, and I think I am warranted by the decision in *Campbell* v. *Leach* (3) (made with the concurrence of such high authorities as DE GREY, C.J., and SMYTHE, C.B.) in saying that a contract of this description does bind a remainderman.

An objection has been raised from the uncertainty which the remainderman would be under with respect to the tenure of the estate. Unquestionably this is a serious consideration, but it applies to many of the cases on jointuring powers, especially as to the lands charged and the extent in which they were bound. But the courts have gone great lengths to assist in rendering certain what has been thus left uncertain. There are cases of contracts to make a jointure where it was impossible for the remainderman to know how far the estate was bound without filing a bill.

A question has been put whether, if this were a case of a parol agreement in part performed, it could be enforced? That, I think, would raise a very distinct question—a question upon the Statute of Frauds, and, perhaps a remainderman might be protected by the statute, though the tenant for life would not. For the party himself is bound by a part execution of a parol agreement principally on the ground of fraud, which is personal. Such a ground could scarcely be made to apply to the case of a remainderman unless money had been expended and there had been an acquiescence after the remainder vested, which were held by LORD HARDWICKE in *Stiles* v. *Cowper* (5), in the case of an actual lease under a power, but with covenants not according to the power, to bind the remainderman to grant a lease for the same term with covenants according to the power.

Again, this is said to be a lease in reversion. I find nothing to warrant this. It is a contract, and a contract must necessarily precede the execution of it. The writing certainly was not complete because it refers to a memorandum, to be subsequently executed. If Sir Samuel had died before Nov. 1 it might have been a different question, but the plaintiff was in possession under Sir Samuel at the time of his death.

The next objection is founded on the covenant to lay out £200 in improvements, but I think this will not avoid the contract if the rent be notwithstanding the best that can be got. Such a covenant is not necessarily a fraud. It may be made with a fraudulent intent, and when it is so made it will avoid the lease. If it were colourable and merely for the purpose of putting money into the pocket of the tenant for life, it would avoid the lease; or if it were not originally intended as a fraud but were afterwards used fraudulently (as, for example, a covenant to repair and a sum of money under colour of damages for breach of that covenant recovered by the tenant for life) a court of equity would at least take care that the damages should be laid out on the lands.

Another objection is the uncertainty of the rent, but I do not think it uncertain, for it is capable of being reduced to a certainty, and it is a common form of reserving rent in this country. Every executory contract must contain this species of uncertainty, but if it contains all that leads to future certainty, I take it to be sufficient.

Here there is also an additional circumstance, and that is the length of time during which the tenant has enjoyed. The present defendant came of age in November, 1792; he takes no step to avoid the lease till 1801, and permits the tenant to enjoy during all the intermediate time. He admits by his answer that both before and after he attained his age of twenty-one he had knowledge of the agreement, and does not pretend that the plaintiff entered under any other agreement. He says he considered the agreement not binding on him as a remainderman,

A but he admits that he never told the tenant so. Then this man, entering and continuing in possession by virtue of this contract, lays out considerable sums on the estate. It is admitted that he laid out £200. The bill states a larger sum, but suppose it only £200, that would be within a trifle of three years' rent. It would be absurd to suppose that he did not lay out this money on the faith of the agreement. It is said that this money was not laid out till 1794, but I think it is rather B to be collected from the pleadings that it was laid out before. However, if it were not laid out till then, it was laid out in confidence of the defendant's acquiescence in the agreement, and I think rather strengthens the case of the plaintiff. It appears that the defendant knew the money was laid out. If he meant to avoid the agreement, he ought to have given the tenant immediate notice, and it strikes me that his not doing so might form a distinct ground of equity against Sir Simon C Bradstreet.

There is another consideration in this case arising from the length of time. Here has been an enjoyment by the tenant without any idea of a demand against the assets of Sir Samuel Bradstreet for non-performance of his agreement. They may have been administered in the meantime in such a manner that the party could not pursue them; they may have been administered in such a manner that D they may be pursued to the prejudice of the representative, who may have paid legacies, may have paid the residuary legatee. Is this nothing? Shall a party now turn round to the tenant and say: "Your demand is against the assets of Sir Samuel, and not against me." It is to be considered too that the length of time might vary the demand against the assets of Sir Samuel because within that time the value of the lands has varied so that the damages that would be recovered E now might greatly exceed the damages that would have been recovered at the time of the death of Sir Samuel. Shall a party lie by and vary the rights of others in such a way as this without giving them notice of his intention to do so? This circumstance of itself, I think, would be a strong ground for me to continue the injunction to the hearing of the cause. I have no doubt, on principle, that a contract of this kind should be enforced against the remainderman. F

Injunction continued till the hearing.

HATCH *v.* HATCH

[Lord Chancellor's Court (Lord Eldon, L.C.), February 3, 1804]

[Reported 9 Ves. 292; 1 Smith, K.B. 226; 32 E.R. 615]

Undue Influence—Guardian and ward—Conveyance of property by ward to guardian—Transaction not properly understood—Delay in seeking relief.

The court will, on grounds of public policy, set aside a conveyance of property by a ward to her guardian, made some months after she came of age but while still living under his care and paying him for her maintenance, the nature of which she had improperly understood, notwithstanding that the application to set aside is made some 20 years after the conveyance.

Notes. Applied: *Wood* v. *Downes* (1811), 18 Ves. 120; *Hunter* v. *Atkins* (1834), 3 My. & K. 113; *Cheslyn* v. *Dalby*, *Dalby* v. *Cheslyn* (1836), 2 Y. & C. Ex. 70. Considered: *Archer* v. *Hudson* (1846), 15 L.J.Ch. 211; *Tomson* v. *Judge* (1855), 3 Drew. 306. Distinguished: *Wright* v. *Vanderplank* (1856), 8 De G.M. & G. 133. Applied: *Davies* v. *Davies*, [1861–73] All E.R. Rep. 937. Distinguished: *Turner* v. *Collins* (1871), 7 Ch. App. 329. Considered: *Liles* v. *Terry*, [1895–9] All E.R. Rep. 1018. Applied: *Wright* v. *Carter*, [1900–3] All E.R. Rep. 706. Referred to: *Edwards* v. *Meyrick* (1842), 2 Hare, 60; *Hindson* v. *Weatherill* (1853), 1 Sm. & G. 604; *Lyon* v. *Horne* (1868), L.R. 6 Eq. 655.

As to fraudulent or voidable conveyances to persons standing in loco parentis, see 17 Halsbury's Laws (3rd Edn.) 679–680; and for cases see 25 Digest (Repl.) 281 et seq. As to laches and delay in applying to set aside a fraudulent conveyance, see 17 Halsbury's Laws (3rd Edn.) 685, 686; and for cases see 25 Digest (Repl.) 302. As to undue influence amounting to an extension of fraud, see 14 Halsbury's Laws (3rd Edn.) 478–480; and for cases see 25 Digest (Repl.) 273 et seq.

Cases referred to:

(1) *Cray* v. *Mansfield* (1750), 1 Ves. Sen. 379; 27 E.R. 1093; 25 Digest (Repl.) 296, *1014*.

(2) *Pierce* v. *Waring* (1745), cited in 1 Ves. Sen. 379; 2 Ves. Sen. 548; 1 P. Wms. 6th ed. 121, n.; 27 E.R. 1093, L.C.; 12 Digest (Repl.) 119, *703*.

(3) *Hylton* v. *Hylton* (1754), 2 Ves. Sen. 547; 28 E.R. 349, L.C.; 12 Digest (Repl.) 119, *704*.

(4) *Osmond* v. *Fitzroy* (1731), 3 P. Wms. 129; 24 E.R. 997; 12 Digest (Repl.) 122, *724*.

(5) *Duke of Hamilton* v. *Lord Mohun* (1710), 1 P. Wms. 118; 1 Eq. Cas. Abr. 90, pl. 6; 1 Salk. 158; 2 Vern. 652; 24 E.R. 319, L.C.; 12 Digest (Repl.) 279, *2146*.

(6) *Griffin* v. *Veiulle* (1781), cited in 14 Ves. at p. 283; 3 P. Wms. at p. 131, n.; 33 E.R. 530; 25 Digest (Repl.) 283, *895*.

(7) *Welles* v. *Middleton* (1784), 1 Cox, Eq. Cas. 112, L.C.; affirmed sub nom. *Middleton* v. *Welles* (1785), 4 Bro. Parl. Cas. 245; 2 E.R. 166, H.L.; 43 Digest (Repl.) 81, *693*.

(8) *Gibson* v. *Jeyes* (1801), 6 Ves. 266; 31 E.R. 1044, L.C.; 43 Digest (Repl.) 85, *731*.

(9) *Coles* v. *Trecothick* (1804), ante p. 14; 9 Ves. 234; 1 Smith, K.B. 233; 32 E.R. 592, L.C.; 47 Digest (Repl.) 259, *2272*.

Bill filed by Thomas Hatch and his wife, to set aside a conveyance of the advowson of Sutton, by the plaintiff, Mrs. Hatch, to the Rev. Giles Hatch, under the following circumstances.

The plaintiff Mrs. Hatch, at the age of four years, upon the death of her father, became seised in fee of the manor and rectory of Sutton: the former worth about £15,000: the latter about £200 a year; capable of improvement. Giles Hatch, who had married her sister, was her guardian. She lived with him till her marriage;

A and he received £130 a year for her maintenance. The rectory becoming vacant during her minority, Giles Hatch was presented. In October, 1779, she came of age; and on Jan. 20, 1780, she executed the conveyance, in consideration, as it was expressed, of her great friendship, kindness and regard for him, the care taken of her by him, love and affection, and 10s. Thomas Hatch, who was an attorney, and brother of Giles, prepared the deed, and was one of the attesting witnesses.

B She continued to live with Giles Hatch, who deducted the same allowance for her maintenance, till 1784; when she married Thomas. In 1800, after the death of Giles, they filed the bill, charging fraud in obtaining the conveyance, that she was very deaf, and intended only to grant the next presentation. An account had been settled between her and Giles Hatch in 1780.

C *Spencer Percival*, *Piggott* and *Cox* for the plaintiffs: This conveyance is bad as being within the cases, in which, upon grounds of public policy, this court has determined against such transactions between such parties: the one in loco parentis, in nature of a guardian to the other during her residence with him, and for the last seven years of her minority under his care and tuition; the conveyance only three months after attaining her age, containing all the covenants usual between vendor and purchaser. The principles of this court will not uphold a conveyance by a ward, just of age, to her guardian, upon grounds of public policy. [They referred to *Cray* v. *Mansfield* (1); *Pierce* v. *Waring* (2); and *Hylton* v. *Hylton* (3) (2 Ves. Sen. at p. 574), per LORD HARDWICKE.]

D One circumstance, considered by LORD HARDWICKE a main ingredient, is the account being settled at the time; the relation not being put off. In *Pierce* v. *Waring* (2) the representative succeeded in setting the gift aside, the party having

E been satisfied with it. The principle is recognised in other cases: *Osmond* v. *Fitzroy* (4) and *Duke of Hamilton* v. *Lord Mohun* (5).

The last case is *Griffin* v. *De Veiulle* (6). The principle, protection of the ward from the undue influence of the guardian, must be applied generally from the difficulty or impossibility of raking into the circumstances, how far the impression

F was made upon the mind of the ward during minority. As to the circumstance in this case, that the plaintiff, the husband, was concerned in the transaction, he is only joined for conformity. The relief is due in respect of the interest of the wife. It must be admitted that no effectual step was taken till this bill was filed. But time alone is not an answer in cases of fraud, or those cases, depending upon grounds of public policy. In this instance the only period that can be taken into consideration is from 1780 to 1784.

G

LORD ELDON, L.C.—In *Wells* v. *Middleton* (7), in the House of Lords, 1785, where LORD THURLOW'S decree was affirmed, all these cases relating to trustees, guardians, attorneys (*Gibson* v. *Jeyes* (8)), etc., were much considered, and the rule very strongly laid down by LORD THURLOW. That was the case of a managing attorney obtaining a deed.

H *Mansfield*, *Romilly* and *Hart* for the defendant: Another very wholesome principle is, that this court will not enforce stale claims, suffered to lie dormant for a great length of time. This bill is filed twenty years after the transaction; after the death of the party who obtained the deed, and also one of the subscribing witnesses; the other under such circumstances that he cannot be examined; the property having been all that time dealt with by the party as his own, made the

I subject of family arrangement, and disposed of by will. Admitting the principle, the question is upon the particular circumstances. The bill seeks to set aside this conveyance upon the ground of fraud, one of the plaintiffs having been the principal actor in this fraud. Under the Statute of Limitations, if once the time has begun to run, it goes on, notwithstanding the party comes under any legal disability. The object of this lady was bounty; a provision for the family of a near connection.

LORD ELDON, L.C., said, that in such a case, if recently made, he should not trouble the Attorney-General to reply; observing, however, as to the four years

preceding her marriage, that she was to all intents and purposes a ward till the month of June preceding the marriage, when she was taken out of the custody of her guardian by Thomas Hatch.

The Attorney-General insisted that the circumstances got rid of the presumption from the lapse of time; which they would not do without showing acquiescence after the influence ceased, especially where the party was under coverture.

LORD ELDON, L.C.—The circumstances of this case are to be lamented. It is proved by the evidence for the defendant that this lady was so deaf, that for the purpose of conversing with her, it was necessary to use the intercourse with the fingers. Under these circumstances, a duty was imposed upon her guardian and her attorney to give her full information. Her guardian, when she came of age, was in the enjoyment of the living. He, therefore, must have distinctly understood the value: not only the actual value at that time, but its improveable nature and quality. It is not like the case of a conveyance of an estate yielding a certain rent, or stock, yielding dividends, or an annuity, a certain annual profit. This is property of such a nature, that one party may be fully acquainted with the value; and no one else can have any correct information upon it except from that person. An account was settled on Dec. 11, 1780. But it is much more material that her guardian continues in possession of her property till her marriage, settles accounts, and deducts the same sum for her maintenance. The relation, therefore, had not ceased. To say that under such circumstances such a deed should stand, would not only not be according to, but would run directly counter to, all the authorities.

This is an infinitely stronger case than any in my recollection: much as I have been versed in them, and obliged to look into them in the case I mentioned [*Welles* v. *Middleton* (7)]. The value of the manor and rectory ought to have been estimated, not separately, but with reference to the connection between them. Looking at this as a recent transaction, is there any pretence for saying, a girl just twenty-one, and such as she is described to have been, knew anything of the value? Is it proved that he, in the immediate perception of the profits, gave her any estimate of the gross or improveable value? Upon her attorney also there was a duty, which he most grossly violated. This case proves the wisdom of the court in saying that it is almost impossible in the course of the connection of guardian and ward, attorney and client (*Gibson* v. *Jeyes* (8)), trustee and cestui que trust (*Coles* v. *Trecothick* (9), 9 Ves. at p. 240, notes (c) and (d)), that a transaction shall stand, purporting to be bounty for the execution of antecedent duty.

There may not be a more moral act, one that would do more credit to a young man beginning in the world, or afford a better omen for the future, than if, a trustee having done his duty, the cestui que trust, taking it into his fair, serious, and well-informed consideration, were to do an act of bounty like this. But the court cannot permit it, except when quite satisfied that the act is of that nature, for the reason often given and recollecting that, in discussing whether it is an act of rational consideration, an act of pure volition, uninfluenced, that inquiry is so easily baffled in a court of justice, that instead of the spontaneous act of a friend, uninfluenced, it may be the impulse of a mind misled by undue kindness, or forced by oppression: the difficulty of getting property out of the hands of the guardian or trustee thus increased. Therefore, if the court does not watch these transactions with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud; where the connection is not dissolved, the account not settled, everything remaining pressing upon the mind of the party under the care of the guardian or trustee.

If this bill had been filed in 1784, it would have been clear this guardian should not hold the benefit of this deed. But it is said, the length of time makes a material difference: and also, that if relief is due to her, she is not to have it on account of the part her husband had in the transaction; and I admit, if ever there was a married woman whose case was likely to be entangled in difficulty by the blameable conduct of the person who becomes her husband, this is that case. But

what is the difficulty? I do not deny that length of time is of great consequence in all these cases of fraud, breach of the policy of the law, etc. But in all cases it is some evidence that the transaction was understood at the time not to be fraudulent; and that there might have been some circumstances of the possibility of which the party ought to have the advantage. But the evidence in this case is the answer; and all the imbecility of the case in 1780 is carried down to the period of her marriage. Under the circumstances, it may be said in a fair sense that she never was her own mistress: being with her guardian until her marriage, and with her husband since.

I am clearly of opinion that this relief could not have been denied in 1785; and, if at that time the case was clear, this unrighteous transaction cannot be made holy by the circumstance of coverture. That dispenses with the necessity of making complaint. There is nothing calling upon me to suppose a case of valuable consideration; but it is the naked case of a ward under the dominion of her guardian part of the time, and of her husband the rest. There could be no doubt of the relief, therefore, if she was sole plaintiff.

As to the other consideration, I am very sorry to give the husband any relief; but I know no instance in cases of relief upon the policy of the law, where the objection that a party not deserving the relief will get it, deriving it through the other, has prevailed. Suppose she had died before marriage, and had devised to him or he had become her heir. The transaction, if not good against her, is not good against him: for through her right it is that he gets any benefit. Length of time also, with reference to the particular nature of this property, does not afford so considerable an objection as in some of the cases. The living was enjoyed by a title paramount this instrument during the life of Giles Hatch. This is very different from the case of stock, annuity, or estate; the income of which is received from time to time. But the church was full of the grantee of the advowson before the grant; and even at law the period of exercising ownership might not occur for thirty years. Hence there is a great difference in considering the just inference from the length of time suffered to elapse after the period at which the instrument might have been complained of.

Under the circumstances of this case, this instrument cannot be permitted to stand; and must be delivered up to be cancelled. But, that the principle of the decree may be understood, though if the wife had survived her husband, and then the bill had been filed by her, I should have directed the deed to be cancelled, with costs to be paid by the defendant; on account of the conduct of the husband, I shall direct it without costs.

Deed to be cancelled.

A

Ex parte JAMES

[Lord Chancellor's Court (Lord Eldon, L.C.), March 30, 31, April 9, 1803]

[Reported 8 Ves. 337; 32 E.R. 385]

Trustee—Purchase of trust property—Setting aside transaction—Consent of cestui que trust—No profit made by trustee.

B

Bankruptcy—Trustee in bankruptcy—Duty in administering estate—Purchase of bankrupt's property—Purchase of debts due from bankrupt's estate—Setting aside transactions.

Bankruptcy—Trustee in bankruptcy—Employment of solicitor—Purchase of bankrupt's property by solicitor—Purchase of debts due from bankrupt's estate—Setting aside transactions.

C

Per Lord Eldon, L.C.: In the general interests of justice a trustee may not purchase the trust property except with the consent of the cestui que trust, however fair and honest may be the circumstances of the transaction, for no court is equal to the examination and ascertainment of the truth in much the greater number of cases. In view of the position of a bankrupt the assignees under the bankruptcy [now the trustee in bankruptcy] a fortiori come within this principle, as also does the solicitor to the assignees. Nor can the assignees or their solicitor buy debts due from the bankrupt's estate. To set aside a purchase by a trustee of the trust property it is not necessary to show that he has made a profit from the transaction.

D

Notes. Approved: *Austin* v. *Chambers* (1838), 6 Cl. & Fin. 1. Considered: *Aberdeen Rail. Co.* v. *Blaikie*, [1843–60] All E.R. Rep. 249. Applied: *Panama and South Pacific Telegraph Co.* v. *India Rubber Gutta Percha and Telegraph Works Co.* (1875), 10 Ch. App. 515. Considered: *Luddy's Trustee* v. *Peard*, [1886–90] All E.R. Rep. 968. Referred to: *Oliver* v. *Court* (1820), Dan. 301; *Carter* v. *Palmer* (1845), 8 Cl. & Fin. 657; *Imperial Mercantile Credit Association* v. *Coleman* (1871), 6 Ch. App. 562, n.; *Hickley* v. *Hickley*, *Same* v. *Same* (1876), 2 Ch.D. 190; *Re Boles and British Land Co.'s Contract* (1901), 71 L.J.Ch. 130; *Nugent* v. *Nugent*, [1908] 1 Ch. 546; *Christoforides* v. *Terry*, [1924] All E.R. Rep. 815; *Regal (Hastings), Ltd.* v. *Gulliver*, [1942] 1 All E.R. 378.

E

F

As to the disability of a trustee to buy trust property, see 14 Halsbury's Laws (3rd Edn.) 626, 627, and ibid. vol. 36, pp. 89–91. For cases see 43 Digest (Repl.) 84–91. As to position of trustee in bankruptcy, see 2 Halsbury's Laws (3rd Edn.) 385, 386; and for cases see 4 Digest (Repl.) 246–248.

G

Cases referred to:

(1) *York Buildings Co.* v. *Mackenzie* (1795), 8 Bro. Parl. Cas. 42; 3 E.R. 432, H.L.; 43 Digest (Repl.) 85, *728*.

(2) *Ex parte Lacey* (1802), 6 Ves. 625; 31 E.R. 1228, L.C.; 47 Digest (Repl.) 259, *2278*.

H

(3) *Owen* v. *Foulkes*, 6 Ves. 630, n.

(4) *Ex parte Linwood*, unreported.

(5) *Ex parte Churchill* (1801), unreported.

(6) *Wren* v. *Kirton* (1803), 8 Ves. 502; 32 E.R. 449, L.C.; 33 Digest (Repl.) 796, *678*.

(7) *Whelpdale* v. *Cookson* (1747), 1 Ves. Sen. 9; 27 E.R. 856, L.C.; 47 Digest (Repl.) 258, *2268*.

I

(8) *Fox* v. *Mackreth* (1791), 2 Cox, Eq. Cas. 320; 30 E.R. 148; sub nom. *Mackreth* v. *Fox*, 4 Bro. Parl. Cas. 258, H.L.; 47 Digest (Repl.) 260, *2282*.

Petition praying that the purchase of a bankrupt's estate by the solicitor to the assignees under the commission of bankruptcy should be set aside, and other relief.

In January, 1785, Joshua James, of Bristol, became a bankrupt. In January, 1786, the assignees under the commission put an estate, called Southmead, of which

the bankrupt had been seised, under the management of the bankrupt as their agent, and he continued such management till December, 1788. In December, 1791, the assignees let that estate to the bankrupt at the rent of £400 a year. The bankrupt, and afterwards his daughter Frances James, the petitioner, continued possessed of the estate as tenants to the assignees till December, 1795, when the assignees let it to John Weekes. On the death of the solicitor to the commission in 1791 Thomas Jones, of Bristol, executor of his brother, a considerable creditor and one of the assignees, was employed by the assignees as their solicitor. Before that time all the bankrupt's property, except the Southmead estate and the shell of his distillery, was sold, but only part of his debts was collected. All the assignees except one Smith died between 1791 and 1796. In May, 1796, a cause which the bankrupt had instituted for specific performance of the contract under which he had in 1772 purchased the Southmead estate was heard, and a decree was made, establishing the contract and directing that the assignees should pay what should be found due on account of the purchase-money, and that all parties should join in a conveyance to them.

In March, 1795, the bankrupt died, having by his will, dated March 3, 1790, given all his property to his wife and after her death to the petitioner who in 1797 filed a bill in the Court of Exchequer for an account of the bankrupt's estate and an application thereof to his debts, that she might be let into possession of Southmead, and that Smith might convey that estate to her, offering to pay all such debts proved under the commission as were not discharged. She also claimed an injunction to restrain the sale of Southmead. In 1798 that bill was dismissed, and the injunction dissolved.

On Oct. 18, 1798, Smith put up Southmead estate for sale by auction at Bristol, and it was purchased by Jones, the solicitor to the commission, for £12,030. Jones and Smith also bought up several debts, proved under the commission, at the rate of 17s. in the pound. The petitioner claimed as a creditor under a judgment given to her by her father, and she took the stock in execution. As representative of her father and on her own account she became, in 1795, considerably indebted to Smith as surviving assignee for rent of the Southmead estate, and for the stock which was purchased by the bankrupt from his assignees. Smith having commenced two actions against her, she confessed two cognovits to him to secure that debt. £6,015 of the purchase-money was paid into the bank by Jones in a cause prosecuted by Smith, and was laid out.

The prayer of the petition was that the sale of the Southmead estate may be set aside, that Jones might account for the rents, etc., that an account might be taken of the bankrupt's estate received, or which but for his wilful default might have been received, by Smith, that it might be applied in satisfaction of the debts, and the surplus be paid to the petitioner, that Jones and Smith might not be allowed to receive dividends on the debts purchased by them upon any larger sum than they actually paid for such purchases, and, if it should appear unnecessary to have the Southmead estate sold for payment of the debts, that it might be conveyed to the petitioner; and that Smith, the assignee, might be removed. The affidavits in support of the petition stated that the petitioner in her own right and as representative of her father and otherwise had proved debts to the amount of £2,000. At the time of the sale of the Southmead estate there was a lease on it granted by Smith to Weekes which was a great prejudice to the sale. A notion prevailed that no title could be made, and it sold to great disadvantage. In 1801 a dividend of only 8s. in the pound had been paid, though there was sufficient to pay 20s. in the pound, leaving a considerable surplus. The solicitor and assignee threatened to arrest the petitioner upon the cognovits though she offered to set off the amount of that debt from her dividends. They applied to her after the sale of Southmead to sell her dividends, but she declined the proposal as they offered only 10s. in the pound, refused inspection of the accounts, and at last exhibited imperfect accounts.

The affidavits against the petition stated that the sale of Southmead took place under a resolution of the creditors at a meeting attended by the petitioner. The bill filed by the petitioner was dismissed with costs for want of prosecution. The sale was duly advertised. A valuation by John Billingsley, an experienced judge, that it would sell for at least £12,000 was laid before the creditors, by whose direction it was to be put up at £10,000 and to be sold without reserve if anyone bid more. Smith and Jones recommended it to be put up at £10,500, but were overruled by the other creditors, one or two of whom signified to the deponent Jones that, if he thought it worth more, he might bid as far as he pleased for it. Jones was present at the auction and bid, and after numerous biddings the estate was knocked down to him at £12,030. The auctioneer declared that no person was bidding for the vendor. The sale was very numerously attended and there were several bidders, but the chief competition lay between Jones and two gentlemen of fortune whose lands adjoined. No one besides those three bid beyond about £10,300; and it would have sold for about that sum if Jones had not bid. The general opinion was that the estate was purchased dear, and several of the creditors or their agents were present and appeared highly pleased with the sale. Before the sale Jones asked the assignee if he had or saw any objection to his being a bidder on his own account, and the assignee declared he had not, but would think the creditors benefited thereby as the more bidders the better.

The affidavits further stated the causes of the delay from difficulties as to the title and the embarrassed state of the bankrupt's affairs which led to an arrangement to let Jones into possession; that the remainder of the purchase-money carrying interest till the sale could be completed; that Rawdon, a son-in-law of the bankrupt and his largest creditor, came to Bristol, and, having examined the accounts, was pleased with the sale, and satisfied as to the causes of the delay; and that at his request Jones paid Smith £2,000 in further part of his purchase-money and the interest of the remainder. About two months after the dividend was declared the eldest son of Smith was taken ill and died, and Jones, hearing it was the assignee himself, became alarmed at his situation and obtained from all the creditors except the petitioner and two or three small creditors a confirmation of the sale, dated Sept. 9, 1801, expressed to be for obviating all objections and questions as to the sale to Jones, with a direction to Smith and all future assignees to complete the same as soon as it could be done. The affidavits further stated that, Rawdon having expressed a wish for a larger dividend, Jones proposed to pay a further part of the purchase-money to Smith to enable him to make a further dividend of 5s. before the title was completed, having the consent of him and some other of the principal creditors, or that, as he (Jones) computed the further dividend might be about 9s. in the pound, he would have no objection, if they wished it, to pay Rawdon and his sisters-in-law, Catherine and Amelia James, who were large creditors, 9s. in the pound in full of their further dividends. They accepted the 9s. in the pound, which Jones immediately remitted, and they expressed great satisfaction with his conduct. A few months after the confirmation of the sale of Southmead was executed to Jones he purchased of several other of the principal creditors their further rights and dividends at 9s. in the pound solely with a view to his own security for the reasons aforesaid, and the creditors, from whom he purchased the same, were content. Jones also relied on the circumstance that the peace had been declared, and the consequences to him from the difference in the value of stock in the event of setting aside the purchase.

Spencer Perceval, *Piggott* and *Cullen* in support of the petition: Under the circumstances of this case this sale cannot stand. It is a sale of the estate of the bankrupt to the solicitor under the commission. The whole estate passes into the banking house of one of the assignees: no dividend, no account, for several years till the brother of another assignee becomes solicitor and gets possession of the whole. The terms of the sale were altered, and the alterations were very

material and of a nature extremely to affect the sale, viz., that the deposit should be paid, not to Smith, the assignee, but to Jones, the solicitor; who was to avail himself of the assignee's licence to him to purchase. Also, if the title should not be approved by the counsel of the purchaser, he was to be at liberty to be off the contract, and to pay no forfeiture. Upon this point there is no difference between the solicitor and the assignee. There is no principle of public policy applicable to the one that does not apply equally to the other. The influence of the solicitor going hand in hand with the assignee is immense. The general principle as to a trustee purchasing for his own benefit is established by *York Buildings Co.* v. *Mackenzie* (1) in the House of Lords, and the late case before your Lordship: *Ex parte Lacey* (2). *Owen* v. *Foulkes* (3) was the case of a solicitor. In *Ex parte Linwood* (4), Lord Rosslyn, though there was a charge of fraud, clearly held that from the mere circumstance of being solicitor the sale could not stand, and in *Ex parte Churchill* (5) that was the only ground. As to the other point, the purchase by the solicitor of the debts at an undervalue, the mischief is still more considerable. The solicitor has an interest to represent the estate as much less solvent than it is. Aware that the result of the accounts will give twenty shillings in the pound, he contracts for the purchase of debts at seventeen shillings in the pound and defers the dividend. Those purchases must be considered made for the benefit of the estate. Smith, the assignee, is interested with the solicitor in the purchase of some of the debts. The consequence of permitting this in these commercial towns will be that offices will be opened for the purchase of debts.

Mansfield, *Richards*, *Romilly* and *Stanley* for Jones, the solicitor, and Smith, the assignee: If this sale is set aside, it must be upon a general, invariable, rule, no imputation being made of improper conduct. The circumstance of the solicitor bidding, the auctioneer having declared that all the bidders were real bidders, must from his knowledge of the value have greatly enhanced the biddings, and for that reason in *Wren* v. *Kirton* (6) your Lordship was struck with the circumstance that the agent had not disclosed that he was bidding on his own account. The point in *Owen* v. *Foulkes* (3) was certainly new. The case of the assignee stands upon a very different ground from that of the solicitor. The former is trustee for the benefit of the creditors. He is the person to sell. His business is to settle the conduct of the sale, to appoint the time and place, etc. The case of the solicitor in bankruptcy is perfectly different, and is also distinct from that of a solicitor under a decree for sale whose duty it is to sell, to prepare the particulars, and to manage the whole. Admitting that is often done by the solicitor in bankruptcy, it is not in the course of his duty. If this is put upon a general rule, it must go upon a general principle, not upon accidental circumstances. As to the inquiries made of Jones, suppose the tenant was referred to. Would that prevent him from purchasing? If the principle is pushed to the utmost, the managing clerk of the solicitor could not be the purchaser. In *York Buildings Co.* v. *Mackenzie* (1) the purchaser was the agent for the sale of the estate. If this general rule that the solicitor under the commission cannot buy under any circumstances exists, then the acquiescence of the petitioner must be considered, and the great change of circumstances, making it impossible to put Jones in the same situation and the injurious consequences to him. The acquiescence is the stronger from the previous opposition. The confirmation obtained by Jones is accounted for, and no imputation can arise from that circumstance. The delay, that has taken place under this commission, as fully accounted for by the circumstances. As to the purchase of the debts, the creditors think themselves much indebted to Jones for such an advance in the situation of this estate.

LORD ELDON, L.C.—This doctrine as to purchases by trustees, assignees, and persons having a confidential character, stands much more upon general principle than upon the circumstances of any individual case. It rests upon

this, that the purchase is not permitted in any case, however honest the circumstances, the general interests of justice requiring it to be destroyed in every instance as no court is equal to the examination and ascertainment of the truth in much the greater number of cases. The principle has been carried so high that where a trustee in a renewable lease endeavoured fairly and honestly to treat for a renewal on account of the cestui que trust, and, the lessor positively refusing to grant a renewal for his benefit, the trustee, as he very honestly might under those circumstances, took the lease for himself, it was held that even in such a case it was so difficult to be sure there was not management, a difficulty that might exist in a much greater degree in many other cases having the same aspect, the lease taken by the trustee from a person who would not renew for the benefit of the cestui que trust, should be considered taken for his benefit and should be destroyed rather than that the trustee should hold it himself under those circumstances. As to assignees under a bankruptcy, there have been many fair cases, but it is obvious that in many instances, when the commission is taken out, schemes are laid for all the benefits to be made by assignees, solicitors, etc., making the thing beneficial for themselves. Considering that in the assignees is vested the whole property, that the conduct of bringing it to sale and the time and manner of the sale are very much in their power, that the creditors seldom have so large an interest as to make it an object to dispute the difference of a sale to A. or B., that the bankrupt perhaps has no interest in the surplus, but is for the present at the mercy of the assignees, his whole property in their hands, his person not free, and considering the opportunity of the assignees to deal for their own benefit, more amply afforded and more out of the reach of investigation, those trustees are more especially within the general principle.

As to the purchase of the debts, I cannot distinguish that from the case of an executor who cannot buy for his own benefit debts due from the testator's estate. Any stranger may. But the executor is bound to do his best for the estate, and the assignee is as much a trustee as an executor, and, being precisely within the range of the same principle, cannot acquire the difference. As to the solicitor, if there is any utility in applying the principle against the assignee, the application as against the solicitor is more loudly called for. He is to do his duty to the assignees, enabling them to do their duty to the creditors, always remembering also their duty to the bankrupt, if by a fair, prudential, and cautious, dealing with the estate a surplus can be secured. Upon the same principle that requires the assignees to make no benefit, the solicitor, who is to direct and inform them in the very act, by which they are to make no benefit, cannot possibly make a benefit.

In this particular case Jones did advise and collect information as to the purchase, and mingle himself with the transaction, and was, therefore, properly referred to. I believe he acted purely at the moment of the sale, but the circumstances show how necessary it is that those who have duties to others imposed upon them should not deal for themselves. If Jones meant to go above £12,000, which was the valuation of Billingsley, it was not according to his duty requiring him to advise the assignees as to the sale to acquiesce in the advice of any creditor to put up at £10,000, and the observation, that he might bid up. If he was bound to state his judgment to those who were to sell he ought not to take the chance of buying it in for less, if he had predetermined to bid more. He ought to have desired the assignees to put it up at £10,500, because he meant to bid that sum. I believe he purchased at a price then understood to be the full value, for I proceed, not upon the undervalue, but upon this principle that there is that general rule in this court which under such circumstances would not permit that purchase to be held if recently disputed. It applies with more force to the solicitor under the commission buying the debts.

The transactions since the sale, taken altogether, will not take the case out of the general rule. The terms upon which the sale is to be undone remain to be

considered, and the acquiescence. As to the account, if the circumstances of the estate required a management different from the usual course so that ultimately a dividend is not made for a number of years, that species of management, not according to the usual course, should be looked at with jealousy and attention. In such a case, therefore, ordinarily speaking, a general account is due.

April 9, 1803. **LORD ELDON, L.C.** My opinion in this case is purely upon the principle. Upon further consideration I have no reason to think that the sale was not fairly had for what was considered at that time by all the parties a good price, and in a moral view Jones dealt as fairly and actively for the creditors as if acting for himself. But notwithstanding that I am clearly of opinion that principle requires (and I add the circumstance of a sale by auction) that an assignee under a commission of bankruptcy cannot buy the property sold under it, unless he shakes off the character altogether, putting himself altogether out of the trust, and not then without a little more than merely parting with the character. If the principle is right as to the assignee under the commission a fortiori it is necessary to adhere to it in the case of the solicitor.

The principle as to trustees is certainly stated very differently in different authorities. It is not my opinion that it must be shown that the trustee has made an advantage as it is stated in some of them. The case I put of the infant as to the lease negatives that. The principle is that, as the trustee is bound by his duty to acquire all the knowledge possible to enable him to sell to the utmost advantage for the cestui que trust, the question what knowledge he has obtained, and whether he has fairly given the benefit of that knowledge to the cestui que trust, which he always acquires at the expense of the cestui que trust, no court can discuss with competent sufficiency or safety to the parties. In this paper of petitions in bankruptcy there is an instance of a solicitor under a commission, finding, he can make a bargain to sell a leasehold estate for £1,400, keeps that in his own breast, and makes a bargain with the assignees for the purchase of it at £350. The danger of collusion with the assignee in such a case is obvious.

Another case might happen, and, I believe, has happened. A person knowing, not only the surface value, but that there are minerals, buys upon the rent, and gains all that advantage. How can that be found out, if he chooses to deny it? Therefore, the courts have said it is better for the general interests of justice that in some cases a loss should be sustained by the cestui que trust than a rule should be established which would occasion loss in much more numerous cases. The sale by auction is evidence of fairness unquestionably, but that makes no difference as to the principle. There are, I know, different opinions from *Whelpdale* v. *Cookson* (7), in which case, I believe, Lord Hardwicke did act upon that circumstance. My opinion is otherwise, for it is obvious that, though it may not come up to its true value, the trustee or solicitor bringing it to sale may have a great deal of information which may bring it up to a price beyond that which it may reach at an auction. For instance, in the case of mines, if the solicitor or assignee knows that circumstance, he may buy under a knowledge which some of the others at least have not. So there may be a great many clandestine dealings which may bring it to a price far short of that, which would be produced, if full information was given. In the present case Billingsley's valuation stating the property to be worth £12,000 at least was known to the assignee and some of the creditors. Was not that material for the others to know? With the knowledge of that valuation the estate was bought at a small increase—whether with reference to that valuation or not, the fact is very material, and the direction at the sale to put it up at £10,000 in consequence of which Jones intending to give £10,500 might have got it for £200 less.

As to the dividends, it is not contended that an assignee can buy dividends. It goes upon the old principle that an executor cannot buy the debts due from the testator. First, the possession of the property gives him the opportunity of

dealing for the purchase. All the gain he gains upon ordinary principles for those who are entitled to the property. The principle upon which I have before proceeded applies to both the assignee and the solicitor. My opinion is that, if there is any species of trustee or agent against whom the principle ought to be strictly held, it is the assignee in bankruptcy, and the agents for him. In the case of general trustees the party may have ample means from other sources, but the assignee has the bankrupt and his property together under his own disposal, and means of working upon him much more than trustees in ordinary cases have. So as to the solicitor under the commission. With regard to creditors, to what a scene it would open, if either of them could buy the dividends for his own benefit. I go upon the naked principle, for upon these affidavits it is very strong that the family of the bankrupt dealt with Jones, and state themselves as perfectly satisfied with his dealing with them. But upon the general principle it is obvious, that bankruptcy would become a stock in trade if the solicitor could throw all difficulties in the way, making that the means of buying the dividends himself.

Next, as to the terms. It is suggested that these estates will sell better in lots. That was not thought of before. But the solicitor or assignee might be in full possession of the circumstance that they would sell better in lots, and yet could not be fixed with that. I think that the method I followed in *Ex parte Lacey* (2) was right. I admit that the principle, with the exception of some doctrine of that kind by Lord Thurlow, has been rarely applied. The cestuis que trust must either let him have the land or put him in the same situation as if he had not had it, and in that case he must have all the money he has advanced returned with interest, accounting for the rents received. His other claims cannot be maintained. First, upon all that has passed since the sale, there is not sufficient to constitute that species of acquiescence to bar the principle, though acquiescence in many cases ought to have that effect. It is clear the mere difference of the price of stock cannot have that effect. Suppose the stock, instead of advancing, had fallen. I could not compel him to take it. Then what right has he to the rise? He is set whole according to the principle of this court by having the principal with interest at 5 per cent. in this particular case, upon the ground that, upon his bargain, if it stood, he must have paid 5 per cent. On the other hand, there must be an account of the rents and profits received by him till he became the tenant himself, to be applied in the usual way to the interest, and afterwards to sink the principal, and from the time he took possession to be charged with an occupation rent. After the account is taken, if the money is not ready, they must either consent to have the estate put up in one lot, as in *Ex parte Lacey* (2), or give that proposition that can make good, and with promptitude, that they will in a reasonable time clear the account, so that they may have the advantage of putting it up in lots. There must be an inquiry as to substantial improvements, if any, and the Master may state anything as to lasting repairs. As to the claim of interest upon the money advanced by Jones for the purchase of the dividends, there is considerable difficulty, upon this ground—that, if in all cases you are to allow interest, it may be for the benefit of the assignee or solicitor to buy the debt, even knowing that the sale will be set aside, as by getting the interest he may get more than the other creditors. I will, therefore, direct the commissioners to calculate the dividend upon the debts purchased to the amount of the original proof. Out of these dividends Jones and Smith shall receive what they paid for the debts respectively, and I will reserve the consideration whether they are to have interest upon the price they gave for these debts till I see the final distribution as to the bankruptcy.

With respect to the question whether I will permit Jones to give up the office of solicitor and to bid, I cannot give that permission. If the principle is right that the solicitor cannot buy, it would lead to all the mischief of acting up to the point of the sale, getting all the information that may be useful to him, then

discharging himself from the character of solicitor, any buying the property. Infinite mischief would be the consequence in a number of cases. On the other hand I do not deny that those interested in the question may give the permission. The rule is that a trustee shall not become the purchaser, until he enters into a fair contract; that he may become the purchaser, with those interested. I repeat as to *Fox* v. *Mackreth* (8), that, in pressing for an issue, it was argued upon a false principle, for the question was not whether the price was fair between the trustee and cestui que trust at the time, but whether a person who had a confidential situation previously to the purchase had at the time of the purchase shaken off that character by the consent of the cestui que trust, freely given, after full information, and bargained for the right to purchase. It is a question, therefore, of prudence, for the creditors and the person entitled to the surplus to decide for themselves, whether they will permit him to buy, and no court can say ab ante that they will permit this, for circumstances may exist at the time of the second sale, that the court cannot know.

Order that Jones, as acting solicitor under the commission, was not entitled to hold the purchase of the estate against the consent of any of the creditors or the person entitled to the surplus of the bankrupt's estate, if any; and that Smith, as assignee, and Jones, as solicitor under the commission, could not buy the dividends for their own use.

GOURLAY *v.* DUKE OF SOMERSET

[Lord Chancellor's Court (Lord Eldon, L.C.), December 10, 1812]

[Reported 1 Ves. & B. 68; 35 E.R. 27]

Specific Performance—Contract—Agreement for lease—Breaches of terms—Possible determination of lease if granted.

Per Curiam: The court will not grant specific performance of an agreement for a lease if, by reason of breaches by the tenant of the terms of the agreement, e.g., by committing waste, the lease, if specific performance of the agreement were granted, could be determined by the clause of re-entry which the lease would contain.

Landlord and Tenant—Covenant—Covenant not to sub-let without giving security—Advertisement for tenant.

A right of re-entry upon underletting by a lessee does not arise by the lessee advertising for a tenant, although it may be a reason for the imposition of terms.

Notes. As to the refusal to grant specific performance of an agreement for a lease where there have been breaches of the terms of the agreement, see 21 Halsbury's Laws (3rd Edn.) 385, and ibid. vol. 36, p. 317; and for cases see 30 Digest (Repl.) 426 et seq. As to the covenant against underletting, see 23 Halsbury's Laws (3rd Edn.) 631; and for cases see 31 Digest (Repl.) 417–419.

Bill for specific performance of an agreement for a lease.

On May 17, 1809, a written agreement was entered into between the plaintiff and the defendant, whereby the latter agreed to let to the former a certain farm, called Deptford Farm, by a lease from Oct. 10 then next for twenty-one years; and to allow the plaintiff £200, and such further sum as the defendant should upon inquiry find proper and necessary for the purpose of putting the buildings in repair, and making necessary alterations and improvements to be first approved by the duke or his agent. The plaintiff agreed not to plough or break up certain lands

away and do all things necessary. By the conveyance of 1761 to John Seaman, under whose devise the plaintiff was entitled, no notice was taken of the reservation in the deed of 1704. The answer insisted that, under the reservation, there was in the heirs of Cicely Croxton a right to all the springs, mines, etc., in the land devised, and a right of entry, etc., in respect of which the plaintiff was entitled to compensation. That question was brought on, by consent, without an exception, the defendant not making it an objection to the title.

Richards and *Roupell* for the plaintiff.
Sir Samuel Romilly and *Wetherell* for the defendant.

SIR WILLIAM GRANT, M.R.—The deed of 1704 contains an express and unequivocal reservation of all mines and veins of salt that might be contained in the estate of Ravenscroft. It was for the purchaser to consider how far it was prudent to take an estate subject to such a lien; but in fact, by the terms of the agreement, Mrs. Croxton became as much the owner of the mines as Mr. Yate became owner of the soil. The question is how those, who may now represent her, have lost this property or their right to enter on the enjoyment of it. Not by any actual grant or release, for none is alleged; but it is said that at this distance of time a release is to be presumed. I do not clearly see any circumstances from which that presumption is to arise. No adverse possession is alleged. The owner of the soil has had the enjoyment to which he was entitled by the contract, and which is perfectly consistent with the right of the owner of the mines. If it could be shown that he had wrought any mines himself, or had interrupted the other parties claiming as representing Mrs. Croxton under the reservation of the mines in working them, that would lay a ground on which the presumption could stand; but nothing is alleged, except the mere absence of any evidence of the exercise of this reserved right, for I do not see, how the circumstance that, in the conveyance of 1761, no notice is taken of this reservation can weigh against the persons who represent Mrs. Croxton if they should think proper to assert her right.

There are many cases where from non-user of a right the inference of abandonment may fairly be made; but that does not apply to such a case as this. It is not so generally true that the owner of mines does work every mine which he has a right to work; and, therefore, the relinquishment of the right cannot be presumed from the non-exercise of it. It is well known that mines remain unwrought for generations; that they are frequently purchased, or reserved, not only without any view to immediate working but for the express purpose of keeping them unwrought until other mines shall be exhausted, which may not be for a long period of time. It is impossible, therefore, to infer that this right is extinguished; though there is no evidence of the exercise of it since the year 1704. *Lyddell* v. *Weston* (1), instead of being an authority for the defendant, appears to me to afford an argument by implication against him. The grounds on which LORD HARDWICKE's judgment goes are two: first, that on examination the probability was great that there were no such mines; secondly, that the Crown, having merely reserved the mines without any right of entry could not grant a licence to enter on another man's estate for the purpose of working them. That position is liable to considerable doubt, as being inconsistent with the resolutions of the judges in *Case of Mines*, *R.* v. *Earl of Northumberland* (2) (Plowd. at p. 336). LORD HARDWICKE, however, thought it necessary to assume it before he could determine against the validity of the purchaser's objection. Here, first, it is not alleged that there is no probability of mines on this estate; it is rather admitted that there were. Secondly, here is the reservation of a right of entry, on the want of which LORD HARDWICKE laid stress in that case. The defendant chooses to consider this, not as an objection to the title, but as a ground for compensation, and I think that he is entitled to such compensation.

FEATHERSTONHAUGH *v.* FENWICK AND ANOTHER

[ROLLS COURT (Sir William Grant, M.R.), April 3, 4, 18, 1810]

[Reported 17 Ves. 298; 34 E.R. 115]

Partnership—Dissolution—No express agreement—Determination of partnership on notice.

Where there is no agreement by partners with regard to the duration of the partnership any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners [see now Partnership Act, 1890, s. 26 (1)]. Per SIR WILLIAM GRANT, M.R.: A partner can very seldom, if ever, have an interest to give notice of dissolution at a period disadvantageous to the general interests of the concern, as where the articles of partnership do not prescribe the terms the law directs the partnership property to be sold and the whole concern wound-up, and the partner giving notice must suffer in proportion to the extent of his interest in the trade.

Partnership—Duration—Term of lease held by partnership—Contracts with other persons—Partnership property—Remainder of term of lease.

If partners take premises for the use of the partnership business on a lease providing for a fixed term an agreement by them to continue the partnership until the termination of the lease is not to be implied. If any part of the term is unexpired at the end of the partnership the remainder of the term is partnership property and is to be sold as such and the proceeds distributed among the partners. Partners cannot by dissolving partnership relieve themselves of contracts into which they have entered with other persons, but as among themselves the existence of such contracts cannot prevent a dissolution.

Partnership—Dissolution—Right of partners to sale of partnership property—Distribution of proceeds.

On the dissolution of a partnership a partner is not bound to accede to the proposal of the other partners that a value should be set on the partnership stock and that they should take his part of the partnership property at that valuation or he should take his share of the property from the premises. On a dissolution, in the absence of agreement to the contrary, a partner has a right to have the partnership property sold and the proceeds divided among the partners.

Partnership—Property—Property acquired by one partner without privity of others.

The acquirement by one partner of a lease of premises, or, **semble,** of any other property, without the privity of the other partners enures for the benefit of all the partners, the partner acquiring the property holding it in trust for the others.

Notes.—Applied: *Rigden* v. *Pierce* (1822), 6 Madd. 353; *Cook* v. *Collingridge*, [1814–23] All E.R. Rep. 7. Considered: *Willett* v. *Blanford* (1842), 1 Hare, 253; *Blisset* v. *Daniel* (1853), 10 Hare, 493; *Darby* v. *Darby* (1853), 3 Drew. 495; Explained: *Cassels* v. *Stewart* (1881), 6 App. Cas. 64. Considered: *Re Biss, Biss* v. *Biss*, [1900–3] All E.R. Rep. 406; *Hugh Stevenson & Sons, Ltd.* v. *Akt. Für Cartonagen-Industrie*, [1918–19] All E.R. Rep. 600. Referred to: *Heath* v. *Sansom* (1832), 4 B. & Ad. 172; *Portlock* v. *Gardner* (1842), 11 L.J.Ch. 313; *Darby* v. *Darby* (1856), 3 Drew. 495; *Wedderburn* v. *Wedderburn* (1856), 22 Beav. 84; *Nielson* v. *Mossend Iron Co.* (1886), 11 App. Cas. 298.

As to dissolution of partnership, see 28 HALSBURY'S LAWS (3rd Edn.) 562 et seq.; and for cases see 36 DIGEST (Repl.) 605 et seq.

Cases referred to:

(1) *Fox* v. *Hanbury* (1776), 2 Cowp. 445; 98 E.R. 1179; 46 Digest (Repl.) 497, *461.*

(2) *Crawshay* v. *Collins* (1808), 15 Ves. 218; 33 E.R. 736, L.C.; 36 Digest (Repl.) 541, *1024.*

(3) *Palmer* v. *Young* (1684), 1 Vern. 276; 1 Eq. Cas. Abr. 380; 23 E.R. 468; 47 Digest (Repl.) 103, *738.*

(4) *Keech* v. *Sandford* (1726), Sel. Cas. Ch. 61; 2 Eq. Cas Abr. 741; Cas. temp. King, 61; 25 E.R. 223, L.C.; 47 Digest (Repl.) 104, *749.*

(5) *Rawe* v. *Chichester* (1773), Amb. 715; 27 E.R. 463; sub nom. *Bromfield* v. *Chichester*, *Raw* v. *Duthelby*, 2 Dick. 480, L.C.; 47 Digest (Repl.) 104, *751.*

(6) *Owen* v. *Williams* (1773), Amb. 734; 1 Bro. C.C. 199, n.; 27 E.R. 474, L.C.; 40 Digest (Repl.) 711, *2062.*

(7) *Blewett* v. *Millett* (1774), 7 Bro. Parl. Cas. 367; 3 E.R. 238, H.L.; 47 Digest (Repl.) 104, *750.*

(8) *Peacock* v. *Peacock* (1809), 16 Ves. 49; 33 E.R. 902, L.C.; 36 Digest (Repl.) 605, *1666.*

(9) *Phillips* v. *Duke of Bucks* (1683), 1 Vern. 227; 23 E.R. 432; 44 Digest (Repl.) 58, *447.*

(10) *Popham* v. *Eyre* (1774), Lofft, 786; 98 E.R. 919; sub nom. *Eyre* v. *Popham*, 1 Bro. C.C. 95, n., L.C.; 44 Digest (Repl.) 43, *298.*

(11) *O'Herlihy* v. *Hedges* (1803), 1 Sch. & Lef. 123; 47 Digest (Repl.) 367, **1164.*

Partnership Action.

In 1783 the plaintiff entered into partnership with George Fenwick, Clark, and Faremond, in the business of manufacturing glass for the term of fourteen years from Feb. 13, 1783. The articles contained a provision that, in case a partner should at any time be desirous to dispose of his interest in the partnership and should give twelve calendar months' notice thereof in writing, at the end of such twelve months the partnership should cease and determine so far as concerned that partner, and that the other partners, or any of them, should have the preference of purchasing the interest of the retiring partner at a fair valuation. By another clause it was provided that at the expiration of the term, the joint stock should be equally divided among the partners, their executors and administrators.

The business was at first carried on at Ayresky, in the county of Durham, but afterwards they obtained a lease from Mr. Lambton of glass houses and premises at Panns, in the same county, and also of a free-stone quarry for the term of fifteen years from Nov, 22, 1789, as tenants in common with a proviso that, if the lessor, his heirs or assigns, should be desirous that the furnaces, kilns and other utensils erected on the premises, should remain thereon after the expiration of the lease, three months' notice of such intention should be given previous to the expiration, and then they should be taken at a fair valuation. If the notice should not be given, the partners might remove them.

The partners worked the stone quarry upon the same terms as those on which the manufactory was carried on. At the expiration of the partnership on Feb. 13, 1797, all the shares were by purchase vested in the plaintiff and George Fenwick who became interested in equal moieties and continued to carry on the business as usual without any new agreement. In June, 1799, they took a lease for the partnership purposes of a warehouse in London for a term of nine years. In 1801 Addison Fenwick, the son of George, was admitted to a moiety of his father's interest in the concern, and was appointed the manager with a salary. They also occupied a brickfield, contiguous to the glassworks, as tenants from year to year under Mr. Lambton until 1805. The profits of this were brought to the partnership account.

In September, 1804, George and Addison Fenwick applied to Mr. Wilkinson, one of the trustees and guardians of Mr. Lambton's infant son and devisee, for a renewal of the lease of the premises at Panns, making the application in their own

names without any communication with the plaintiff, with whom it was represented that George Fenwick was determined to have no further connection in trade, they not having at that time apprised him of their intention to dissolve the partnership. An agreement was accordingly executed by them and Wilkinson for a renewal of the lease to them exclusively for the term of eight years from Nov. 22, following. On Oct. 19, 1804, the Fenwicks first informed the plaintiff that they had obtained that renewal, and gave him verbal notice of their intention to dissolve the partnership on Nov. 22 following. On Nov. 15 they gave him a written notice to that effect. At this time various contracts, entered into by Addison Fenwick in the name of the partnership with glass manufacturers and other workmen, for long terms of years, were still subsisting, and in May, 1804, he purchased in the partnership name a large quantity of kelp though the stock then in hand was more than sufficient to last till November. The defendants, the Fenwicks, offered to take the contracts with the workmen off the plaintiff's hands and to give him an indemnity, or to divide the workmen. They also offered to take the partnership property and utensils at a valuation, and desired the plaintiff, if he would not comply with that proposal, to take his share off the premises. The plaintiff refusing, they continued the business with the partnership machinery, stock of kelp and workmen.

The plaintiff, having filed the bill, died, and the suit was revived by his representatives. The defendants insisted that the partnership was duly dissolved; that they were only accountable for the value of the partnership property at the time of the dissolution; and that it was not necessary for them to inform the plaintiff of their intention to dissolve the partnership or to apply for a renewal of the lease. The questions were (i) whether under the circumstances the partnership was duly dissolved; if it was (ii) whether the defendants were not accountable for the profits, derived since by means of the partnership property; (iii), whether the renewed lease was not taken in trust for the partnership.

Wilkinson and Murray, his solicitor, being examined by the defendants, stated that the plaintiff was for many years employed as one of the coal agents of the Lambton family until September. 1803, when Wilkinson discharged him on the ground that he had taken a colliery contiguous to those of Mr. Lambton, and, therefore, was not likely to do ample justice to the latter as agent to which he had also the command of large sums of the trust money. For these reasons, though there was no allegation of misconduct, the plaintiff was discharged from the agency, and Wilkinson informed him that he should not have any communication in future with the trust estates. He also received notice to quit some lands which he held under the trustees as tenant from year to year. Wilkinson further stated that he would not have granted a renewal of the lease at Panns to the plaintiff, either separately or jointly with other persons; that he came to that resolution in September, 1803; and that it was a deliberate and final resolution and was publicly known in the neighbourhood where the plaintiff resided.

Sir Samuel Romilly, *Bell* and *Simpkinson* for the plaintiff: (i) The business having been carried on after the expiration of the term fixed by the articles in the same manner, this court will hold that the original terms were to be observed, and, therefore, the partnership could not be dissolved without twelve months' notice according to the original stipulation. Where a partnership concern is carried on after the expiration of the original term without any new agreement, the conclusion of law is that it proceeds upon the old footing, as a tenant, continuing the occupation of a farm after the expiration of his term, holds subject to all the covenants in the old lease. From the nature of this covenant it could not be determinable at pleasure, and the conduct of the parties, the lease taken of the warehouse in London, the contracts with the workmen, and the purchase of the additional stock of kelp, show that it was not so considered. The notice of dissolution, therefore, was not sufficient. (ii) Taking the partnership to have been duly

dissolved, the whole of the joint property ought to have been sold at that time. The defendants had no right either to appropriate it to their own use at their own price, or to insist that the plaintiff should take away his proportion. That is not the mode of winding-up a partnership according to *Fox* v. *Hanbury* (1) and *Crawshay* v. *Collins* (2). These defendants, therefore, having continued the business by means of the partnership property, must account with the plaintiff for the profits. (iii) The rule is established that, if a trustee, or a person, having a particular interest in a lease, obtains a renewal, it shall be for the benefit of all persons interested in the old lease: *Palmer* v. *Young* (3); *Keech* v. *Sandford* (4); *Rawe* v. *Chichester* (5); *Owen* v. *Williams* (6). In this respect a partner is in the same situation as any other person. The evidence of Wilkinson is not that he refused to renew to the partnership, or that the plaintiff was ever informed of his resolution, and Wilkinson's refusal could not have had effect, unless the plaintiff, being informed of it, consented to the defendants treating for their own benefit, according to *Keech* v. *Sandford* (4); recognised in *Blewitt* v. *Millett* (7). The occupation of the brickfield by the plaintiff and defendants as tenants from year to year, permitted by Wilkinson until 1805, is inconsistent with the resolution he represents himself to have formed in 1803, and the defendants could not, as they pretended, have been convinced that an application for renewal on the joint account of themselves and the plaintiff would have been refused.

Hart, *Leach* and *Wear* for the defendants: (i) If the partnership had originally commenced without articles, it might have been dissolved at a moment's notice, and the same rule prevails where after the expiration of the period originally stipulated, the business is by mutual consent continued. That rule which, whatever may have been held formerly, is now settled by *Peacock* v. *Peacock* (8), was adopted to obviate the inconvenience resulting from the question what is reasonable notice and to prevent endless litigation as that question in each case must have produced a suit. The clause in these articles can apply only to the limited term. It is merely an enabling clause, empowering any of the partners to retire during the continuance of the term. The case of a tenant holding over after the expiration of his term has no analogy, and in that instance, if the lease had contained a clause for determining it at twelve months' notice, yet, after the expiration of the term, the tenant continuing in possession as tenant from year to year, six months' notice would be sufficient. The general rule cannot give way to the inconvenience of the particular case, from the quantity of kelp laid in, the contracts with the workmen, and the lease of the warehouse. The argument upon these circumstances proves too much, viz., that the partnership must continue during the whole period of these contracts. If for instance a lease had been taken for ninety-nine years, the partnership must have had the same duration. (ii) This case is not within the principle of *Crawshay* v. *Collins* (2) where the Lord Chancellor held that, if after dissolution some of the partners continue to use the partnership effects for other purposes than that of winding-up the concern, they are accountable for the profits. These defendants were compelled by the plaintiff's conduct to use this property. He did not object to their offer, as improper, but insisted that the partnership was not dissolved. The stipulation in the articles respecting the division of the stock at the expiration of the partnership was still in force, and the correct principle is that where partnership property is capable of division it shall be divided, and not sold. (iii) This case is distinguished from those which have been cited, and under the circumstances, attending to the evidence, the defendants were at liberty to treat on their own account without giving notice to the plaintiff who must have been apprised of Wilkinson's determination. Even taking it to be a trust, a specific performance would not have been decreed against Wilkinson upon a bill by the plaintiff: *Phillips* v. *Duke of Bucks* (9); *Eyre* v. *Popham* (10). Considering the lease to have been obtained in trust, the partnership does not continue: the parties are merely tenants in common; and the

consequence would be, that a rent must be set upon the premises during the occupation of the defendants.

SIR WILLIAM GRANT, M.R.—The first question in this cause is whether the partnership was dissolved on Nov. 22, 1804. The plaintiff contends that the defendants had no right to put an end to the partnership at that period, and that is contended on several grounds.

The first ground is that, as by the articles which formerly existed but had expired twelve months' notice was necessary to enable a partner to withdraw, the same notice was necessary for withdrawing from the partnership which continued without articles. I do not agree to that proposition. The latter partnership was for an indefinite period, and, therefore, might be dissolved at the will of the parties subject to the question, afterwards made, by what notice that will must be declared. Another ground on which the plaintiff contends against the dissolution on Nov. 22 is that the lease of the premises in London used in carrying on the concern was then unexpired. That does not oppose any obstacle to the dissolution, for it is not a necessary consequence that partners taking premises for the use of their trade for a definite period contract a partnership for the same period. If any part of the term is unexpired at the end of the partnership, that is partnership property, and is to be distributed as such, but I do not apprehend, that they are bound to continue the partnership on that account. A third ground is that there were several contracts subsisting with their workmen which had a considerable period of time to run. That argument goes considerably too far. It would go to the extent that a partnership could not be dissolved until all its contracts were completely ended and wound-up, and that can hardly be the case at any period as persons are entering into contracts from day to day which cannot all expire at the same period. It would on that ground be hardly possible to dissolve any partnership as there must always be contracts depending. I do not conceive, therefore, that the existence of engagements with third persons, either for goods to be worked up or engagements with their workmen, which had not come to a conclusion, can form an objection to the dissolution. The partners cannot, it is true, by a dissolution relieve themselves from the performance of any engagements, which they may have contracted with third persons, but, as among themselves, the existence of such engagements cannot prevent a dissolution either by mutual consent or by notice.

The question then is: What sort of notice ought to be given for this purpose? Until a very recent period it had been, I believe, understood that a reasonable notice should be given, but upon the question: What is reasonable notice? much difference of opinion may prevail. On the one hand, it may be extremely disadvantageous to parties to say that a partnership shall be dissolved on a given day; on the other, it must be extremely difficult for a court of equity by a general rule to ascertain what is reasonable notice, and the question whether the particular notice was reasonable or convenient would be the subject of discussion in almost every instance of the dissolution of a partnership. Considerations of that sort, I believe, have led to a different rule, that in the case of a partnership such as this, subsisting without articles and for an indefinite period, any partner may say: "It is my pleasure on this day to dissolve the partnership", but, considering the principles on which the dissolution must take place, a partner can very seldom, if ever, have an interest to give notice of dissolution at a period disadvantageous to the general interests of the concern, as where the articles do not prescribe the terms the law ascertains what shall be the consequence of dissolution, viz., that the whole of the joint property must be sold off; and the whole concern wound-up. No partner, therefore, can derive a particular advantage by choosing an unseasonable moment for dissolution, as upon the principles, established in *Crawshay* v. *Collins* (2) and the authorities there referred to, he must suffer in proportion to the extent of his interest in the trade. I hold, therefore, that the dissolution of this partnership took place on Nov. 22.

The next consideration is whether the terms upon which the defendants proposed to adjust the partnership concern were those to which the plaintiff was bound to accede. The proposition was that a value should be set on the partnership stock, and that they should take his proportion of it at that valuation, or that he should take away his share of the property from the premises. My opinion is clearly that these are not terms to which he was bound to accede. They had no more right to turn him out than he had to turn them out upon those terms. Their rights were precisely equal—to have the whole concern wound-up by a sale and a division of the produce. As, therefore, they never proposed to him any terms which he was bound to accept, the consequence is that, continuing to trade with his stock and at his risk, they come under a liability for whatever profits might be produced by that stock. In *Crawshay* v. *Collins* (2) there was no circumstance, except merely that there had been no adjustment of accounts with the assignees of the bankrupt; here the defendants proposed adjusting the accounts on certain terms, but terms, which the other party was not bound to accept. Though he, thinking they had no right to dissolve the partnership, might not have gone into any detail of the principles on which the dissolution should take place, yet I conceive it to have been their duty in the first place to put themselves right by offering to him those terms upon which the law gave him a right to insist, and, not having done so, but continuing to trade with his stock under the liability to answer for the profits, the same inquiry should be directed as in *Crawshay* v. *Collins* (2) to ascertain what that stock was at the period of the dissolution on Nov. 22, what use was afterwards made of it, and what profits were produced by the trade.

There is still remaining what I consider a separate question—whether the renewed lease formed any part of the partnership property at the time of the dissolution. That is the only view I take of this question. Counsel for the plaintiff seemed to think that, if it formed part of the partnership property, the consequence would be that the partnership was not dissolved. For the reason I have already given I think that that consequence would not follow, but supposing the lease to have been renewed on Nov. 22, and that the defendants are to be considered as trading for the plaintiff under that renewal, the consequence is that the renewed lease was partnership property from Nov. 22. It is clear that one partner cannot treat privately and behind the back of his co-partners for his own individual benefit for a lease of the premises where the joint trade is carried on. If he does so treat and obtains a lease in his own name, it is a trust for the partnership, and this renewal must be held to have been so obtained. Consider what an unreasonable advantage one partner would upon a different principle obtain over the rest. In this respect there can be no distinction whether the partnership is for a definite, or indefinite period. If one partner might so act in the latter case, he might equally in the former. Supposing the lease and the partnership to have different terms of duration, he might, having clandestinely obtained a renewal of the lease, say to the other partners: "The premises, on which we carried on our trade, have become mine exclusively; and I am entitled to demand from you whatever terms I think fit, as the condition for permitting you to carry on that trade here."

Is it possible to permit one partner to take such an advantage? When the application was made for a renewal, no notice of dissolution had been given, nor had the plaintiff notice of any intention of renewing the lease. It is not true, as has been represented, that the impediment to a renewal of the partnership arose solely from the indisposition of Mr. Wilkinson to any connection with the plaintiff, as, before any objection had been made on that or any other ground, the first defendant goes with the intention, and for the direct purpose, of obtaining a renewal for himself and his son exclusively. He makes the application to Murray who says that the proposal was for a renewal for the benefit of the defendants, expressly excluding the plaintiff, with whom, it was represented, George Fenwick was determined to have no further connection in trade. Though it may be true that Wilkinson afterwards said he would not have granted a lease to the defendants jointly with the plaintiff,

that declaration had become quite unnecessary by the resolution, previously expressed by the defendant, not to take a lease jointly with him.

This clandestine conduct was very unfair towards the plaintiff. The defendants had not intimated to him that they would not have any further connection with him and that they intended to apply for a lease on their own account. They ought first to have given him notice and to have placed him on equal terms with them, and then, if Mr. Wilkinson had thought proper to give them the preference, the case might admit of a different consideration. Instead of that they clandestinely obtained an advantage which would enable them to dissolve the partnership on terms very unfavourable to the plaintiff, and they evidently had that object in view. If they can hold this lease and the partnership stock is not brought to sale, they are by no means on equal terms. The stock cannot be of equal value to the plaintiff who was to carry it away and seek some place in which to put it as to the defendants who were to continue it in the place where the trade was already established. If the stock was sold, the same circumstance would give them an advantage over other bidders. In effect they would have secured the goodwill of the trade to themselves in exclusion of their partner.

Does the circumstance that Wilkinson was unwilling to admit the plaintiff into the agreement for a renewal, make any difference. I think, it does not as it is no injury whatsoever to him, or any other of the trustees of Mr. Lambton, to declare the defendants trustees of this property for the plaintiff. There may be cases where the interest which a third party may have against the specific performance of an agreement, would preclude the execution of it, as between cestui que trust and trustee, as in *O'Herlihy* v. *Hedges* (11) before Lord Redesdale an insolvent tenant made over his lease to another person who treated with the landlord for a renewal to himself ostensibly, but under a secret agreement in trust for the original tenant. Lord Redesdale held, and very justly, that he would not execute that agreement as against the landlord, forcing upon him a tenant whom he never would have chosen, and one unable to execute the agreement into which the ostensible tenant had entered. Therefore, the principle that a trustee shall derive no benefit to himself from the trust should fail rather than be carried into execution against a third party not apprised of the secret engagement and imposed upon by the default of him who claimed as the cestui que trust, but Lord Redesdale said, if the farm had been occupied by the trustee, the court must have held him to be accountable for the profits, that, as between them there was no reason for not carrying the trust into execution; the interest of the landlord was the only impedient.

It is not necessary here to determine whether I would, or would not, have decreed Wilkinson specifically to perform the agreement for a lease in which the plaintiff was to be one of the tenants, but I have no difficulty in declaring that under the circumstances in which this new agreement was made, I can without injury to any third party decree that this lease must be considered as taken for the benefit of the partnership, and that it was therefore partnership property at the time of the dissolution. The effect will not be to consider it as partnership stock so as to entitle the plaintiff to all the profits that might be made during the continuance of the lease, as it is not stock employed and producing profit in the same sense as the other stock. If he is entitled to an allowance in respect of his share of these premises, it does not follow that I should hold him entitled to a share of all the concerns carried on there. I consider him as having an interest in the premises in which the trade was carried on to this extent only, that, in taking an account of the value of the partnership stock as it existed on Nov. 22, this lease is to be included in the estimate of value as part of the joint property.

Account directed of the partnership property upon Nov. 22, 1804, the renewed lease to be considered as partnership property; and to be sold; with a further inquiry whether there were any, and what, profits, made since Nov. 22, 1804, by means of the stock in trade and capital of the partnership business.

Ex parte PYE

Ex parte DUBOST

[Lord Chancellor's Court (Lord Eldon, L.C.), April 26, 29, May 27, June 13, 28, 1811]

[Reported 18 Ves. 140; 34 E.R. 271]

Portions—Double portions—Presumption against—Portion on marriage less than legacy and different in character—Position of a stranger.

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Notes. The reference by the Lord Chancellor to a smaller provision on marriage totally destroying a larger provision in the will is no longer the rule: see 14 Halsbury's Laws (3rd Edn.) 601, note (g). At the date of the present case the father of an illegitimate child was regarded as in the position of a stranger, but it is thought that today he would be presumed without evidence to be in loco parentis: see ibid., p. 602.

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Petitions in an administration action.

William Mowbray, by his will, dated April 10, 1806, giving his wife the residue of his property after payment of his debts except the sums after mentioned, among other legacies gave as follows:

"I give and bequeath the sum of £4,000 sterling to Louisa Hortensia Garos, daughter of John Louis Garos formerly of Berwick Street, Westminster: the like sum of £4,000 to Emily Garos, her sister, and £4,000 to Julia Garose, her other sister; and in case of the death of one of the three I desire that the legacy may be divided equally betwixt the two surviving sisters; and in case of the death of two of them I desire the whole £12,000 may be paid to the surviving sister."

The testator also gave to John Louis Garos £600; and

"to Marie Genevieve Garos his wife the sum of £2,500 sterling for her own use, and over which her husband is not to have any power: he having lived abroad for many years and she in this country; and no correspondence having passed between them during that time."

The testator died on June 8, 1809. His widow became a lunatic. The petitioner Pye was the committee under the commission, and upon her death took out administration to her and administration de bonis non to the testator. The Master's report stated from the examination of the petitioner Pye that Louisa Hortensia, Emily, and Julia Garos were the three natural daughters of the testator by Marie Genevieve Garos the wife of John Louis Garos, and that since the date of the will Louisa Hortensia Garos married Christopher Dubost. The testator advanced as a marriage portion for her, which by the settlement appeared to have been received by Christopher Dubost, the sum of £3,000, and, it being contended that the said sum of £3,000 ought to be considered as an advancement and in part satisfaction of the legacy of £4,000, and the whole legacy being claimed on the part of Christopher Dubost and his wife (who were both represented to be residing abroad), the Master did not allow the claim. As to the legacy of £2,500 to Marie Genevieve Garos the report stated from the same examination that since the date and execution of the will the testator caused an annuity to be purchased in France, to which country she had retired for her life, and laid out in such purchase £1,500. It being contended by the petitioner Pye that the said sum of £1,500 ought to be deducted from the legacy of £2,500 as being an advancement and in part satisfaction, and the whole legacy being claimed by the legatee, the Master had not allowed such claim, but left it open to the party to prosecute when in a situation to do so.

By a further report the Master found as to the French annuity that by a letter written by the testator to Christopher Dubost in Paris, on Nov. 25, 1807, the testator authorised him to purchase in France an annuity of £100 for the benefit of Marie Genevieve Garos for her life, and to draw on him for £1,500 on account of such purchase. Under that authority Dubost purchased an annuity of that value, but, as she was married at the time and also deranged the annuity was purchased in the name of the testator. The testator sent to Dubost by his desire a power of attorney authorising him to transfer to Marie Genevieve Garos the said annuity dated June 10, 1808. The report further found upon the affidavit of Dubost and the copy of the deed that the first intimation he received of the death of the testator, who died in June, 1809, was in November, 1809, and that in ignorance of such death Dubost on Oct. 21, 1809, exercised the power, vested in him, by executing to Marie Genevieve Garos, her late husband being then dead and she of sound mind, a deed of gift of the said annuity, and the Master found that by the law of France, if an attorney be ignorant of the death of the party who has given the power of attorney, whatever he has done while ignorant of such death is valid. The Master, therefore, stated his opinion that the annuity was no part of the personal estate of William Mowbray.

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annuity to be no part of the testator's personal estate might be set aside, and that it might be said that the said annuity was part of his personal estate. The other petition, by Dubost and his wife, prayed a transfer of £3 per cent. bank annuities in satisfaction of £1,000 of the legacy, and that so much of the bank annuities as would be sufficient to raise £3,177 3s. 6d., the residue of the said legacy and interest might be sold. An affidavit was offered by Dubost that upon the treaty of marriage the testator assured him that, independent of the £3,000, he had already bequeathed her £4,000, and Dubost might depend upon his not altering it. A letter was also produced to the testator from Dubost, previous to the marriage stating that he would not believe the information he had received that the testator, being asked whether he would remember the young ladies in his will, answered: "You cannot expect that ;" that he had said to Mrs. Dubost that he did not see why there should be a difference between the sisters; and asking if, according to the custom in France, he would give besides the portion of £100 to be laid out in jewels, etc. This letter was found after the testator's death among his papers.

Sir Arthur Piggott, *Richards*, *Wingfield*, *Horne* and *Wear* for different parties, in support of the first petition: The French annuity being purchased in the testator's name and no third person interposed as a trustee, the interest could not be transferred from him without certain acts which were not done at the time of his death. It was, therefore, competent to him during his life to change his purpose, and to make some other provision for this lady by funds in this country, conceiving, perhaps, that she might return here. The authority given to purchase this annuity could not have been enforced against him during his life by a person claiming as a volunteer, nor can it be established against his estate after his death: the act which would have given the benefit of it against the personal representative, not having been completed. Where a question is to be decided by a foreign law, the first step is an inquiry by the Master to ascertain, what is the law of that country.

With regard to the other petition and the objection to the letter offered as evidence, the circumstances resemble those of *Shudal* v. *Jekyll* (1) before Lord Hardwicke, *Powel* v. *Cleaver* (3) before Lord Thurlow, and *Trimmer* v. *Bayne* (2) before your Lordship, and the conclusion is that the evidence is admissible. Lord Hardwicke's opinion was that this rule as to satisfaction is not confined to the case of a parent. It is true it does not apply to a mere stranger, standing in no relation, natural or civil, either as a legitimate, adopted, or natural child, but it applies to any person, standing in loco parentis, equally as to the parent. The presumption was repelled in *Shudal* v. *Jekyll* (1) by the evidence, which was held to be admissible, and proved that the testator had no intention of limiting his bounty to the portion he had given on the plaintiff's marriage, declaring that he would leave her something by his will, but would not be put under any obligation to do it, the evidence, therefore, contradicting the supposed intention to substitute the portion for the legacy. *Powel* v. *Cleaver* (3) certainly had strong circumstances admitting argument, and Lord Thurlow, finding the legatee a mere stranger to the testator who, though, undoubtedly, he provided a portion for her on marriage, stood in no relation to her, and could not be considered as having taken upon him the character of parent, determined against her claim of a double provision. *Trimmer* v. *Bayne* (2) was the case of a provision for a natural daughter, which has been considered as a solid distinction, and your Lordship decided that case with great attention and upon a full review of the authorities. Upon the evidence it is impossible to deny the intention to make a provision at least for an adopted child, whom the testator had educated, and that there was an ulterior purpose in his mind. This is the same species of case as *Shudal* v. *Jekyll* (1) in which the provision by the will, accompanied with the declared intention of the testator to do something more for his niece, justified Lord Hardwicke's decision; and the same principle that governed that case and *Trimmer* v. *Bayne* (2), though

with a different effect, must be applied to this—the case of a person treated by the testator as a child, adopted and educated by him, standing upon the evidence of this letter in loco parentis and filiæ, having from the infancy of these children acted as their parent, and, therefore, as much within the rule as the actual relation of parent and child, and the circumstance that the legacy is given over upon the contingency from one child to another cannot prevent its application. The letter of Dubost, which is clearly evidence, is decisive. It is the letter of a person treating upon the subject of his proposed marriage with the testator as his wife's parent, and also as having made a provision for her by his will. The circumstance that this letter, which came out of the testator's papers after his death, had been kept by him, the settlement following immediately upon it, is remarkable. The Master's report, therefore, is right, and the second petition should be dismissed.

Sir Samuel Romilly and *Bell*, in support of the second petition: It cannot be disputed, that the advance of a portion by a parent on the marriage of his child is a satisfaction of a legacy, either the whole or part, and that, if the testator, though not the natural or legitimate father, has placed himself in loco parentis, the same consequence will follow. The difference consists in the application of that principle, and the question is whether the testator gave this legacy as to his child, which must be made out, otherwise the presumption of satisfaction cannot arise. In no case has the court proceeded on any other supposition than that the legacy was given to the legatee as a child. If a legacy was bequeathed to a child with whom the testator had then no connection, but afterwards married the mother, took that child as his adopted child, and gave it a portion as such, the legacy not being given in the same character, the portion would not be a satisfaction. The clear conclusion from all the authorities is that they must be given in the same character. In this case the legacy clearly is not given to the legatee as the child of the testator, and no evidence can be received to show that it was given to her in that character, the will containing an express statement, by way of description certainly, that she is the child of another man. The objection to the letter as evidence is that it is produced directly to contradict the will, which declares her to be the daughter of another. If, however, it can be received, the fair inference is that she was to have both the legacy and the portion. It is a letter from the proposed husband suggesting to the testator that he ought besides the portion to give this lady a legacy, and representing that he could not believe, as it was said, that he intended the contrary. The testator leaves the legacy standing, keeping the letter which must have drawn to his attention that besides the portion he had given her a legacy. The fair inference is that the letter had its effect, inducing him to make no alteration in the will, but to leave the legacy standing. How is that to be otherwise accounted for? Can it be conceived that this testator was acquainted with these decisions, and thence collected that upon this doctrine of satisfaction it was unnecessary for him to make the alteration? *Grave* v. *Earl of Salisbury* (4), the decision certainly turning upon particular circumstances, is material as showing Lord Thurlow's reluctance to extend this rule of which he evidently disapproved.

LORD ELDON, L.C.—I recollect that Lord Thurlow in *Grave* v. *Earl of Salisbury* (4), though the decision did not turn upon it, remarked that, as the law will not acknowledge the relation of a natural child, the doctrine of this court, on whatever principle founded, is that, if a portion is given to a child by will or a gift so constituted as to acknowledge the legal relation, and afterwards an advancement is made on marriage, that is prima facie an ademption of the whole, or pro tanto, but if the legacy is given to a person standing in the relation of a natural child to the testator and he afterwards gives that child a sum of money on marriage, the law does not admit the conclusion prima facie that the testator at the time of making the will recognised that relation. The natural child, therefore, is in so much better a situation that in his case the advancement

is not prima facie an ademption as it is in the case of a legitimate child, the effect of which is that the presumption is to be formed consistently with the motion that the testator has less affection for his legitimate child than even for a stranger as LORD THURLOW used to express it. His Lordship also made another observation of great weight that ought to check any disposition to carry this further—that, having raised the presumption from the fact, you beat it down by declarations which from the very nature of mankind deserve little credit, viz., what a man has done, or will do, by his will, how much shall stand, and how much shall not. Declarations generally intended to mislead, but the prima facie presumption was established beyond controversy.

The question is certainly of great consequence whether this class of cases does, or does not, require evidence that at the time the legacy was constituted the legatee, not standing in the relation of child to the testator, was regarded by him quasi in that relation, conceiving the purpose of placing himself in loco parentis, and, if it is necessary, that such a relation must then exist, it is very difficult to conclude that this particular case falls under that description. His purpose, whatever was his opinion with regard to these children, seems to have been that no one should consider him as standing in the place of father. His expressions seem particularly selected with the view to avoid the description of a portion, and to denote that, not he, but some other person, stood in the situation of parent.

In *Shudal* v. *Jekyll* (1), and the subsequent case before LORD THURLOW, upon the same principle holding that by such a declaration that he might leave something, but would not specify what or be bound, the legacy could not be partly cut down, a natural interpretation was that, taking £500 from the legacy and leaving £500, he did leave something more beyond what he had advanced, but LORD HARDWICKE correctly said he had no means of collecting what was that something more, and the will giving £1,000 was better evidence than any conjecture he could form. If this letter can be considered as fair evidence that he did not mean to disturb the will, and that this fortune, as it is called in the letter, should be an ademption of that fortune, the doctrine of *Shudal* v. *Jekyll* (1) must be applied to this case. This is a very important question, and I wish to read the cases, particularly *Trimmer* v. *Bayne* (2) on which occasion I gave the subject considerable attention.

The other question involves not only the construction of the French law and the point whether that has been sufficiently investigated, but, further, whether the power of attorney amounts here to a declaration of trust. It is clear that this court will not assist a volunteer, yet, if the act is completed, though voluntary, the court will act upon it. It has been decided that upon an agreement to transfer stock this court will not interpose, but if the party had declared himself to be the trustee of that stock, it becomes the property of the cestui que trust without more, and the court will act upon it.

June 13, 1811. **LORD ELDON, L.C.**—These petitions call for the decision of more importance and difficulty than I should wish to decide in this way if the case was not pressed upon the court. With regard to the French annuity, the Master has stated his opinion as to the French law perhaps without sufficient authority or sufficient inquiry into the effect of it as applicable to the precise circumstances of this case: but it is not necessary to pursue that as upon the documents before me it does appear that, though in one sense this may be represented as the testator's personal estate, yet he has committed to writing what seems to me a sufficient declaration that he held this part of the estate in trust for the annuitant.

The other question is one of great difficulty—whether a sum of money advanced upon the marriage of one of these young ladies when a settlement was executed is to be taken to be a satisfaction of a legacy, not given upon the face of the

A will as a portion, not given to a person stated upon the will to be an adopted child of the testator or described merely by name, but given to an individual, a stranger, described in the will as the child of another person who is designated as the father of that child. It not only does not appear that the testator represented himself as in loco parentis, but he has designated another individual as being the parent, and, therefore, according to Lord Thurlow's opinion in *Grave* v. *Earl of Salisbury* B (4) the testator has expressed himself in terms anxiously calculated to conceal the fact that he was the reputed father of that child if he was so.

Without going through all the cases that were cited, and those referred to in them, having compared *Shudal* v. *Jekyll* (1) with manuscript notes of that case, and looked into some other cases, one being *Watson* v. *Earl of Lincoln* (5), and some earlier, I may state as the unquestionable doctrine of the court that where C a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, the court understands him as giving a portion, and by a sort of artificial rule in the application of which legitimate children have been very harshly treated, upon an artificial notion that the father is paying a debt of nature, and a sort of feeling upon what is called a leaning against double portions, if the father afterwards advances a portion on the marriage of that child, though D of less amount, it is a satisfaction of the whole or in part. In some cases it has gone a length consistent with the principle, but showing the fallacy of much of the reasoning, that the portion, though much less than the legacy, has been held a satisfaction in some instances upon the ground that the father, owing what is called a debt of nature, is the judge of that provision by which he means to satisfy it, and though at the time of making the will he thought he could not E discharge that debt with less than £10,000, yet by a change of his circumstances and of his sentiments upon that moral obligation, it may be satisfied by the advance of a portion of £5,000. [But see note ante p. 96.]

The court seems in the older cases to have met with some difficulty in determining whether this rule should be confined to those who stood in the actual relation of parent and child, and it has accordingly been urged in argument, but not F supported by decision except where accounted for by evidence of declarations, that the court have said they did not mean to confine this doctrine to persons standing in that actual relation, but perhaps it might apply to a person placing himself in loco parentis, undertaking the care of an orphan, but what is to be the evidence of that, whether written evidence in the will and settlement, or the conduct observed at the marriage, or to be derived from mere declarations, is left so much G afloat, that there is considerable difficulty in making a judicial decision upon it.

In *Grave* v. *Earl of Salisbury* (4), the first case before Lord Thurlow, Lord Salisbury had several natural children to whom he had given legacies by his will, making afterwards a provision for them during his life not ejusdem generis, giving the living of Hatfield to one, a farm and stock to another, upon which the question arose. It was contended that this was a satisfaction, that he intended H by the legacy to make a provision, or, in other words, to discharge the obligation he owed to that child, and that he had the same intention in advancing the portion, and the farm and stock. Lord Thurlow felt the extreme hardship, as it is evidently that in the case of children whose relation, as such, the law recognises, the doctrine of presumption is that a subsequent advancement is a satisfaction of a legacy to such a child, but, as the law does not recognise the relation between I the putative father and illegitimate child as imposing this debt of nature, the father in that case stands as a stranger, and no such presumption arises where the subsequent advance is not proved to have been for the very purpose of satisfying the legacy, and, therefore, the legatee is entitled to both. Lord Thurlow directed a reference to the Master to inquire into the circumstances. The Master did not report the relation which the testator had to those children, and his Lordship, being pressed to send it back on that account, refused to do so, observing that the object might have been to conceal the circumstance of that

relation, and, therefore, the court would not make the inquiry, but, without deciding what would have been the case if that relation appeared, it was enough that it stood as the case of a stranger, and, therefore, the other provision was not a satisfaction. In *Powel* v. *Cleaver* (3), where the provision made was described as a portion, LORD THURLOW stated expressly that, if the legacy is given, not as a portion, by a stranger who advances money on the marriage of the legatee, denominating that advance a portion, that denomination will not have the same effect in the case of a stranger as it would in the case of parent and child. LORD THURLOW asserts that there is no authority contradicting that.

If that is right, it comes to this, that, where a father gives a legacy to a child, the legacy, coming from a father to his child, must be understood as a portion, though it is not so described in the will, and afterwards advancing a portion for that child, though there may be slight circumstances of difference between that advance and the portion and a difference in amount, yet the father will be intended to have the same purpose in each instance, and the advance is, therefore, an ademption of the legacy, but a stranger, giving a legacy, is understood as giving a bounty, not as paying a debt. He must, therefore, be proved to mean it as a portion or provision, either by its being shown on the face of the will, or, if it may be, and it seems that it may, shown by evidence applying directly to the gift proposed by that will. Recollecting how artificial the rules are, where a person has educated a child through life, considering himself as standing in the relation of putative father to that child, having a father acknowledged, describing that child as the child of a mother named and a father named, and also making a provision for that father and mother, it would be too much upon such a will to say that this is the case of a person meaning to pay, not what the court calls a debt of nature, but a debt he meant to contract, in other words, meaning to put himself in loco parentis in the situation of the person described as the lawful father of that child.

That brings the question to this, whether this advance of a portion of £3,000 is an ademption of the legacy between strangers on the ground that this subsequent advance is treated as a portion or fortune, and whether, the testator having given that legacy of £4,000 and afterwards giving to that legatee a portion on marriage, the mere circumstance of giving that as a portion or fortune is to be taken as evidence that, when the will was made, it was meant as paying a debt of nature, or whether it was not to be understood as in the first instance giving a bounty and in the other making an addition to that bounty. In this case, as in *Shudal* v. *Jekyll* (1), more was intended to be given, but in the case of a stranger no authority says that the advance of a less sum shall be an ademption of the whole. This letter, if it is to be admitted in evidence, shows how little such evidence can be trusted, as no one would have supposed upon the correspondence that the testator had such a will in his desk. Upon the authority of *Powel* v. *Cleaver* (3), unless you can show that at the time of making the will the testator meant to give a portion as parent, or as standing in loco parentis, and meant to satisfy that in the whole or in part by the subsequent advance, the court is not authorised by the artificial rules of equity to hold it a satisfaction.

I am not much impressed by the objection that he had not altered his will. The answer is that the subsequent advance operates a revocation, and, therefore, actual revocation was unnecessary, but it is too much to say upon such circumstances as are before me that this advance of £3,000 is an ademption of the legacy of £4,000 and the contingent interest, and, though I believe I am disappointing the actual intention and that this lady will get more than was intended, I am bound by the rule of the court to say that this is not a satisfaction.

Order accordingly.

MACKRETH *v.* SYMMONS

[Lord Chancellor's Court (Lord Eldon, L.C.), May 13, 14, 26, 1808]

[Reported 15 Ves. 329; 33 E.R. 778]

Lien—Vendor's lien—Lien on land for unpaid purchase-money—Receipt stated in conveyance—Persons bound by lien—Loss of lien—New security taken for the debt—Inference of intention not to rely on lien—Mortgage taken by vendor.

A vendor of land has an equitable lien on the land for the unpaid whole or part of the purchase-money, even though the consideration is expressed as having been paid on the face of the instrument and by a receipt endorsed on the back. This lien binds not only the purchaser and volunteers claiming under him, but also third persons who have had notice that the purchase-money has not been paid. The vendor may lose the lien if he takes some other security for the debt and from the nature of that security it can be inferred that he intended to rely no longer on the lien but on the new security. A mortgage, however, taken by the vendor from the purchaser is not to be regarded as decisive evidence of the vendor's intention to give up the lien.

Notes. Explained: *Re Lightoller, Ex parte Peake*, [1814–23] All E.R. Rep. 376. Distinguished: *Cood* v. *Cood and Pollard* (1822), 10 Price, 109. Referred to: *Cowell* v. *Simpson* (1809), 16 Ves. 275; *Winter* v. *Anson* (1827), 3 Russ. 488; *Selby* v. *Selby* (1828), 4 Russ. 336; *Clarke* v. *Royle* (1830), 3 Sim. 499; *Wythe* v. *Henniker* (1833), 2 My. & K. 635; *Buckland* v. *Pocknell* (1843), 13 Sim. 406; *Rice* v. *Rice* (1854), 2 Eq. Rep. 341; *Wythes* v. *Lee* (1855), 3 Drew. 396; *Dixon* v. *Gayfere* (1857), 1 De G. & J. 655; *Re Stucley, Stucley* v. *Kekewich*, [1904–7] All E.R. Rep. 281; *Lloyds Bank* v. *Swiss Bankverein, Union of London and Smiths Bank* v. *Swiss Bankverein* (1913), 108 L.T. 143.

As to equitable lien and its abandonment, see 24 Halsbury's Laws (3rd Edn.) 155 et seq., 171–173. For cases see 32 Digest (Repl.) 316 et seq., 350–353.

Cases referred to:

(1) *Chapman* v. *Tanner* (1684), 1 Vern. 267; 23 E.R. 461; 32 Digest (Repl.) 335, *641*.

(2) *Nairn* v. *Prowse* (1802), 6 Ves. 752; 31 E.R. 1291; 32 Digest (Repl.) 352, *744*.

(3) *Austen* v. *Halsey* (1801), 6 Ves. 475; 31 E.R. 1152, L.C.; 32 Digest (Repl.) 325, *563*.

(4) *Hughes* v. *Kearney* (1803), 1 Sch. & Lef. 132; 32 Digest (Repl.) 353; **955*.

(5) *Wigg* v. *Wigg* (1739), 1 Atk. 382; West temp. Hard. 677; 26 E.R. 244; sub nom. *Wig.* v. *Wig*, cited in 1 Ves. Sen. 137, L.C.; 48 Digest (Repl.) 290, *2564*.

(6) *Bond* v. *Kent* (1692), 2 Vern. 281; 1 Eq. Cas. Abr. 143; 23 E.R. 782; 32 Digest (Repl.) 352, *744*.

(7) *Pollexfen* v. *Moore* (1745), 3 Atk. 272; 26 E.R. 959; 40 Digest (Repl.) 194, *1568*.

(8) *Fawell* v. *Heelis* (1773), Amb. 724; 2 Dick. 485; 27 E.R. 468; sub nom. *Fowel* v. *Heelis*, 1 Bro. C.C. 422, n., L.C.; 32 Digest (Repl.) 352, *740*.

(9) *Blackburn* v. *Gregson* (1785), 1 Bro. C.C. 420; 1 Cox, Eq. Cas. 90; 28 E.R. 1215, L.C.; 32 Digest (Repl.) 352, *741*.

(10) *Trimmer* v. *Bayne* (1803), 9 Ves. 209; 32 E.R. 582; 32 Digest (Repl.) 329, *589*.

(11) *Smith* v. *Hibbard* (1789), 2 Dick. 730; 21 E.R. 455, L.C.; 40 Digest (Repl.) 223, *1819*.

(12) *Harrison* v. *Southcote and Moreland* (1751), 1 Atk. 528; 2 Ves. Sen. 389; 26 E.R. 333, L.C.; 44 Digest (Repl.) 322, *1531*.

(13) *Elliot* v. *Edwards* (1802), 3 Bos. & P. 181; 127 E.R. 100; 32 Digest (Repl.) 335, *636*.

(14) *Gibbons* v. *Baddall* (undated), 2 Eq. Cas. Abr. 682; 22 E.R. 575; 32 Digest (Repl.) 334, *634*.

(15) *Hearle* v. *Botelers* (1604), Cary, 25; 21 E.R. 14, L.C.; 32 Digest (Repl.) 334, *629*.

(16) *Coppin* v. *Coppin* (1725), Cas. temp. King, 28; 2 P. Wms. 291; 25 E.R. 204, L.C.; 23 Digest (Repl.) 385, *4557*.

(17) *Walker* v. *Preswick* (1755), 2 Ves. Sen. 622; 28 E.R. 396, L.C.; 32 Digest (Repl.) 334, *631*.

(18) *Burgess* v. *Wheate*, *A.-G.* v. *Wheate* (1759), 1 Eden, 177; 1 Wm. Bl. 123; 28 E.R. 652; 32 Digest (Repl.) 310, *501*.

(19) *Tardiff* v. *Scrughan* (1769), cited in 1 Bro. C.C. p. 423; 28 E.R. 1216; sub nom. *Fordiff* v. *Scrugham*, cited in Amb. at p. 725, L.C.; 32 Digest (Repl.) 332, *602*.

(20) *Powel* v. —— (circa 1766–1770), cited 15 Ves. at p. 349; cited sub nom. *Powel* v. *Brockway*, 1 Bro. C.C. at p. 422.

(21) *Beckett* v. *Cordley* (1784), 1 Bro. C.C. 353; 28 E.R. 1174; 35 Digest (Repl.) 512, *2004*.

Bill for a declaration that the plaintiff had a lien on certain property.

In 1783 and 1784 the plaintiff was indebted to John Manners in several sums amounting in the whole to £13,500, for which sums John Martindale, as surety, joined the plaintiff in bonds. In 1790 Martindale, having upon a settlement of accounts with the plaintiff in 1785 taken credit for payment to Manners of £3,000, undertook to discharge the remaining £10,500, and they settled an account accordingly. Other accounts were afterwards settled between them, the last in February, 1792, upon which a balance of £54,000 was due to Martindale including £10,393 17s. the value of annuities granted by the plaintiff against which Martindale agreed to indemnify the plaintiff in consideration of the plaintiff's agreeing to pay him the amount. A bond for £20,000 was given accordingly, and a mortgage in fee was executed by the plaintiff to Martindale for the balance of £54,000. By indentures of lease and release, dated Oct. 30 and 31, 1793, reciting an agreement by the plaintiff to sell to Martindale the reversion of the mortgaged estates which was valued at £60,000, composed of the principal and interest due upon the mortgage, those estates were conveyed to Henry Martindale and his heirs, to the use of the plaintiff for life, with remainder to John Martindale in fee. The bill further stated that John Martindale did not, according to his undertaking, pay the sum of £13,500 to Manners, nor the value of the annuities, which sum constituted part of the consideration for his purchase of the reversion of the estate. In September, 1797, a commission of bankruptcy issued against him, under which Manners's representatives proved the debt upon the bonds and received dividends, the plaintiff being obliged to pay the remainder of the debt on account of those bonds, being £14,128 3s. 9d. besides costs and several sums on account of the annuities.

John Martindale before his bankruptcy had contracted to execute a mortgage to the defendant of the reversion comprised in the indentures of 1793, and the plaintiff, claiming a lien upon the estate for the payments he had made in consequence of Martindale's failure to fulfil his engagements, gave notice to the assignees under the commission. In 1798 the defendant Symmons obtained a decree that the assignees should execute a mortgage of the reversion to him, expressly without prejudice to the plaintiff's claim, and he afterwards filed a bill of foreclosure against the assignees and obtained a decree, Mackreth not being a party to that suit. The legal estate was vested in Coutts, as a trustee under a conveyance by Mackreth and Martindale in 1793 to secure annuities of £2,000. The bill filed by Mackreth, prayed a declaration that he had a lien upon the

A reversion of the estates sold to Martindale, and mortgaged to Symmons for the payments he had been obliged to make, and those sums which he might hereafter pay in respect of the annuities, etc. The defendant Symmons by his answer denied that he had any notice, prior to his entering into the agreement with Martindale, that the plaintiff had not received full consideration, and submitted that he had no lien.

B *Sir Samuel Romilly* and *Wriottesley* for the plaintiff: The equitable lien of a vendor upon the estate sold for the purchase-money as against the vendee, and even though a bond was taken, is established by a great number of cases, from *Chapman* v. *Tanner* (1) to *Nairn* v. *Prowse* (2). In *Austen* v. *Halsey* (3) your Lordship considered it as clearly settled except where upon the contract evidently the lien by implication was not intended, and *Hughes* v. *Kearney* (4) is another C direct authority, LORD REDESDALE laying down as a very clear rule that in all cases the vendor has the lien and that it lies upon the purchaser to show a special agreement excluding it, that case being decided upon that ground. It cannot be admitted certainly against a purchaser for valuable consideration without notice, but this defendant has not that character, having merely an equitable agreement D for a security, not performed, when Martindale became a bankrupt, the plaintiff giving notice to the assignees, and the decree obtained by the defendant Symmons for a mortgage to him expressing that it was without prejudice to the claim of this plaintiff. A former debt is sufficient to sustain a purchase as for a valuable consideration, but it is necessary that a party taking a conveyance for such a consideration should not have had notice of the claim when he took the conveyance. E There are but two periods to which the point of notice can apply—(i) the time when the consideration was advanced; (ii) when the conveyance was executed, and even where a consideration has actually passed it is necessary to state in pleading that there was no notice at either period, otherwise the purchaser cannot protect himself: *Wigg* v. *Wigg* (5). In this case it is essential that there should not have been notice at the latter period before which notice is clearly established. F The estate was never properly out of the hands of the plaintiff. He had not taken a security carved out by himself which might preclude the equitable lien he once had, and, therefore, it still remains. From the nature of this transaction, the consideration being a former debt, no money actually passing, no such hardship can arise from enforcing the lien as in the case of a purchaser for valuable consideration actually paid in that transaction who is affected by notice. If, how- G ever, this defendant is to be considered as a purchaser for valuable consideration without notice so that the lien cannot prevail against him, the plaintiff is entitled to consider him as only a mortgagee, having contracted with Martindale, as against whom the lien is good, for a mortgage. The plaintiff, therefore, cannot be affected by the decree for a foreclosure obtained by this defendant, who, having notice of the plaintiff's claim, did not make him a party.

H *Richards*, *Alexander* and *William Agar* for the defendant: There is nothing in the circumstances of this case depriving this defendant of the protection due to a purchaser for valuable consideration without notice, his transaction with Martindale being perfectly fair, the vendor claiming a preference by way of lien for the purchase-money remaining unpaid as an equitable charge, prior in time, though he took the security of Martindale to that extent. Under such circum- I stances the lien has never been established, nor can the inference, necessary to maintain it, be collected either upon principle or authority. The general case of lien, as between vendor and vendee, is admitted where there is no special agreement, no security taken in respect of the purchase-money, but this equity has not been carried beyond that simple case of vendor and vendee. In *Chapman* v. *Tanner* (1) there was a special agreement. The title deeds were kept by the vendor, a deposit of the title deeds of itself amounting to an equitable charge. Other cases besides those which have been mentioned in which this point arose

either directly or incidentally are *Bond* v. *Kent* (6), the case of a mortgage of the purchased estate for part of the money, and a note for the remainder; *Pollexfen* v. *Moore* (7), a very perplexed case, often cited; *Fawell* v. *Heelis* (8); *Blackburn* v. *Gregson* (9), which is merely the opinion of LORD LOUGHBOROUGH who desired to have the point further considered; *Trimmer* v. *Bayne* (10). The result of all of them is that where a security is given there is no place for this equity, the purchaser certainly having to show that it does not exist. Here a bond was given by Martindale, the security stipulated between the parties, and, therefore, the lien, substituted by equity where there is no stipulation for a particular security, cannot be raised.

LORD ELDON, L.C.—Upon the special circumstances of this case I shall postpone my judgment, but I shall be very unwilling to leave some of the doctrine that has been brought into controversy with so much doubt upon it, as would be the consequence of deferring the judgment without taking some notice of it. The settled doctrine, notwithstanding *Fawell* v. *Heelis* (8), is, that, unless there are circumstances such as we have been reasoning upon where the vendor conveys, without more, though the consideration is upon the face of the instrument expressed to be paid, and by a receipt endorsed upon the back, if it is the simple case of a conveyance, the money or part of it not being paid as between the vendor and the vendee and persons, claiming as volunteers, upon the doctrine of this court, which, when it is settled, has the effect of contract, though, perhaps, no actual contract has taken place, a lien shall prevail, in the one case for the whole consideration; in the other, for that part of the money, which was not paid. I take that to have been the settled doctrine at the time of the decision of *Blackburn* v. *Gregson* (9), which case so far shook the authority of *Fawell* v. *Heelis* (8) as to relieve me from any apprehension that LORD BATHURST'S doctrine can be considered as affording the rule to be applied as between the vendor and vendee themselves and persons claiming under them.

There is a case, *Smith* v. *Hibbard* (11), which seems to decide this point. There is also another case, besides those which have been mentioned, showing the opinion of LORD HARDWICKE that the lien prevails: *Harrison* v. *Southcote and Moreland* (12), the case of a Papist vendor, for whom, LORD HARDWICKE says, the lien would not be raised as that would be giving an interest in land to a Papist, the specialty of that proving that the lien prevails in general cases. In *Elliot* v. *Edwards* (13) LORD ALVANLEY was very strong upon it. There was a covenant for payment of the money upon the first purchase and also an undertaking by a surety, strong circumstances to show that, as between the vendor and vendee, there was no intention to rely upon the lien. The point was not decided in that case, but LORD ALVANLEY lays down the doctrine, as I have stated it, that even in the hands of another person with notice the lien remains. In *Gibbons* v. *Baddall* (14) the lien was held to be clear against a second purchaser with notice. There is a very old case, *Hearle* v. *Botelers* (15), which I have heard cited as one of this class, but I have some doubt whether it is not a case of equitable interposition upon another ground. The circumstance leading me to that doubt is that there was a lost bond, and the modern doctrine of dispensing with profert [production of a document under seal to the court which a party to an action relied on in his pleadings: abolished by s. 55 of Common Law Procedure Act 1852] was not at that time known. The Lord Chancellor might, therefore, consider himself as having jurisdiction in that case to direct payment of the money due upon that bond out of the estate.

In *Austen* v. *Halsey* (3) what I stated upon this subject was not said without much consideration. I had not at that time, nor have I now, the least doubt that it is the doctrine. I have some doubt upon another point, taking the vendor to have the lien, whether the court will in case of the death of the vendee marshal the assets so as to throw the lien upon the purchased estate. It has often been said,

A and *Coppin* v. *Coppin* (16) stated as an authority, that the court will not do that. The Lord Chancellor in his judgment takes no notice of that point. In that case the vendor happened to be the heir of the vendee so that the estate was at home, and it was held that, being also the executor, he was entitled to retain the purchase-money out of the personal assets. That decision requires a good deal of consideration. If the estate had been in a third person, the general doctrine as to a person having two B funds to resort to might be thought to have an immediate application, and the express terms of the decree in *Pollexfen* v. *Moore* (7) might be found very inconsistent with it.

It is not, however, necessary to decide that point, as this is an equity that in ordinary cases will affect a purchaser. Upon principle, without authority, I cannot doubt that. It goes upon this, that a person, having got the estate of another, shall C not, as between them, keep it and not pay the consideration, and there is no doubt that a third person, having full knowledge, that the other got the estate without payment, cannot maintain that though a court of equity will not permit him to keep it, he may give it to another person without payment. It is not, however, necessary to discuss that upon general principles, as it has been repeatedly stated by authorities that ought at this time to bind upon that point.

D Another principle as matter of general law is involved in this case: what shall be sufficient to make a case in which the lien can be said not to exist. It has always struck me, considering this subject, that it would have been better at once to have held that the lien should exist in no case and the vendor should suffer the consequences of his want of caution, or to have laid down the rule the other way so distinctly that a purchaser might be able to know, without the judgment of a court, E in what cases it would, and in what it would not, exist. LORD BATHURST seems to have thought a note would put an end to it. Other judges, of very high authority, dissented from that, as appears by *Gibbons* v. *Baddall* (14) and *Hughes* v. *Kearney* (4). It does not necessarily follow from a written contract giving another remedy that the lien was intended not to exist. It is very difficult then to distinguish the case where a note, or bond is given for part of the money. In *Bond* v. *Kent* (6), F where the estate sold was mortgaged for part of the money and a note taken for the rest, there was strong negative evidence that the vendor was not intended to be a mortgagee for the rest. The case, put by SIR WILLIAM GRANT, M.R., in *Nairn* v. *Prowse* (2) (6 Ves. at p. 760), of a mortgage upon another estate, also afforded strong, perhaps not quite conclusive, evidence against the lien, considering the value of the mortgaged estate, in general much more than the amount of the money. G It does not, however, appear to me a violent conclusion as between vendor and vendee that notwithstanding a mortgage the lien should subsist. The principle has been carried this length—that the lien exists unless an intention, and a manifest intention, that it shall not exist, appears.

This case remains to be considered upon its own circumstances with reference H to the points I have stated. The questions are, first, supposing the lien would have existed as to the gross sum, the debt to Manners, and the annuities or their value, whether the circumstances of silence as to the debt and the indemnity taken against the annuities, which is very important, amount in equity to evidence of a manifest intention to abandon the lien. If they do, another very considerable point is whether, the lien having been abandoned, the plaintiff can set himself up I as a mortgagee claiming to redeem the defendant. If the lien is to be considered as not abandoned, the question will be, not whether a purchaser with notice would be affected by the lien, which, as general doctrine, I admit, but whether under the circumstances attending the contract with and conveyance to this defendant it shall prevail against him. Upon the particular circumstances the case must stand for judgment.

Nov. 26, 1808. **LORD ELDON, L.C.**, having stated the case very particularly, and observing that the legal estate in the premises was, before the assignees of

Martindale executed the agreement for a mortgage to Symmons, vested under a former conveyance by Mackreth in a trustee to secure annuities granted by him, pronounced the following judgment: This case, when it was argued, and since, has appeared to me to involve a question of very great importance with regard to which I am not able to find any rule which is satisfactory to my mind. If I had found, laid down in distinct and inflexible terms, that, where the vendor of an estate takes a security for the consideration, he has no lien, that would be satisfactory, as, when a rule so plain is once communicated, the vendor not taking an adequate security loses the lien by his own fault. If, on the other hand, a rule has prevailed, as it seems to be, that it is to depend, not upon the circumstance of taking a security, but upon the nature of the security, as amounting to evidence, as it is sometimes called, or to declaration plain, or manifest intention—the expressions used upon other occasions—of a purpose to rely, not any longer upon the estate, but upon the personal credit of the individual, it is obvious that a purchaser taking a security, unless by evidence, manifest intention, or declaration plain, he shows his purpose, cannot know the situation in which he stands without the judgment of a court how far that security does contain the evidence, manifest intention, or declaration plain, upon that point. That observation is justified by a review of the authorities from which it is clear that different judges would have determined the same case differently, and, if some of the cases that have been determined had come before me, I should not have been satisfied that the conclusion was right.

This bill insists upon a lien, in respect of these annuities, to be paid all that the plaintiff himself has paid, and either as to the original value, or the present value, or the future payments. I state that claim in these different terms as, to determine what is the lien it is necessary to point out the amount of it and how it is to be calculated. Some doubt was thrown in the argument upon the question of lien between the vendor and vendee, but it was not carried far, and it is too late to raise a doubt upon it, but it is insisted that the lien does not prevail against third persons even with notice of the situation of the vendor and vendee. It may be of use to state the cases upon this subject in the order of time.

The earliest case, not very applicable, is *Hearle* v. *Botelers* (15) in Cary's Reports of Chancery Cases, 25, and most of the Abridgments which imperfectly collect the authorities upon this head. According to my own understanding that case is to be classed rather among those of relief in equity upon a security that has been lost than under this head, but the fact of its existence is a circumstance of evidence that this doctrine has obtained in professional practice.

There is no other case between that and *Chapman* v. *Tanner* (1) which is very imperfectly reported, and its authority is weakened by the observation in subsequent cases that there was a special agreement that the vendor should keep the writings, and it is stated as a fact that he had not taken any security. Taking it to be a decision in favour of the lien under those circumstances, the declaration of the court as to what was the natural equity, shows strongly how the law upon this subject was understood. That case, therefore, has considerable weight. The doctrine is probably derived from the Civil Law as to goods, which goes further than our law, by which, though the right of stoppage in transitu is founded upon natural justice and equity, yet, if possession, either actual or constructive, was taken by the vendee, the lien is gone. That is not so by the Civil Law. The Digest states (lib. 18, tit. 1, l. 19):

> "Quod vendidi non aliter fit accipientis quam si aut pretium nobis solutum sit, aut satis eo nomine factum, vel etiam fidem habuerimus emptori sine ullâ satisfactione;"

which points at this article of security, but with those excepted cases the lien according to the Civil Law is so strong that the goods may be taken out of the possession of the individual who had obtained actual or constructive possession of them.

A The next case is *Bond* v. *Kent* (6), the circumstances of which are special—a mortgage for part of the money and a note for the residue. It was urged with considerable, perhaps not conclusive, weight that the express charge of a part gave a ground for the inference that a lien for the residue was not intended. The case, however, goes to prove that in equity this lien was supposed to exist, amounting to an admission that without those special circumstances there would have been a lien.

B The next case is *Coppin* v. *Coppin* (16) where the doctrine of *Pollexfen* v. *Moore* (7), as to marshalling, was practically, though I doubt whether it ought to have been, admitted. I should mention *Gibbons* v. *Baddall* (14), where it is expressly stated that the lien remained though a note was given for part of the purchase-money, but I cannot ascertain the date of that decision. In *Pollexfen* v. *Moore* (7) LORD HARDWICKE affirms the lien of the vendor upon the estate for the remainder

C of the purchase-money, considering the vendee from the time of the agreement a trustee as to the money for the vendor, but adds that "this equity will not extend to a third person." If from that it is to be understood that this equity would not extend to a third person who had notice that the money was not paid, LORD HARDWICK'S subsequent decisions contradict that, if the meaning is that he would

D follow *Coppin* v. *Coppin* (16), and that, if the vendor exhausted the personal assets, the legatee of the purchaser should not come upon the estate, there is great difficulty in applying the principle, as it would then be in the power of the vendor to administer the assets as he pleases, having a lien upon the real estate to exhaust the personal assets and disappoint all the creditors, who, if he had resorted to his lien, would have been satisfied, and in that respect, with reference to the principle,

E the case is anomalous.

The next case in which the doctrine was admitted is *Harrison* v. *Southcote and Moreland* (12), followed by *Walker* v. *Preswick* (17), which case, it is remarkable, was not cited in *Fawell* v. *Heelis* (8); and in *Burgess* v. *Wheate* (18) SIR THOMAS CLARKE, M.R., lays down the rule both as to vendor and vendee thus (1 Wm. Bl. at p. 150):

F

> "Where conveyance is made prematurely, before money paid, the money is considered as a lien on that estate in the hands of the vendee: so, where money was paid prematurely the money would be considered as a lien on the estate in the hands of the vendor for the personal representative of the purchaser."

Tardiff v. *Scrughan* (19) is very material upon this point, as it is represented in *Blackburn* v. *Gregson* (9) as a case in which the lien was held to attach upon the

G two moieties of the estate, but it has been also considered [in *Fawell* v. *Heelis* (8)] a case, whether of lien upon the land or not, for contribution upon the circumstances between the sisters, giving the one sister a right to call upon the husband of the other to pay a moiety of the annuity. In another case also, *Powel* v. —— (20), whether accurate or not I cannot trace, LORD CAMDEN determined in favour of

H the lien.

In *Fawell* v. *Heelis* (8) LORD BATHURST'S opinion certainly was, for reasons best stated in *Nairn* v. *Prowse* (2) by SIR SAMUEL ROMILLY, that the bonds taken by the vendor furnished evidence that credit was not given to the land, and, therefore, there was no lien. In *Beckett* v. *Cordley* (21) LORD THURLOW says it was compared to the case of a person selling an estate and not receiving the money, and, therefore,

I there was a lien, asserting the general doctrine as familiar, but distinguishing that case upon the nature of the transaction, younger children joining the eldest in a mortgage discharging the estate from their portions, and by their consent the whole money being paid to the eldest son, the lien being discharged by that transaction.

In the argument of *Blackburn* v. *Gregson* (9) LORD KENYON took the doctrine to be perfectly clear, and it is not possible to state a stronger judicial opinion than LORD LOUGHBOROUGH expressed that the lien does exist, though it is not a decision. In *Smith* v. *Hibbard* (11) it was insisted that the delivery of possession upon payment of a small part of the money was evidence that he meant to trust to the

personal security, but it was held clear that the money, contracted to be paid, was a specific lien upon the premises. The contract for payment of the money is itself in a sense a security full as good as a note. I do not state as an authority what appears upon this subject in *Austen* v. *Halsey* (3), as it is a mere dictum, and a dictum that fell from me, but, endeavouring to state this doctrine as accurately as I could, I see I expressed it in these words (6 Ves. at p. 483):

> "That the vendor has a lien for the purchase-money, while the estate is in the hands of the vendee. I except the case, where upon the contract evidently that lien by implication was not intended to be reserved."

In *Elliot* v. *Edwards* (13) this is the doctrine of Lord Alvanley, a very experienced judge in equity, with reference to whom I may say that his judgments will be read and valued as producing great information and instruction to those who may practise in courts of equity in future times. He there states that, if a man, having purchased an estate, conveys it before the purchase-money has been paid, a court of equity will compel the person to whom the estate was conveyed, to pay that money, provided he knew at the time he took the conveyance, that it had not been paid.

The next case in equity is *Nairn* v. *Prowse* (2), before the Master of the Rolls, in which it was contended that there was no lien, the vendor had taken a security for the money payable at a future time, and during the interval the vendee might have sold the stock. The Master of the Rolls in his judgment, admitting the general doctrine as to the vendor's lien, observes upon the question whether a security taken will be a waiver that by conveying the estate without payment a degree of credit is given to the vendee which may be given upon the confidence of the existence of such a lien, and it may be argued that taking a note or a bond cannot materially vary the case: a credit is still given to him, and may be given from the same motive, not to supersede the lien but for the purpose of ascertaining the debt and countervailing the receipt endorsed upon the conveyance. There is great difficulty to conceive how it should have been reasoned almost in any case that the circumstance of taking a security was evidence that the lien was given up as in most cases there is a contract under seal for payment of the money. The Master of the Rolls, having before observed that there may be a security which will have the effect of a waiver, proceeds to express his opinion that, if the security be totally distinct and independent, it will then become a case of substitution for the lien instead of a credit given on account of the lien, meaning that, not a security, but the nature of the security, may amount to satisfactory evidence, that a lien was not intended to be reserved; and he puts the case of a mortgage of another estate or any other pledge as evidence of an intention that the estate sold shall remain free and unencumbered. It must not, however, be understood that a mortgage taken is to be considered as a conclusive ground for the inference that a lien was not intended as I could put many instances that a mortgage of another estate for the purchase-money would not be decisive evidence of an intention to give up the lien, though in the ordinary case a man has always greater security for his money upon a mortgage than value for his money upon a purchase, and the question must be whether under the circumstances of that particular case, attending to the worth of that very mortgage, the inference arises. In the instance of a pledge of stock does it necessarily follow that the vendor, consulting the convenience of the purchaser by permitting him to have the chance of the benefit, therefore, gives up the lien which he has? Under all the circumstances of that case the judgment of the Master of the Rolls was satisfied that the conclusion did follow, but the doctrine as to taking a mortgage or a pledge would be carried too far if it is understood as applicable to all cases that a man taking one pledge, therefore, necessarily gives up another, which must, I think, be laid down upon the circumstances of each case rather than universally.

A In *Hughes* v. *Kearney* (4) LORD REDESDALE states the doctrine, and the proposition is, not merely that the vendor might have security, but that he relied upon it, and a note or bills are considered, not as a security, but as a mode of payment.

From all these authorities the inference is, first, that, generally speaking, there is such a lien; secondly, that in those general cases in which there would be the lien, as between vendor and vendee, the vendor will have the lien against a third B person who had notice, that the money was not paid. Those two points seem to be clearly settled. I do not hesitate to say that, if I had found no authority that the lien would attach upon a third person having notice, I should have had no difficulty in deciding that upon principle, as I cannot perceive the difference between this species of lien and other equities by which third persons, having notice, are bound. In the case of a conveyance to B., the money being paid by A., B. is a trustee, and C C. taking from him, and having notice of the payment by A., would also be a trustee. Many other instances may be put. The more modern authorities upon this subject have brought it to this inconvenient state, that the question is not a dry question upon the fact whether a security was taken, but it depends upon the circumstances of each case, whether the court is to infer that the lien was intended to be reserved or that credit was given, and exclusively given to the person from D whom the other security was taken.

In this case having, as other judges have had, to determine this question of intention upon circumstances, I may mistake the fair result of the circumstances which I have endeavoured to recollect. I must say I have felt from the first that there is upon the part of the plaintiff that natural justice and equity which excite a wish E that I could enforce the lien throughout, but, first, as to the annuities, I am persuaded that, with reference to that part of the case involving the question of lien as to the consideration, or any part of it, or any sum of money, the quantum of which is to be estimated with reference to the present value, or the past or future payments, this is a case in which the plaintiff intended to rely entirely upon the personal security, the bond for £20,000, and that was the conception of Martindale also, by whose default of payment, therefore, the estate is not now subject to the F lien in respect of the consideration of the annuities, or any allowance in respect of it. See, how it stands. In 1790 the plaintiff, as principal, and Martindale, as surety, being engaged in an obligation, which I understand to be a personal one, for these annuities, agree to change situations, Martindale to be the principal and the plaintiff to be surety in consideration of which the plaintiff agrees to give £9,000 secured by a mortgage. It rests upon that until 1793 when the transaction G takes this course, that Martindale shall be no longer a mortgagee, but owner of the reversion in fee, and, which is material, of the reversion expectant upon the plaintiff's life estate. The annuities remain upon the old footing, that is, some payments were made or arrears accrued between 1792 and 1793, and payments were to arise from time to time. The value, given to Martindale in 1792 by the mortgage of £9,000 for taking the liability upon himself, was a value which merely H by the lapse of time between 1792 and 1793 must have varied. If the annuities had been paid, there must have been a difference in the estimation, also de anno in annum the value was decreasing, not only, as the annuities were wearing out, but also as the number of the annuitants was decreasing by death. It is impossible, it is not natural, to suppose that parties dealing for the consideration of annuities and the purchase of a reversion which might not take effect in possession I until all the annuitants were dead relied on that reversion as security in addition to the indemnity by the bond for £20,000, in the original transaction the estate being pledged for the sum of £9,000, as if actually paid.

As to the lien, for what is it? Is it for the original sum? That it cannot in justice be. Is it for future payments, that, one sum being paid, it does not attach, another sum not being paid, it does attach, a charge upon the reversion arising from time to time accordingly as these payments are or are not made, and is that inference to be drawn where a conveyance was executed without the least notice

of such an intention, a security taken, not of itself sufficient to exclude the purpose of such a lien, but the nature of the subject, connected with the fact of that security taken, is decisive proof against such an intention, and it appears accordingly in another cause, *Symmons* v. *Rankin*, that Mackreth and Martindale joined in the conveyance to Coutts, to secure an annuity of £2,000 without the least reference to such intention. A

I admit that the opinion of LORD LOUGHBOROUGH in *Blackburn* v. *Gregson* (9), that *Tardiff* v. *Scrughan* (19), before LORD CAMDEN, went upon the ground of lien, is an authority very considerably against my opinion, and I cannot say upon what the case did proceed if upon that ground as the estate, given by the wife to her husband for his life after her own death, if not affected by the lien, could not be bound to pay the annuity. If that case is accurately represented, LORD CAMDEN'S opinion seems to have been that the mere circumstance of an estate given in consideration of an annuity with a bond would not prevent the lien attaching from time to time, and, so understanding it, I cannot bring my mind to the conclusion that it is an authority which ought to lead me to determine that with reference to these annuities there is a lien, either for the original value, the present value, or the future payments, which may, or may not, become due. B C

As to the other part of the case, I have considered long, whether the conclusion is just that, not meaning to have a lien, as I think this party did not, with regard to the annuities, he should mean to have a lien as to the sum of money, due to Manners. My individual opinion is that the intention was the same as to both, but with regard to the latter the cases authorise the lien unless it is destroyed by particular circumstances which do not exist here. That sum is precisely in the condition of a part of the consideration, not paid, and then the inference in equity, unless there are strong circumstances, getting over it, is that a lien was intended. This comes very near the doctrine of SIR THOMAS CLARKE, M.R., in *Burgess* v. *Wheate* (18), which is very sensible, that where the conveyance or the payment has been made by surprise there shall be a lien. This plaintiff understood at the time of the conveyance that this money was to be paid on his account to Manners, which is the same as if it was to have been paid to himself, and was not paid, and then the only question is whether, as from the special circumstances as to the value and nature of the annuities I am to infer that a lien was not intended as to them, I must make the same inference with respect to this gross sum, as to which, if the annuities were not mixed with the transaction, the doctrine of equity is that the lien would attach. As to that sum my judgment is that the plaintiff has a lien. D E F G

It is contended that there are other circumstances in this case—that the defendant Symmons has a conveyance of the estate without notice, or rather a contract, as he had notice at the time of the conveyance. It is not necessary to go into the doctrine as to the effect of notice at the time of the contract or at the time of payment of the money, though there is no doubt the defendant, when he took his conveyance, had notice from the recitals in his title deeds of Mackreth's rights and Martindale's obligations as vendor and vendee. Neither is it necessary to go into the consideration of another argument, that the defendant's money was not originally lent upon the faith of land. There is a great difference between the effect of a judgment as attaching upon the land and a special agreement by a creditor for a security upon the land. It is not, however, necessary to determine such questions as neither the plaintiff nor the defendant Symmons has the legal estate; which appears in the other cause, *Symmons* v. *Rankin*, to be in Coutts, under the conveyance of 1793, in which Martindale and Mackreth joined, and then between equities the rule: "Qui prior est tempore potior est jure," applies. H I

Bill dismissed as it regarded the annuities, but right as to the other part of the claim. Decree without costs.

A

GILES AND ANOTHER *v.* PERKINS

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), November 7, 1807]

[Reported 9 East, 12; 103 E.R. 477]

B *Bank—Lien—Banker's lien—Bills of exchange—Bills not yet due—Customer's account in credit.*

The plaintiffs kept a banking account with D. & Co., who were bankers in Birmingham. The plaintiffs endorsed and paid into the bank three bills of exchange which were not due for one or two months, and, before they became due, D. & Co. became bankrupt. At the date of the bankruptcy there was C a considerable balance due to the plaintiffs on their cash and bills due account independently of the three bills. It was the practice of D. & Co. and other country bankers to enter approved undue bills, if they had not a long time to run, in a gross sum with cash to the credit of the customer, giving him either cash or liberty to draw on them to that amount. The bankers would, D as convenience required, pay them away to other customers or transmit them to their own agents in London. Interest was charged on both sides of the account on such transactions. London bankers did not carry undue bills to the credit of the customer, but entered them short. The assignees of the bankrupts received the proceeds of the bills.

E **Held:** the assignees were liable to refund the proceeds of the bills to the plaintiffs because the bankers could not have a lien on the bills until the plaintiffs' account was overdrawn.

Notes. Distinguished: *Carstairs* v. *Bates* (1812), 3 Camp. 301. Extended: *Thompson* v. *Giles* (1824), 2 B. & C. 422. Considered: *Re Dilworth, Ex parte Benson* (1832), Mont. & B. 120. Applied: *Gaden* v. *Newfoundland Savings Bank*, [1899] A.C. 281; *Dawson* v. *Isle*, [1906] 1 Ch. 633. Referred to: *Re Boldero, Ex parte Pease* (1812), 1 Rose, 232; *Torrens* v. *I.R. Comrs.* (1933), 18 Tax Cas. 262. F

As to collection of short bills, see 2 Halsbury's Laws (3rd Edn.) 186, 187; and for cases see 3 Digest (Repl.) 228 et seq.

Case referred to in argument:

Bent v. *Puller* (1794), 5 Term Rep. 494.

Motion by the defendants for a new trial in an action for money had and received. G

Dickinson & Co. were bankers at Birmingham with whom the plaintiffs had opened a banking account in 1804, which was continued down to Nov. 18, 1805, when Dickinson & Co. stopped payment and became bankrupts. On Nov. 12, 1805, the plaintiffs paid into the bank three bills to the amount of above £1,100, which were endorsed by them but were not due till December and January following; H and at the time of the bankruptcy there was a considerable balance due to the plaintiffs on their cash and bills (due) account independently of the three bills in question. It was stated to be the practice of this and other banking houses in the country that, when bills which were approved were brought to them by a customer, though the bills were not then due, if they had not a long time to run they would enter them in a gross sum with cash or paper which was immediately I payable to the credit of the customer, giving him either cash or liberty to draw on them to that amount. The bankers so far considered those running bills (which were always endorsed by the customer) as their own, that they would, as convenience required, pay them away to other customers in the usual course of business or transmit them to their own correspondents in London, and interest was charged on both sides the account on such paper transactions. If the interest account turned out to be against the customer, the bankers also charged a certain commission. That practice differed in this respect from the practice of bankers in London, who, on the receipt of undue bills from a customer, did not carry

the amount directly to his credit, but entered them short, as it was called, that is, noted down the receipt of the bills in his account, with the amount, and the times when due, in a previous column of the same page, which sums, when received, were carried forwards into the usual cash column. The assignees of the bankrupts, considering that the three bills in question had been entered in the bank books in common with cash and that, by the usual mode of dealing, the plaintiffs might have drawn for the amount before the bills were due, refused to deliver them up to the plaintiffs on demand; and as they became due the assignees received the money from the acceptors to the credit of the bankrupts' estate.

The plaintiffs brought an action for money had and received, and the question was whether they were entitled to receive back those bills in specie from the bankrupts at the time of their bankruptcy, the same not being then due though endorsed by them and the balance of the cash account being in favour of the plaintiffs, or whether they were only entitled to come in as creditors under the commission for the whole amount of their banking account. LORD ELLENBOROUGH, C.J., was of opinion that the plaintiffs were entitled to recover, and they accordingly obtained a verdict for the amount of the bills.

Garrow and *Richardson* for the defendants, moved for a new trial.

LORD ELLENBOROUGH, C.J.—Every man who pays bills not then due into the hands of his banker places them there, as in the hands of his agent, to obtain payment of them when due. If the banker discount the bill, or advance money on the credit of it, that alters the case; he then acquires the entire property in it, or has a lien on it pro tanto for his advance. The only difference between the practice stated of London and country bankers in this respect is that the former, if overdrawn, has a lien on the bill deposited with him, though not endorsed; whereas the country banker who always takes the bill endorsed has not only a lien on it, if his account be overdrawn, but has also his legal remedy on the bill by the endorsement. But neither of them can have any lien on such bills until their account be overdrawn; and here the balance of the cash account at the time of the bankruptcy was in favour of the plaintiffs.

GROSE, LAWRENCE and **LE BLANC, JJ.,** concurred.

Rule refused.

A

M'QUEEN *v.* FARQUHAR

[Lord Chancellor's Court (Lord Eldon, L.C.), August 8, 12, 17, 21, 1805]

[Reported 11 Ves. 467; 32 E.R. 1168]

B *Power of Appointment—Fraud on power—Avoidance of power—Need to prove corrupt purpose—Insufficiency of evidence of suspicion or possibility of improper motives—Waiver of objection.*

To avoid an appointment under a power the party making objection must prove a corrupt purpose and not merely a suspicion or possibility of improper motives by or benefit to the appointor. An objection cannot be waived by a party participating in the benefit as against other interests.

C Accordingly, the court would not act against a title upon a mere suspicion that a transaction was of that nature, it appearing fair both upon the instruments and the abstract, namely, a purchase under the execution of a power of appointment by a father subject to estates for life in him and his wife, in favour of their son, all three joining and receiving the money, the fair value, which was presumed to be received according to their interests in the estate.

D **Notes.** Distinguished: *Hall* v. *Montague* (1830), 8 L.J.O.S. 167. Applied: *Butcher* v. *Jackson* (1845), 14 Sim. 444; *Cockroft* v. *Sutcliffe* (1856), 25 L.J.Ch. 313. Considered: *Henty* v. *Wrey* (1882), 21 Ch.D. 332. Referred to: *Wright* v. *Wakeford* (1811), 17 Ves. 454; *A.-G.* v. *Hamilton* (1816), 1 Madd. 214; *Moodie* v. *Reid* (1816), 1 Madd. 516; *Hougham* v. *Sandys* (1827), 2 Sim. 95; *Allen* v. *Bradshaw* (1835), 1 Curt. 110; *Green* v. *Pulsford* (1839), 2 Beav. 70; *Campbell* v. *Home* (1842), 1 Y. & C. Ch. Cas. 664; *Burdett* v. *Spilsbury, Skynner* v. *Spilsbury* (1843), 10 Cl. & Fin. 340; *Warren* v. *Postlethwaite* (1845), 2 Coll. 108; *Doe d. Knight* v. *Spencer, Same* v. *Sansum* (1848), 2 Exch. 752; *Vincent* v. *Bishop of Sodor and Man* (1849), 8 C.B. 905; *Brassey* v. *Chalmers* (1852), 16 Beav. 223; *Domville* v. *Lamb* (1853), 1 W.R. 246; *Baker* v. *Bradley* (1855), 2 Jur. N.S. 98; *Wellesley* v. *Mornington* (1855), 2 K. & J. 143; *Bradshaw* v. *Fane* (1856), 25 L.J.Ch. 413; *Wasde* v. *Dixon* (1858), 28 L.J.Ch. 315; *Re Rickett's Trust* (1860), 2 L.T. 320; *Re Huish's Charity* (1870), L.R. 10 Eq. 5; *Re Frith and Osborne* (1876), 3 Ch.D. 618; *Cloutte* v. *Storey*, [1911] 1 Ch. 18.

E

As to fraud on a power, see 30 Halsbury's Laws (3rd Edn.) 275–281; and for cases see 37 Digest (Repl.) 375 et seq.

F

G Cases referred to:

(1) *Abel* v. *Heathcote* (1793), 2 Ves. 98; 4 Bro. C.C. 278; 30 E.R. 542, L.C.; 36 Digest (Repl.) 411, *34*.

(2) *Lord Hinchinbroke* v. *Seymour* (1789), 1 Bro. C.C. 395; 28 E.R. 1200; sub nom. *Lord Sandwich's Case*, cited 11 Ves. at p. 479, L.C.; 37 Digest (Repl.) 378, *1124*.

H (3) *Shapland* v. *Smith* (1780), 1 Bro. C.C. 75; 28 E.R. 994, L.C.; 44 Digest (Repl.) 174, *593*.

(4) *Cox* v. *Chamberlain* (1799), 4 Ves. 631; 31 E.R. 325; 37 Digest (Repl.) 325, *718*.

I **Bill** praying the specific performance of an agreement for the sale of the estate of High Cannons, Herts, by the plaintiff to the defendant, for £14,175. This claim was resisted upon different objections to the title, the plaintiff also insisting that all objection was waived by the defendant having immediately after the sale attempted to re-sell the estate by auction, at which sale it was bought in, and thereby a future sale was prejudiced. By a decree pronounced at the Rolls a reference to the Master as to the title was directed. The Master's report was in favour of the title, except as to a small part, a little exceeding six acres. As to this part the report stated that it was not material to the possession and enjoyment of the estate, and that £500 would be a proper compensation in respect of it.

Exceptions were taken by the defendant to the report as stating that a good title could be made to all the estate except the six acres, and, that the six acres were not material to the possession and enjoyment; and by the plaintiff as the report stated that he could not make a good title to the six acres. The objections to the title as to the principal part of the estate stood upon the following instruments and circumstances. A

By indentures dated July 8, 1747, the manor and estate of Cannons were settled to the use of William Abney, for life, without impeachment of waste, remainder to the use of Catherine his wife for life in the same manner, remainder to trustees to preserve contingent remainders, remainder to the use of all and every or such one or more of the children of William and Catherine Abney, and in such parts and proportions, manner and form, and subject to such charge or charges for the benefit of any such child or children, and with or without power of revocation, as William Abney by any deed or deeds, writing or writings, to be by him signed and sealed in the presence of two or more witnesses, or by his last will and testament, attested by three or more credible witnesses, should direct or appoint, and, until such direction or appointment, to the use of all and every the children, equally to be divided between them, share and share alike, as tenants in common and not as joint-tenants, and the several and respective heirs of their bodies, with survivorship, if one or more die without issue, and for want of such issue, to the use of the heirs of the body of Catherine, remainder to the heirs and assigns of William Abney. This deed contained a proviso that it should be lawful for Abney and his wife during their joint lives, and for the survivor, by any deed or deeds, writing or writings, to be by them or the survivor sealed and delivered in the presence of two or more credible witnesses, to revoke and make void all and every the uses and estates before limited, and to limit to two trustees upon trust that they should with all convenient speed after creating such trust by direction of Abney and his wife or the survivor, in writing, sell and convey the premises, and upon further trust that the trustees should with all convenient speed by direction of Abney and his wife or the survivor, or the executors or administrators of the survivor, lay out the money to be raised by such sale in the purchase of freehold estates, and settle the same to the same uses, or such as shall be capable of taking effect (except the power of revocation and trust to sell) and until the purchase with consent, etc., to lay out the money upon real or government securities. The deed contained another power for Abney and his wife, or the survivor, by any deed or deeds, writing or writings by them or the survivor, signed and sealed in the presence of two or more credible witnesses, to revoke or alter all or any of the said uses before limited of the premises or any part thereof, and by the same deed or deeds, etc., or any other, to declare any new or other uses of the same, or so much whereof such revocation or alteration shall be made, as they or the survivor shall think fit. B C D E F G

By indentures dated Mar. 3, 1748, Abney and his wife under the powers limited to them revoked all the uses, and appointed all the premises to the same uses, except the last power to revoke the uses, and limit new uses. By indentures dated July 15, 1771, reciting the above instruments, and that William Abney and his wife had Robert their eldest son, and five other children, it was declared, that in consideration of natural love and affection, which William Abney had for Robert Abney, his eldest son and heir apparent, and in performance of a promise and agreement made by the said William Abney unto and with the said Robert Abney, and for other good causes and considerations, William Abney by force of all and every or any of the powers limited to him, did by the said deed by him signed, sealed and executed, in the presence of three credible witnesses, declare, direct, settle, limit, and appoint, all the said manor of Cannons, etc., from the determination of the estates for life limited to him and his wife and the survivor, and, subject thereto, unto and to the use of Robert Abney, his heirs and assigns for ever. H I

By indentures of lease and release dated Aug. 30 and 31, 1771, reciting the above deeds and an agreement for a sale, it was witnessed that in consideration of £8,000 paid to William Abney and Catherine his wife, and Robert Abney, by Robert Cotton Trefusis, William and Catherine Abney did grant, bargain, sell, release, direct, limit, and appoint, and Robert Abney did grant, bargain, sell, release, ratify and confirm, unto Trefusis and his heirs, the manor of Cannons, etc., to the use of Trefusis, his heirs and assigns, with covenant to levy a fine which was levied accordingly.

The objection to the title as to the six acres arose in this way. Honorat Smith by his will devised one moiety of his estates in the counties of Middlesex and Hertford to the use of John Carter and his wife, their heirs and assigns for ever, and the other moiety to the use of Mary Randall Carter, her heirs and assigns for ever. The latter moiety was in 1753 settled upon the marriage of Mary Randall Carter with James Yalden, to the use of Yalden and his wife successively for life without impeachment of waste, and afterwards of their children according to appointment, in default of appointment, equally, with cross-remainders, and in default of issue, to the use of Yalden and his wife, and the survivor, with power for Yalden and his wife, or the survivor, by any deed or writing, signed by them or the survivor of them and attested by two or more witnesses, with consent of the trustees in writing, and attested, as aforesaid, to revoke and make void all the uses and estates therein limited and absolutely to sell the said moiety or any part thereof for the best price by one or more sales to any person willing to purchase the same, so as the money arising from such sale should be paid to the trustees upon trust as soon as conveniently might be with the same money to purchase other freehold lands, tenements and hereditaments of equal value with the moiety of the messuages, lands, and hereditaments, to be sold, and settle the same to the same uses as the said moiety of the premises then stood except the proviso for revocation. By indentures of lease and release dated June 12 and 13, 1755, in pursuance of a recited agreement for partition and in consideration of £602 paid to the trustees in Yalden's marriage settlement by Carter and his wife for equality of partition, Carter and his wife and Yalden and his wife conveyed to trustees, to the use, as to part of the premises divided, of Carter and his wife in fee, subject to their power of appointment, and, as to the other part to the same uses, as the marriage settlement of Yalden, with a covenant from the trustees to apply the £602 for the purposes of the settlement.

The objections, therefore, taken upon these instruments were, first, that the appointment by William Abney in favour of his son Robert appeared to have been made under a previous agreement between them, and, if the father derived any benefit from that agreement, which seemed probable, or even made a previous stipulation that his son should join him in a sale, which there appeared the strongest reason to apprehend, it would have been a fraudulent execution of the power. The second objection was, that the power of sale, contained in the deed of 1753, did not authorise a partition. A third objection was taken to the form of attestation of the execution of the deed of appointment of 1771 by William Abney, as applying only to the sealing and delivery, the power requiring signing and sealing.

Richards and *Leach* for the plaintiff.

Alexander, *Romilly* and *Thomson* for the defendant.

In support of the exception taken by the plaintiff to the Master's report against his title to the six acres, *Abel* v. *Heathcote* (1) was cited as a direct authority that a power to sell included a partition. It was contended that the partition in that case was authorised by the power to sell, not the power to exchange; and if it was by the latter, a power to sell, where the object was, as in this instance, to lay out the money in other land would equally extend to a partition. For the defendant it was argued that this point was not decided by that case, which might

have proceeded upon the power to exchange. According to one of the reports (2 Ves. 98) the language of the court was less favourable to the opinion that it was upon the power of sale, and it was more easy to consider a power to make a partition included in a power of exchange than in a power to sell. Upon the exception as to the title to the principal part of the estate, the plaintiff, to repel any suspicion of fraud upon the son, relied on the fact that the intsruments of 1771 were executed under the opinion of counsel who, on behalf of the purchaser Trefusis, advised that Abney and his wife should by lease and release under their powers appoint to trustees and their heirs to the use of Abney and his wife for their lives and the life of the survivor, and, after their deaths, to the use of their eldest son, his heirs, etc., and afterwards that their eldest son should by lease and release and fine sur cognizance convey to the purchaser and his heirs.

LORD ELDON, L.C.—These exceptions involve three questions: one, the effect of the transaction under the power given by the title deed relating to the six acres; another, the effect of a transaction, stated to be the execution of a power, contained in a deed, which is part of the muniments relating to the greater part of the estate; and another question, less considerable, is whether supposing the power well executed, the circumstance of the attestation forms an objection to the title.

As to the six acres, the title is represented as depending altogether upon the effect of an instrument executed in 1755. The state of the title was not discussed, either as it may be affected by anything that passed subsequent to that year, or with reference to the general law of partition, but it was put simply upon the point whether the power contained in the deed of 1753 is well executed by the transaction that took place in 1755. That transaction is, not only a partition, but also in a sense a sale of part of the premises for that sum of £602 paid to the trustees in Yalden's marriage settlement, to be laid out in the purchase of other lands to be settled to the same uses. But there is nothing distinguishing any particular part of the estate, as being that in respect of which that sum of £602 was paid. So the transaction is as to each and every acre a partition and a sale in a strict sense, and also as to each and every acre it is neither a partition nor a sale. I am not at liberty to inquire whether this is a good equitable title. The question before the Master was whether there was a good legal title as to the six acres. It is insisted that the receipt of the entirety in part of the estate in lieu of an undivided moiety in the whole and the receipt of that sum of £602 for owelty [equality] of partition, amount to, not only an equitable, but a legal, execution of the power that the transaction in 1755 was, not a revocation of the uses of 1753 to the intent to receive money and lay it out in other lands to be settled to the same uses, but a revocation under an execution of the power to the intent to convey the entirety in certain acres, and to receive from the same persons what would make the entirety in other acres, and that the effect was a good revocation of the existing uses, and a limitation of new uses, to enure upon and attach to the seisin of the relessees in the settlement of 1753, for that must be the effect of a good legal execution. That is contended on the ground that the effect of both operations is precisely the same, and that there is no doubt this moiety might have been sold and the money employed in purchasing the entirety. It might or might not, but the real question is whether by the law attaching upon the doctrine of uses this new use is well limited.

I conceive that, where there is a conveyance by lease and release to uses with a power to alter the uses by an instrument the terms and limitations of which are prescribed by the general law, the new use will not arise except under the very circumstances in which it is contracted that it shall arise. In the ordinary settlements of great estates, powers of sale, partition, exchange, etc., are inserted. As to the first special caution is used, if there is not a previous power of revocation to declare at what time the uses shall be revoked and the seisin shall attach upon

the new use, and no cesser or determination of the old uses or creation of new uses arise except in the very circumstances described. This is a power of revocation, but to the intent to do some other act, and that intent, as prescribed by the instrument, must accompany the revocation in order to make the revocation essential. It is clear that this was not disturbed by decision though there were floating opinions until the case of *Abel* v. *Heathcote* (1). I doubt whether the language I hear and have read that a power of exchange is well executed by a partition, is authorised by anything in that decision. Exchange and partition are very different. According to Sheppard's Touchstone and other old books, you cannot exchange until there has been a partition. There is infinite difficulty in saying, a partition under the execution of a power by a tenant for life with those, who have the inheritance in the other moiety, could be called an exchange. I am not surprised that the Lords Commissioners in *Abel* v. *Heathcote* (1) had considerable doubt upon it, and I should rather have said upon that case that a partition was a conveyance for "such other equivalent interest" in lands, according to the expression of the deed, as to the trustees should seem proper, than put it upon the ground that a power of exchanging authorised an exchange by partition. Certainly receiving the entirety instead of a moiety does appear like receiving "such other equivalent interest" in lands, etc.

But I am not called upon to decide whether a power of exchange can be well executed by partition—a point, which, if it had been decided by that case, I would not disturb. This case was discussed in short opinions, given by Sir Dudley Ryder and Mr. Filmer, and a very elaborate one by Mr. Booth. The case was laid before them upon the will of Sir John Jackson. George Jackson was tenant for life, having an express power with consent to revoke the uses and to sell or exchange any part of the land, so as the money should be invested, and the land received in exchange should be settled to the same uses. The tenant for life had an estate in fee of his own. The object which he meditated was one very frequent in considerable families—that he should sell or exchange the estate he had in fee simple for an estate in settlement, buying the latter for himself under the execution of the power vested in him. That tends to open the question, how far this court would endure a tenant for life of a settled estate executing such a power with the object to bring into settlement an estate of his own, and to put out of settlement an estate which was in settlement. Mr. Booth's opinion expresses in much better terms than I can many of my own notions on the subject.

This case is much stronger, and, having met with no case in which a power of sale in these words has been considered well executed by a mere partition, it seems to me more conformable to principle to say that is not a due execution of the power than that it is so. Therefore, without infringing upon *Abel* v. *Heathcote* (1), I must hold that this title to these six acres is not unexceptionably good in law, whatever it may be in equity.

Next, as to the attestation required by the power of revocation as to the larger part of the estate. That objection was not much insisted on. The power itself in the deed of 1747, the marriage settlement of Abney and his wife, was executed in 1771 by a deed purporting that William Abney did by that deed, by him signed, sealed and executed, in the presence of three credible witnesses, declare, etc. The fact in all probability is that the person who prepared the attestation endorsed the ordinary words, not attending to the circumstance that the party was doing the act by this deed, purporting to be signed, sealed and executed, in the presence of the witnesses. Upon the question whether after execution it ought to be taken that he did sign in the presence of the witnesses, attesting the sealing and delivery, there would be a miscarriage in a judge directing a jury, if that fact was found, not to presume that the deed was signed in the presence of the same witnesses, as it professed to be. That attestation, therefore, is good.

Another question of immense importance is whether the power given by the settlement of 1747 is ill executed, upon the ground of such suspicion as may arise

upon the circumstances appearing on the face of the instrument, or those disclosed in the abstract, coupled with the probability that the same circumstances in the body of the abstract, not upon the face of the instrument, were disclosed to the persons through whom the title had gone. I mention that as, if the intermediate persons had not notice, this person, though he had notice, would have the benefit of that. Upon the face of the instrument the power is given to a person who is tenant for life with remainder to his wife for life to limit reversion after their lives to such one or more of the children as he should think proper, and upon the face of the instruments it appears that he did by a deed, dated July 15, 1771, reciting the indentures of 1747, and a fine levied, in consideration of natural love and affection and in performance of a promise and agreement made by him unto and with his son, and for other good causes and considerations, appoint the reversion to his eldest son, his heirs and assigns for ever. By other deeds, dated Aug. 30 and 31, in pursuance of a contract for the sale of the estate, in consideration of £8,000, stated to be paid to the husband, wife, and son, they convey to the use of Trefusis with a covenant to levy a fine, and a fine was levied.

It is clear, if nothing appeared but that the father and mother, seised for their lives with such a power, appointed in favour of their son in fee, and afterwards by a transaction, separate from or connected with the transaction of the power, supposing, their intention had been to give the entire benefit of the reversion to their eldest son, after such appointment, either by previous or subsequent contract, to which the son was a party, they had sold the estate for £8,000, the full value, and upon the face of the instruments that money appeared to have been paid to the three, in law and equity that would have been a payment to them according to the interests they had in the estate, and the purchaser would be safe as the money got home to the three persons entitled. How they disposed of it afterwards as to their respective interests was not of any importance to him.

But it is stated that if a person executes a power for his own benefit, that is an objection that cannot be waived by a person participating in the benefit arising from that transaction, and, therefore, the circumstance that the eldest son waives the objection is not sufficient if the younger children are discontented, for they are entitled to the benefit of the settlement, unless the interest, vested in them, has been dislodged, and divested. It is truly said that this court will not permit a party to execute a power for his own benefit. In *Lord Hinchinbroke* v. *Seymour* (2) a father, having a power of appointment and thinking one of his children was in a consumption, appointed in favour of that child, and the court was of opinion that the purpose was to take the chance of getting the money as administrator of that child. To bring this case within that, it is said, if there is any ground for suspicion that the execution of the power was for the benefit of the party executing, the court must act upon it, as a judicial suspicion. I am extremely apprehensive that I should make great havoc in many considerable titles by adopting that principle, for upon the cases to which I allude it is extremely familiar that a person, having a settled estate and an unsettled estate, executes his power, in order to acquire the fee of the former, giving to the uses of the settlement the fee of the unsettled estate, and the court would go a great way, and would make great havoc among titles, by holding that afterwards, at a considerable distance of time or immediately (for there must be regard to the intervening circumstances) as such a transaction took place between parties who might take improper advantages in their dealings upon the estate they must prove that they did not.

If there is not sufficient upon the face of the instruments to shake the title, what is there upon the face of the abstract, supposing all the purchasers had notice, beyond what appears upon the face of the instruments, to authorise this court to say that this power is not well executed in law, or, if it is, that it is not well executed in equity? The few circumstances are these. Abney, the father, entered into a contract with Trefusis for the sale of the estate to him, previous certainly to the execution of these instruments, which shows an inconsistency in the recital

stating the contract to be with the father and son unless there was a subsequent contract. He states, in a case for the opinion of Mr. Duane, that he had entered into a contract. The opinion was that a title could not be made unless an appointment was executed to the son, of age. The father does make that appointment. It does not appear that the estate sold for less than its value, that the son got less than the value of his reversionary interest. But the estate becoming his absolutely by the appointment, he by an instrument, affected by nothing but the contents of it, as the owner of the reversion accedes to the purchase, and conveys with his father and mother in consideration of £8,000, and the parties taking the conveyance pay the money to the father, the mother, and the son to be dealt with according to their respective interests, that is, according to their rights in the land; and though the contract with Trefusis was only to substitute money for the estate there was nothing to show that the son was not to receive a due proportion of the money when the contract was afterwards executed by the deed in which he joins and, with his father and mother, receives all the money. Upon the question, therefore, whether those possibilities and probabilities are sufficiently evidenced by anything to show that this is not a good title, my opinion is that it is a good title. I say nothing as to what is to be done upon that—whether it is such a title as the court will according to its present course compel a purchaser to take. I will hear that argued.

For the plaintiff it was then contended that, the title being declared a good title, as a necessary consequence the purchaser must take it with costs. In *Shapland* v. *Smith* (3) there was a considerable legal opinion against the title; and it appeared by this defendant's answer that he resisted merely because he did not like the purchase. For the defendant it was insisted that this was not such a title as a purchaser was bound to take; that there was no rule to give costs with a decree for specific performance; and in *Cox* v. *Chamberlain* (4) the purchaser having resisted under the advice of counsel, Lord Alvanley did not give costs.

Aug. 21, 1805. **LORD ELDON, L.C.**—I am firmly of opinion that the title to the legal estate, attending to all that could be known from the abstract, is a good title and such as a purchaser must accept, for I should very reluctantly lay down that notice from opinions in an abstract, or anything, that appears upon a deed, that there may by possibility be reason to suspect, what I cannot know and may not be true, that the title is bad, is such a notice as would affect a purchaser. The vendors were right to abstain from making applications to the younger children. It was not the duty of the vendors to take steps to bring the title into question.

Decree for specific performance.

UNDERHILL *v.* HORWOOD AND OTHERS

[Lord Chancellor's Court (Lord Eldon, L.C.), November 16, 19, 20, 1804]

[Reported 10 Ves. 209; 32 E.R. 824]

Bond—Avoidance—Execution of bond intended to be joint bond—Other party failing to execute bond—Right of first party to have bond cancelled.

Guarantee—Co-sureties—Right to contribution—Right of joint surety.

Where a person executes a bond meaning that it should be the joint bond of himself and another and that other does not execute the bond the person executing the bond, and so becoming severally bound, has a right to have the bond delivered up to be cancelled, for his intention was not to become a mere several obligee, but to be a joint and several obligee, the rights of these being different both in law and in equity. If he is a several obligee he has no remedies over against anyone, but, if he is a joint and several obligee, or only a joint obligee, there is a right of contribution against the other sureties in equity and of exoneration from the principal.

Notes. Considered: *Re Dover, Hastings, etc. Rail. Co., Carew's Case* (1855), 7 De G.M. & G. 45. Followed: *Evans* v. *Brembridge*, [1843–60] All E.R. Rep. 170. Considered: *Luke* v. *South Kensington Hotel Co.* (1877), 7 Ch.D. 789; *In the Goods of Cowardin* (1901), 86 L.T. 261. Referred to: *Copis* v. *Middleton* (1817), 2 Madd. 410; *Gardner* v. *Walsh* (1855); 1 Jur. N.S. 828; *Traill* v. *Baring* (1864), 4 De G.J. & Sm. 318; *Naas* v. *Westminster Bank, Ltd.*, [1940] 1 All E.R. 485.

As to the validity of a bond, see 3 Halsbury's Laws (3rd Edn.) 334–336, and as to a surety's right to contribution from co-sureties, see ibid., vol. 18, pp. 484–491. For cases see 7 Digest (Repl.) 171 et seq., 239, 240; 26 Digest (Repl.) 143 et seq.

Cases referred to:

(1) *Gibson* v. *Jeyes* (1801), 6 Ves. 266; 31 E.R. 1044, L.C.; 47 Digest (Repl.) 259, *2277*.

(2) *Mortlock* v. *Buller* (1804), ante p. 22; 10 Ves. 292; 32 E.R. 857, L.C.; 12 Digest (Repl.) 176, *1165*.

(3) *Thellusson* v. *Woodford*, *Woodford* v. *Thellusson* (1799), 4 Ves. 227; 31 E.R. 117; affirmed (1805), ante p. 30; 11 Ves. 112; 1 Bos. & P. N.R. 357; 32 E.R. 1030, H.L.; 37 Digest (Repl.) 139, *642*.

(4) *Heathcote* v. *Paignon* (1787), 2 Bro. C.C. 167; 29 E.R. 96, L.C.; 25 Digest (Repl.) 289, *945*.

(5) *Bromley* v. *Holland*, *Tyrrell and Oakden* (1802), Coop. G. 9; 7 Ves. 3; 35 E.R. 458; 20 Digest (Repl.) 304, *462*.

(6) *Thomas* v. *Frazer* (1797), 3 Ves. 399; 30 E.R. 1074, L.C.; 7 Digest (Repl.) 199, *340*.

(7) *Burn* v. *Burn* (1798), 3 Ves. 573; 30 E.R. 1162, L.C.; 7 Digest (Repl.) 198, *324*.

(8) *Gray* v. *Chiswell* (1803), 9 Ves. 118.

Bill filed by the plaintiff, Richard Underhill, praying that securities for granting an annuity might be avoided.

In 1796 Cleophas Comber and Daniel Smith, partners in trade, for the purpose of raising the sum of £1,400 agreed, in consideration of that sum, to grant an annuity to William Coare of £155 11s. 1d., being nine years purchase, for the lives of the grantors and four other persons and the survivors and survivor. Accordingly a bond was prepared, dated Dec. 24, 1796, purporting that William Smith, George Smith, Richard Underhill, Charles Comber, Cleophas Comber, and Daniel Smith, were jointly and severally bound to William Coare in the sum of £2,800, with condition, reciting the agreement to grant the annuity for the price of £1,400, which sum Coare had that day paid to the said grantors, the receipt whereof they did thereby respectively acknowledge, to be void if they or any of them, their, or any

of their heirs, executors, etc., should pay the said annuity during the natural life of the survivor of them, the said William Smith, etc. A memorandum was endorsed upon the bond for redemption.

The bond and warrant of attorney were executed, and the receipt signed, in London, by Underhill, Cleophas Comber, and Daniel Smith, on Dec. 24, 1796. Immediately afterwards, on that day, they went with Coare to his banker, where he received bank-notes for £1,400, and gave them to Daniel Smith, who immediately paid them into the bank in the joint names of himself and Lowe, Coare's solicitor, taking an accountable receipt, under an agreement or understanding for that purpose in consequence of William and George Smith not having then executed, and of some accident which prevented Charles Comber's attending to execute, on which account Paul Giblett was substituted as a surety in his place who executed a separate bond on Dec. 25, taking a bond of indemnity from Underhill and others of the obligors. On the same day the bond and warrant of attorney were executed by William and George Smith at Leicester, Daniel Smith having after the transaction at the bank gone to Leicester for that purpose. He returned on Dec. 26, delivered them to Lowe, and received the money at the bank.

The present bill was filed by Underhill praying that the securities for granting the annuity might be declared void under the Grants of Life Annuities Act, 1776 (c. 26), an account of the principal and interest and of the payments under the annuity, and that the balance might be paid out of the personal estate of Cleophas Comber and by the defendant Daniel Smith, and in case the court shall be of opinion that the securities ought not to be declared void, then for a redemption, and that the plaintiff might be indemnified, and the other sureties contribute, etc. The memorial stated that the bond was not yet executed by Charles Comber; that the consideration was the sum of £1,400 that day paid to William Smith, George Smith, Richard Underhill, Charles Comber, Cleophas Comber, and Daniel Smith; that that sum was paid to Daniel Smith for the use of himself, William Smith, George Smith, Richard Underhill, Charles Comber, and Cleophas Comber, by Coare. The memorial also stated merely that these six persons became bound, not that they were jointly and severally bound, except that it was so recited in stating Giblett's bond, and did not notice that the heirs were bound, but the condition was for payment by the obligor, his heirs, executors, etc. Upon these points some additional objections besides those which were before the Court of King's Bench in *Coare* v. *Giblett*, were brought forward. Lowe by his depositions stated that he asked whether all were principals, and Daniel Smith answered that all were principals to Coare.

Romilly, *Hollist* and *Hart* for the plaintiff.
Piggott and *Martin* for other sureties, defendants.
Alexander and *Bell* for the defendant, Coare.
Richards for the defendant, Giblett.

LORD ELDON, L.C.—This bill is filed upon various grounds, to which it is necessary to advert with a view to sustain the jurisdiction of this court: first, supposing the instruments invalid; if not, that the contract is in its nature so unconscionable that, admitting the legal validity of the instruments, this court ought to interpose upon grounds of conscience to have them delivered up; finally, that, if they are not to be delivered up, there ought to be a redemption by force of the contract.

As to the jurisdiction upon the invalidity of the instruments from defects in the memorial, it would be improper to say more than that it has been repeatedly settled that this court will upon such objections order them to be delivered up. The courts of law in their zeal to destroy annuity transactions for some time mis-read the Act of Parliament and supposed they had that power. Eyre, C.J., first corrected that, but it has been since settled that the instruments being by the Act declared void to all intents and purposes, there is

inherent in this court that jurisdiction to order them to be delivered up, and if that doctrine could be maintained in any case, in such a case as this the court would struggle to maintain it, for this species of instrument in equity creates, not only relations, but duties, between the obligee and the obligors and between the obligors as among each other, upon which several actions may be brought, and suits for contribution both in law and equity. If there is a jurisdiction that one obligor may have the instruments delivered up, in such a case, so pregnant with the seeds of suits, I should be inclined to hold the jurisdiction. There is no doubt, therefore, of the jurisdiction to direct these instruments to be delivered up, if the objections can be maintained.

As to the unconscionable nature of this bargain, I hardly know how to express it, but must express it in terms that have been used by the court before, that, if the terms are so extremely inadequate as to satisfy the conscience of the court, by the amount of the inadequacy, that there must have been imposition or that species of pressure upon his distress which in the view of this court amounts to oppression, this court would order the instruments to be delivered up: *Gibson* v. *Jeyes* (1) (6 Ves. at p. 273); *Mortlock* v. *Buller* (2), though courts of law might hold that judgment not within the sphere of their powers. I never have been more astonished than in the course of this evidence attempting to prove there is so little difference between an annuity for one life of the age of thirty, and five such other lives as are the cestuis que vie in this transaction. We all know that, when in *Thellusson* v. *Woodford* (3) it was objected that accumulation for nine lives was an evil, not to be tolerated by courts of justice, the argument occurred to no one that an accumulation for six lives, though it is less striking, would have been so little more mischievous than for one life the legality of which no one could doubt. I cannot come to the conclusion whether the inadequacy is so gross until I understand from some evidence, what is the real value, for, though the witnesses state their opinion that an annuity for six lives is worth little more than an annuity for one life, they have assigned no reason upon which the court can judicially act, for that opinion. If it rests upon that, therefore, there must be some species of inquiry. In *Heathcote* v. *Paignon* (4) the inquiry was as to the market price: see *Gibson* v. *Jeyes* (1) (6 Ves. at p. 274). I doubt, whether that is so good an inquiry, as what is the value. The market price may be under the value; and the object is to enable the court to determine upon the inadequacy of value.

That inquiry I should not wish to direct if this can be determined upon any other point, as, first, whether the securities are good at law, which ought to be first decided. A second ground is furnished by a variety of objections to the memorial. It is put thus by the defendant: (i) that there is not ground enough to induce the court to say the questions stated ought to be discussed even at law; (ii) that it is perfectly clear they are of such a nature that this court ought not in the first instance to dispose of them, but ought to send them, as legal questions to law. In *Bromley* v. *Holland* (5), I ordered the deeds to be delivered up, being of opinion that upon objections to the legal effect of the instruments I ought to decide the question, but expressly declaring the reason that I thought it within the jurisdiction of a court of equity to decide the point of law, though a court of equity ought to be very cautious not to exercise that jurisdiction if the point is reasonably doubtful. If that was proper in that instance, it is more peculiarly proper where the objections seem at least founded upon assertions in law which directly contradict the judgments of the courts of law. One ground, upon which the bill may clearly be sustained, is that, adverting to the infinite variety of suits that may take place, I can arrange that suit in a court of law so that they should have an opportunity of bringing before that court all the objections, that can be made, that the decision may bind all the obligors and obligees and to determine upon the validity of the instruments in which all their demands must be founded.

The first objection is that it is stated in the memorial that the money was paid to Daniel Smith for the use of six persons, and it is contended that it was not so

A paid in fact, but was paid to him for the use of himself and Cleophas Comber, and that the other four, of whom only three executed, were mere sureties. It might be paid as between the obligee and the obligors to the use of all, though as among the obligors themselves it might be for the use of two only. That is a question of fact, whether it was received by Smith for the use of all six or of himself and Cleophas Comber only. The form of the issues admitted of the decision of that question, and
B the finding of the jury is in strictness a decision upon all the propositions contained in them. But, upon looking at the report, the question really agitated was whether it was a payment by Coare to the use of the six or a payment by the hands of Smith and Lowe to the use of the six, and there was ground enough for contending that it was in the latter way as it would be if it was a payment upon the 26th, not upon the 24th. LORD ELLENBOROUGH says that the form of the plea did not bring that
C question before them, being of opinion that facts might have been brought by plea upon the record that would have called for the judgment of the court upon those facts. The question then is whether these parties, considering that there is an infant, have not a right to bring those facts that will put upon the record a plea worthy the attention of the court.

Another objection is that the time of payment is not accurately set forth in the
D memorial. If it is true that the time of payment will not form a material issue, it follows that the objection, founded upon the time of payment, cannot furnish a ground for setting aside this bond. But then is it material to be set forth in the memorial? I feel insuperable difficulty in supposing that, and I ought not to go the length of giving the parties the countenance of saying, they shall be at liberty to take the opinion of a court of law upon it. The first section of the Act does not
E require the consideration to be set forth in any other terms than "the consideration or considerations." In the third clause, coming to speak of the deed, it states circumstances as to the consideration, as requisite for the deed, of which no notice is required in the memorial by the former section, and the time is not mentioned in either clause. The first section requiring nothing but the consideration to be set forth without any circumstances, and the third section requiring only by whom and
F upon whose behalf it was paid, two circumstances, by no means so material for the world to know as many others, I should have said, upon the two clauses taken together, that the legislature did not mean that any circumstances should be set forth except such as were expressed as to the deed in the latter clause. But it is clear that has not been the course of decision which has gone the length that all the res gestae are to be set forth: the effect of the instrument, whether joint or
G several, for whose use, and a great variety of circumstances which the Act has not required to be disclosed unless they are circumstances without the disclosure of which the memorial does not manifest what was the consideration. Then it is said it comprises, by whom, upon whose behalf, in what manner, whether by principal or agent, and all the circumstances, going to the res gestae that have been required in the several cases; and it has been held that those circumstances, expressly
H required to be stated, shall be stated whether material for the information of the public or not. In this case the court of law has gone on to say—and most consistently with former decisions—that those circumstances which are material shall be set forth, if substantially, though not expressly, required by the Act.

Then, is the time of the payment to the grantor a material circumstance, and material with reference to the consideration? I agree that the time of payment
I is of itself a circumstance extremely material to the value of the consideration. It is of no consequence that in this instance the difference was but two days, for the question is not upon the particular circumstances of any case, but, whether in general the time is essential in ascertaining the value of the consideration, and the decision upon the small interval of time in this instance must regulate the decision, if an interval of twelve months had elapsed. It was not the object of the Act to distinguish whether it proceeded from the default of the grantor or the grantee that the money was not received till after the time, that in the former

case the difference is not essential but it is in the latter. That is a distinction, for which there is no ground in the Act. It is objected in this case, not only that the delay proceeded from the default of the grantor, but also that the grantee had no benefit. That is not correct. By the agreement, regulating the dealing with the money upon the three days, the 24th, 25th, and 26th (supposing, there is ground to infer a payment in fact upon the last of those days) the benefit to the grantee is that, dealing with that money in that manner, he gets his annuity by it. It had the effect of securing to him the annuity, for the money was detained for the very purpose of pressing Daniel Smith to procure the execution of the deeds by the other parties. I will put two or three cases. The only annuity Coare was bound to accept was one granted by five, perhaps by six and Giblett, upon the recital that the bond was not executed by Charles Comber. Suppose, one or two of them had died, must Coare have gone on? He was entitled to say that his annuity was to be secured by these six grantors, and he might in the case I have put have refused to take it. Whose money was that at the banker's in the name of Daniel Smith and Lowe? In this court, there is no doubt that money must have been returned to Coare, also it might have been recovered in an action for money had and received, for the real agreement, even supposing the payment to have been on the 24th, is that the money should be paid to Smith, but he should not keep it and it should be paid into a bank in the names of himself and another; and he would become a trustee for the person entitled to the money having regard to the fact whether the security was perfected to his satisfaction, or not. Therefore, in this sense a benefit resulted in the grantee that secured to him the annuity, or a return of his money.

Another circumstance, with reference to the consideration, is whether, if circumstances are to be set forth, the legislature did not mean that the time should be set forth though it was by default of the grantor that he did not receive the money. If that had its effect in a transaction that has the quality of an agreement in which the grantee took a part, that the grantor should not receive the money until a particular period. Otherwise how is the court to know what the consideration was? The delay might have brought the day of payment of the consideration down to the first payment of the annuity, or further. If the cases are to stand which require substantial circumstances to be set forth, not required by the Act, I am not satisfied that the time of payment of the money does not furnish a material objection to the annuity, and I wish that point to be re-considered.

The next objection is that there is no memorial that this is a joint and several bond. Upon that it is said that the original transaction, as intended, was that six persons should become jointly and severally bound, that the instrument prepared was joint and several, that an accident was supposed to have happened to one of them and he could not attend to execute, and it was then proposed that Giblett should execute, not that, but another, bond, and should receive an indemnity. The course of the transaction was, not that a new bond should be prepared substituting Giblett, but that the original bond should be executed by the five, Charles Smith not executing and that Giblett should execute another bond, obliging himself that the other six shall pay and that a bond of indemnity should be given to him, not by the six, nor the five, who execute, but by three of those five. First, is that bond both joint and several? Without saying what the law is upon that, it is not the joint bond of the five. It is said, it is the several bond of the five; and then, if the party can maintain his action upon it, this court ought not to interpose. My inclination upon that is that it is the several bond of the five, but I state that with the observation that it is not an opinion formed upon the research into the authorities that may be due to it. I had a notion, which, I think, was not correct, that where a man executes a bond meaning that it should be the joint bond of himself and another and not his several bond, it would not be his several bond. But the cases go further. In such a case, however, unless there is something special, the man who has become so severally bound has a

A right to have that bond delivered up, for his intention was, not to become a mere several obligee, but to be a joint and several obligee. The rights are different both in law and equity, for, if he is only a several obligee, he has no remedies over against anyone, but, if he is a joint and several obligee, or only a joint obligee, there is right of contribution against the other sureties in equity, from the earliest times, and of exoneration from the principal. At law the contract is perfectly B different. The objection of the obligee that a court of equity should not interfere, must depend upon very special circumstances. There might be such a case, if for a great length of time acts had been done amounting to a waiver of the objection.

It is not necessary in this stage to decide upon that part of the case, nor to consider it further, than to show that it is material as to the defect or sufficiency of the memorial. That proceeds upon this, that either the memorial does not C assert anything sufficiently as to the nature of the security, or it asserts what is false. It is said that, if the nature of the security appears upon any recital in the memorandum, from that recital there is as express information as to the nature of the security as if that part of the memorandum, which sets forth the security, had itself contained the terms, and though this bond is not stated as joint and several, yet in stating Giblett's bond it is recited as being joint and D several. One point is whether the doctrine applies to a recital in an instrument that is not the instrument of the party whose instrument is recited. Another material circumstance is the ground for what is stated in the report of this case in the Court of King's Bench, that the recital is not true. It is not, unless that bond, intended to be the bond of the six, is the bond of the six, or is the joint bond of the five, for, if not, the recital that it is the joint and several bond of the E five, containing the circumstance that it was not executed by Charles Smith, that is not true, unless it can be made out to be the joint bond of the five.

Another objection is that the heirs are not mentioned as bound. If the real meaning of the Act is, not that you shall set forth in the memorial and deed everything the Act requires, but the res gestae in the sense that everything material shall be set forth, it cannot be denied that the statement that the security affects F the real property of the grantor is material. Many of the decisions under this Act go greatly beyond what the legislature meant to require, but there is so much of decision upon it that it must be considered as having that authority. It is said there is enough in the memorial to show the heirs were bound, the condition expressing, if the heirs, executors, etc., pay. My present opinion is that, if a man in express terms binds himself, his executors and administrators, there is no way of G contending that, because the condition which is to avoid the obligation imposed by that bond upon the personal representative is a condition that may be performed by the heir, therefore, the heirs are bound. I know, both in causes and in bankruptcy, where there is a joint bond, the court has sometimes inferred from the nature of the condition and the transaction that it was made joint by mistake, H and would rectify that, decreeing in a cause that a new bond shall be executed, joint and several, and, as this court would so decree in a cause, ordering in bankruptcy that proof shall be made accordingly: see *Thomas* v. *Frazer* (6), and the cases stated in the notes; *Burn* v. *Burn* (7); *Gray* v. *Chiswell* (8). But that turns upon this, that the instrument, though joint only, was intended to be both joint and several, and, therefore, the court will make it what it was intended I actually to be. But I never understood that, though upon the ground of mistake this court would reform the instrument, therefore, it would hold that the instrument has a different effect from that which belongs to it at law. If the court of law should think it material that the heirs should be set forth, the extent of that is for their consideration, for in fact there is scarcely an instance of an annuity without a covenant binding the heirs, and I am not aware that it was ever supposed necessary to set forth the purport and effect of all those covenants.

This, I believe, exhausts the whole of the objections that were taken. Another objection occurred to me. There is considerable difficulty to construe this with

reference to the first clause where the deed is executed by different parties upon different days. The first clause directs that a memorial shall be enrolled within twenty days of the execution, and shall contain the day the deed bears date. The question, therefore, is, in law: What is the meaning of the words "the day of the date?" The day of the date of a deed is, I apprehend, the day of the execution. It may be otherwise where the expression is "the day the deed bears date." But, whether the legislature meant in this clause the day of execution may require some argument. If the day the deed bears date means expressly the day put upon the parchment, that certainly may be a day on which no one party executes. It may be a day on which some execute and some do not, and then the question is, from what time are the twenty days to be accounted? Suppose, the bonds in this case were executed on Jan. 1 and 2, and the bond was the several bond of each, and no relief was to be had in equity. Then a memorial, enrolled upon Jan. 22 would be a good memorial as to the man who executed upon Jan 2, and bad as to him who executed upon Jan. 1. There would be great singularity in the law, if those words, "the day of the execution" and "the day the deed bears date" have not the same meaning. I am not aware that this has been noticed in any case.

Upon the result of the whole, the first question for this court to decide is whether this bond is a legal instrument. This court may decide that question without sending it to law. But I am far from thinking, if these objections were all originally made, it would have been proper to decide upon them in the first instance, and it is still less proper, some of them having received decisions at law, denying their validity. The best course will be that some of the actions that are brought, should be tried, giving liberty to any of the parties to introduce objections to the memorial by way of plea, and all parties to be at liberty to attend the hearing of the cause. If so, there will be no room to raise the questions as to Giblett, whether he is bound at any rate, and, if he is, whether this court will interfere to prevent his making use of his bond of indemnity. Neither of those questions will arise if any of the objections to the memorial are good. If, therefore, in any of the actions that are brought, these objections can be introduced upon the record, they shall go to trial, and all parties shall be at liberty to attend the trial.

Order accordingly.

COOKE *v.* CLAYWORTH

[Rolls Court (Sir William Grant, M.R.), February 13, 14, 18, 1811]

[Reported 18 Ves. 12; 34 E.R. 222]

Contract — Avoidance — Intoxication — Evidence — Unfair advantage — Persuasion to drink—Deprivation of reason.

The court will not avoid a contract at the suit of a party who claims that he was drunk at the time he entered into the contract, merely on the ground of his having been intoxicated at that time. To obtain an order avoiding the contract he must prove that an unfair advantage was taken of his situation, or that he was persuaded to drink, or that he was in that extreme state of intoxication that deprives a man of his reason.

Notes. Considered: *Wiltshire* v. *Marshall* (1866), 14 L.T. 396. Referred to: *Gore* v. *Gibson* (1845), 13 M. & W. 623; *Shaw* v. *Thackray* (1853), 1 Sm. & G. 537.

As to when drunkenness is a ground on which a transaction is invalidated, see 8 Halsbury's Laws (3rd Edn.) 65, 66, and ibid. vol. 14, p. 477; and for cases see 12 Digest (Repl.) 43, 44.

Cases referred to:

(1) *Cory* v. *Cory* (1747), 1 Ves. Sen. 19; 27 E.R. 864, L.C.; 12 Digest (Repl.) 43, *211.*

(2) *Johnson* v. *Medlicott* (1734), 3 P. Wms. 130, n.; 24 E.R. 998; 12 Digest (Repl.) 43, *209.*

(3) *Evans* v. *Bicknell* (1801), 6 Ves. 174; 1 Coop. temp. Cott. 480; 31 E.R. 998, L.C.; 35 Digest (Repl.) 34, *253.*

(4) *East India Co.* v. *Donald* (1804), 9 Ves. 275; 32 E.R. 608, L.C.; 35 Digest (Repl.) 93, *2.*

Also referred to in argument:

Cragg v. *Holme* (1811), 18 Ves. at p. 14, n.

Bill praying that an agreement in writing executed by the plaintiff might be declared fraudulent and void as against him and be delivered up to be cancelled, and an injunction.

The plaintiff by his bill represented that on June 11, 1807, he met by appointment at Spilsby in the county of Lincoln several persons, of whom he had made purchases, in order to pay them, one of those persons being the defendant Taylor. After the business was concluded, the plaintiff was prevailed upon to drink until he was intoxicated; in that state he left Spilsby about six in the evening, accompanied by Taylor and they stopped at the house of the other defendant Clayworth, to whom also the plaintiff had a payment to make. They found him at home, drinking with some other persons; and they all continued drinking for a considerable time, the plaintiff returning home about half past two in a state of complete intoxication. The agreement was obtained from him while in that state, and utterly unable to understand what he was doing.

The defendants by their answer denied that the plaintiff was solicited to drink, stating that he continued to do so of his own free will; and was disqualified from transacting business of difficulty and importance; that the agreement arose from Clayworth's stating a dispute with his landlord, who threatened to turn him out of his farm; upon which the plaintiff made the offer. The answer then stated the agreement, which was inaccurately expressed: i.e., that Cooke agrees to let all the lands and tenements he occupied in the parish of Brough or elsewhere; and Clayworth and Taylor agreed to take the land to rent for twenty years, to commence at Lady Day, 1808, stating the terms; and that Cooke agreed to give possession at the time before mentioned: that it was signed by all the parties on May 11, 1807; witnessed by Robert Marshall; that it was prepared by Marshall, but dictated by the plaintiff: and was executed at twelve o'clock at night.

It was proved that Marshall, a school-master, was called out of bed to prepare the agreement. There was much contradiction in the evidence as to the plaintiff's situation: some of the witnesses stating that he was in a high degree of intoxication, and came home in that situation about two in the morning: others representing him as perfectly sober and fully competent to transact business.

Sir Samuel Romilly and *Horne* for the plaintiff.
Hart and *William Agar* for the defendant.

SIR WILLIAM GRANT, M.R.—Retaining the opinion which I stated in the case that was alluded to in the argument, I think that a court of equity ought not to give its assistance to a person who has obtained an agreement or deed from another in a state of intoxication, and, on the other hand, ought not to assist a person to get rid of any agreement or deed merely upon the ground of his having been intoxicated at the time. I say merely upon that ground, as, if there was, as LORD HARDWICKE expresses it in *Cory* v. *Cory* (1) any unfair advantage made of his situation, or as SIR JOSEPH JEKYLL says in *Johnson* v. *Medlicott* (2), any contrivance or management to draw him in to drink, he might be a proper object of relief in a court of equity. As to that extreme state of intoxication that deprives a man of his reason, I apprehend that, even at law, it would invalidate a deed obtained from him while in that condition.

After a very attentive consideration of the evidence in this case I can find no ground on which, upon the supposed state of intoxication of the plaintiff, the court could be warranted in decreeing this deed or agreement to be delivered up to be cancelled. There is a contrariety of evidence as to the fact of intoxication, upon which it is not easy for this court to decide. There are three witnesses who all swear that at the time of execution the plaintiff was perfectly sober and capable of business. Marshall indeed says he was as capable of transacting business to any extent as ever he was in his life. Whatever difficulty I may have in believing this after all the other evidence that has been produced, I should hesitate to determine a fact, so construed, without the intervention of a jury.

But, supposing the intoxication proved to a considerable extent, still the inquiry would remain whether the conduct of the defendants has been such as to furnish ground for setting aside this agreement. It is admitted that there was no previous design in bringing about the meeting at the defendant's house, the bill stating that the plaintiff's calling there was in proposition of the plaintiff to Taylor. As to the plaintiff's being drawn in to drink by contrivance and management, it is to be observed that the drinking was not introduced on account of his coming there nor after he came there: but a company engaging in drinking he joined them. One witness, Mary Hall, says that the plaintiff was pressed and almost forced by Clayworth to drink, but her testimony, not being corroborated by any other witness, cannot prevail against the denial of that fact by the answer: see *Evans* v. *Bicknell* (3); *East India Co.* v. *Donald* (4).

As to the manner in which the treaty was introduced, Pedley, the only witness upon that, represents it as proceeding entirely from the plaintiff; that the defendant so far from holding out any inducement, rather hesitated to accept the offer. There is no pretence that the offer was in its own nature such as necessarily discovers absence of judgment in the person making, or a degree of unfairness in those accepting, it.

In this state of the evidence, I cannot possibly hold that the plaintiff was by contrivance and management drawn in to drink; or that any unfair advantage was taken of his intoxication to obtain an unreasonable bargain. As to the doubt appearing on the face of the paper, whether, as it stands, it contains what was dictated to the plaintiff, read to him by Marshall, and afterwards by himself, the investigation of that point will be open at law upon the trial of any action founded upon this instrument; and can be much better made there than here. Here indeed that has not been examined; it was only adverted to in the course of the hearing.

That the paper was not at first written, as it now stands, is quite apparent; and it will be rather difficult for the witnesses, professing to have given a full representation of the transaction, to account for their entire silence as to all that must have been said or done before the paper was brought into its present state by the introduction of the first clause, and the consequential erasures and alterations. That however, as I have said, will be for another tribunal, and in the view I have taken of the case, I can do nothing but dismiss the bill without costs and dissolve the injunction.

Bill dismissed.

COBBAN AND ANOTHER *v.* DOWNE

[Court of King's Bench (Lord Ellenborough, C.J.), July 15, 1803]

[Reported 5 Esp. 41; 170 E.R. 731]

Shipping—Custom—Delivery of cargo—Delivery to ship's mate at wharf—Loss of cargo—Liability of wharfinger.

Where goods are to be carried coastwise and the usage of the wharf is to deliver them on the wharf to the mate of the ship by which they are to be carried, if they are delivered to the mate the wharfinger's responsibility is at an end, and he is not liable though the goods are lost from the wharf before they are shipped.

Notes. Referred to: *Leigh* v. *Smith* (1825), 1 C. & P. 638; *Blaikie* v. *Stembridge* (1859), 6 C.B.N.S. 894.

As to delivery of cargo, see 35 Halsbury's Laws (3rd Edn.) 387 et seq.; and for cases see 41 Digest (Repl.) 353, 354.

Action brought against the defendant, who was a wharfinger, to recover the value of a parcel of goods, which had been sent to the defendant's wharf to be forwarded to Inverness, in Scotland.

The plaintiff proved the sending of four trusses to the wharf; one of which was lost. They were directed to be sent by the ship *George*, bound for that port. The defendant proved that the goods were brought to the wharf, and laid at the door of the counting-house. While they lay there, the mate of the *George* was called. He came; and the truss in question was delivered to him. What afterwards became of it did not appear.

It was contended on the part of the defendant, that it was not part of the duty of a wharfinger, where goods are to go coastwise, either according to general usage, or the particular usage of the defendant's wharf, to see the goods actually put on board. That they were, in many instances, delivered from the warehouse, or from the wharf to the mate of the vessel, to be by him and his crew put on board the vessel; and that on the delivery to them, all further responsibility on the part of the wharfinger was at an end.

Several wharfingers were called, who proved the invariable usage to be: that goods, which were not to go coastwise, were delivered from the carts on board the ship; that when goods came to the wharf, and no ship was then at the wharf bound for the port to which the goods were directed, they were warehoused; and on the arrival of the first ship, they were delivered to the mate of the vessel: but when a vessel was there, they were immediately delivered to him, to be put on board; that before the shipping foreign goods, the wharfinger charged for wharfage and shipping; but for shipping goods coastwise, they charged for wharfage only, considering that they had nothing to do with the shipping, being satisfied with

a delivery to the mate, or other officer on board the ship, as putting an end to their responsibility. A

Garrow and *Manley* for the plaintiffs.
Erskine and *C. Warren* for the defendant.

LORD ELLENBOROUGH, C.J.—This is an action charging the defendant in his character of a wharfinger. What the duty of a wharfinger is, is to be measured by the usage and practice of others in similar situations, or his known and professed liability. Every man contracts with the public according to the known and ascertained extent of the trade or business in which he is engaged. The defendant has proved that, by established usage, the goods are delivered by the wharfinger to the mate and crew of the vessel which is to carry them; from which time it has been considered that their responsibility is then at an end. Undoubtedly, where the responsibility of the ship begins, that of the wharfinger ends; and a delivery to the ship creates a liability there: but the delivery must be to an officer or person accredited on board the ship; it cannot be delivered to the crew at random: but the mate is such a recognised officer on board the ship, that delivery to him is a good delivery, and the responsibility of the ship attaches, if the jury believe that the mate received the goods, as stated by the defendant's witnesses. It has been said that they were lost on the wharf before they were put on board; but if they were once well delivered to the mate, the subsequent loss cannot affect the wharfinger: they are delivered into the care of the mate; and his negligence cannot revive any responsibility on the part of the wharfinger. I think, therefore, the usage has been sufficiently proved; that by a delivery to the mate of the ship, the wharfinger's responsibility was at an end; and that the only question for the jury to decide was: Was the delivery made of the goods to the mate of the *George* by which vessel the goods were ordered to be sent?

B C D E

Verdict for defendant.

F

BATEMAN *v.* PHILLIPS

G

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Le Blanc and Bayley, JJ.), April 16, 1812]

[Reported 15 East, 272; 104 E.R. 847]

Guarantee — Surety — Letter written and signed by defendant to creditor's solicitor—Admissibility of parol evidence to identify parties and subject-matter. H

By s. 4 of the Statute of Frauds: "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt default or miscarriages of another person . . . unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto lawfully authorised." I

A letter addressed by the defendant to Mr. G., who was the plaintiff's attorney, stated that "the bearer D. Williams has a sum of money to receive from a client of mine some day next week, and I trust that you will give him indulgence till that day," and it was signed by the defendant.

Held: the letter was evidence within s. 4 of the Statute of Frauds to charge the defendant with the debt due from Williams to the plaintiff upon parol proof as to its amount and that Mr. G., to whom it was addressed, was the

attorney of the plaintiff and received the letter in that character from Williams and not as the principal and creditor.

Notes. Considered: *Sheers* v. *Thimbleby* (1897), 76 L.T. 709. Referred to: *Jenkins* v. *Reynolds* (1821), 3 Brod. & Bing. 14; *Higgins* v. *Senior*, [1835 42] All E.R. Rep. 602; *Holmes* v. *Mitchell* (1859), 7 C.B.N.S. 361; *North Staffordshire Rail. Co.* v. *Peek* (1860), E.B. & E. 986; *Williams* v. *Byrnes* (1863), 1 Moo. P.C.C.N.S. 154; *Plant* v. *Bourne* (1897), 76 L.T. 820.

As to the nature of written evidence required, see 18 HALSBURY'S LAWS (3rd Edn.) 433 et seq., and as to the admission of extrinsic evidence, see ibid., 441, 442; and for cases see 26 DIGEST (Repl.) 44 et seq., 58, 59.

Cases referred to:

(1) *Champion* v. *Plummer* (1805), 1 Bos. & P.N.R. 252; 127 E.R. 458; 12 Digest (Repl.) 161, *1029*.

(2) *Egerton* v. *Mathews* (1805), 6 East, 307; 2 Smith, K.B. 389; 102 E.R. 1304; 12 Digest (Repl.) 173, *1126*.

(3) *Boydell* v. *Drummond* (1809), 11 East, 142; 103 E.R. 958; 12 Digest (Repl.) 133, *820*.

(4) *Seagood* v. *Meale and Leonard* (1721), Prec. Ch. 560; 24 E.R. 251; sub nom. *Seagood* v. *Neale*, 1 Stra. 426; 2 Eq. Cas. Abr. 49, pl. 20, L.C.; 12 Digest (Repl.) 147, *926*.

Motion by the defendant for a rule nisi to set aside the verdict for the plaintiff and enter a nonsuit in an action tried by WOOD, B., at Hereford, in which the plaintiff claimed on a promise made to him by the defendant to pay the debt of David Williams, if he did not pay it, in consideration of the plaintiff's forbearing to sue Williams for a week, on the ground that there was no sufficient evidence of the defendant's promise in writing within s. 4 of the Statute of Frauds.

The plaintiff was about to sue Williams for a debt of £80, and had employed Mr. Gwyn his attorney for that purpose, when the defendant addressed the following letter to Mr. Gwyn, dated Monday:

"Sir, the bearer, David Williams, has a sum of money to receive from a client of mine some day next week, and I trust you will give him indulgence till that day, when I undertake to see you paid. (Signed by the defendant.)"

Mr. Gwyn was called as a witness at the trial to prove that this letter was addressed to him as the attorney for the plaintiff; that it was brought to him by Williams; and the amount of the debt due from Williams to the plaintiff was also proved.

Peake for the motion observed that the name of the plaintiff was not mentioned in the letter, nor the amount of the debt; and that if this could be received in evidence to charge the defendant within the statute, it was open to the plaintiff's attorney by parol evidence to have applied the letter to any other person, or for any other sum, in direct contravention of the statute, which meant to exclude all parol evidence of an agreement to pay the debt of another, by requiring the writing to contain the agreement, that is, the whole agreement. Thus in *Champion* v. *Plummer* (1) where the question arose upon a memorandum in writing of the sale of goods, within s. 17; the writing, being signed by the seller only, was held not sufficient to charge him in an action by the purchaser, whose name was not mentioned in it. [BAYLEY, J.: *Egerton* v. *Mathews* (2) in this court, was the other way. That was an action to charge the buyers upon the agreement to purchase signed by them only. The memorandum did indeed mention the name of the seller, but it did not express in terms the consideration for the promise, and, therefore, did not contain the whole agreement. Here the consideration is expressed.] That Gwyn was the attorney for the plaintiff depends entirely upon his parol evidence: he might have applied the letter to any client of his to whom Williams was indebted. [BAYLEY, J.: If you had shown that Williams was indebted at the time to another client of Gwyn's, that might have made a doubt.] *Boydell* v. *Drummond*

(3) arose upon another branch of s. 4 of the statute; but it shows the opinion of the court that the words are to be construed strictly; for they held that part performance of a contract within the year was not sufficient to take the case out of the words to be performed. So in *Seagood* v. *Meale and Leonard* (4) it was considered that the writing ought to specify all the terms of an agreement for a purchase of houses; among others, the sum to be paid.

LORD ELLENBOROUGH, C.J.—The parol evidence received did not go to extend the terms of the agreement in writing: it only went to show that the letter was addressed to him as the attorney for the plaintiff, and not as the principal and creditor of Williams. Would it be contended to be necessary to state the very sum to be paid where it appeared that the defendant meant to say to the plaintiff, whatever sum Williams owes you I engage to pay, if you will not sue him? If the defendant did not know the exact amount of the debt, might he not contract to pay it in those terms? The parol evidence does not enlarge any term of the letter; and I think it would be holding the statute too strictly to say that this was not sufficient evidence of the contract.

LE BLANC, J.—If the doctrine were to be pushed the length now contended for, we must say that a man could not contract in writing with another to pay him for all the goods with which he had furnished a third person in the course of the antecedent month. Or suppose the writing had only contained a promise to pay the debt of Williams, would not that be sufficient, without mentioning the amount?

GROSE and **BAYLEY, JJ.**, concurred.

Rule refused.

TURNER *v.* MEYERS, FALSELY CALLED TURNER

[Consistory Court of London (Sir William Scott), May 6, 1808]

[Reported 1 Hag. Con. 414; 161 E.R. 600]

Nullity—Insanity—Suit by party alleging own incapacity—Degree of proof.

A party may, after his recovery, bring proceedings to annul his marriage on the ground of his own insanity at the time of the ceremony, though the degree of proof must be stronger than in a case brought by or on behalf of the other party to the marriage. If he is of age, he must bring the action in his own name.

Per Sir William Scott: Madness may subsist in various degrees, sometimes slight, as partaking rather of disposition or humour, which will not incapacitate a man from managing his own affairs, or making a valid contract. It must be something more than this, something which, if there be any test, is held, by the common judgment of mankind, to affect his general fitness to be trusted with the management of himself and his own concerns. The degree of proof must be still stronger when the person brings a suit on allegation of his own incapacity, by exposing to view the changes of his mind.

Notes. By s. 9 (1) (b) (i) of the Matrimonial Causes Act, 1965 (45 Halsbury's Statutes (2nd Edn.) 460) a marriage is voidable if at the time of the marriage either party to the marriage was of unsound mind, and a decree of nullity will be granted subject to the conditions set out in sub-s. (2).

Referred to: *Hancock* v. *Peaty* (1867), L.R. 1 P. & D. 335; *Moss* v. *Moss*, [1897] P. 263; *Jackson* v. *Jackson* (1908), 52 Sol. Jo. 535; *R.* v. *Dibden*, [1910] P. 57; *J.*

(*orse. B.*) (*by her next friend*) v. *J.*, [1952] 2 All E.R. 1129; *In the Estate of Park, Park* v. *Park*, [1953] 2 All E.R. 408.

As to capacity to marry, see 19 HALSBURY'S LAWS (3rd Edn.) 779; and for cases see 27 DIGEST (Repl.) 40.

Case referred to :

(1) *Morison* v. *Stewart, falsely called Morison* (1745), unreported.

Proceeding to annul a marriage, on the plea of insanity, instituted on the part of the husband, after his recovery.

SIR WILLIAM SCOTT. This is a suit brought by a man to set aside his marriage on the ground of his own incapacity at the time alleged, though, at other times, he is pleaded to have been capable. The suit was first brought by the father, but the son being of age, and there being no means of making the father guardian, or curator ad litem, the court was of opinion that the suit could not proceed in that form. It has, therefore, since assumed its present shape.

It is, I conceive, perfectly clear in law, that a party may come forward to maintain his own past incapacity, and also that a defect of incapacity invalidates the contract of marriage, as well as any other contract. It is true, that there are some obscure dicta, in the earlier commentators on the law, that a marriage of an insane person could not be invalided on that account, founded, I presume, on some notion, that prevailed in the dark ages, of the mysterious nature of the contract of marriage, in which its spiritual nature almost entirely obliterated its civil character. In more modern times, it has been considered in its proper light, as a civil contract, as well as a religious vow, and, like all civil contracts, will be invalidated by want of consent of capable persons. This has been fully determined in a case before the Delegates, when the effect of all these dicta was brought before the court (*Morison* v. *Stewart, falsely called Morison* (1)), and it has been since acted upon in various cases in this court which it is unnecessary to review. I take it to be as clear a principal of law, therefore, at this day, as any can be, and as incapable of being affected by any general dicta, which may be found in writers of earlier periods, as any fundamental maxim, on which the courts are in the habit of proceeding.

When a commission of lunacy has been taken out, the conclusion against the marriage will be founded on the statute 15 Geo. 2, c. 30 [Marriage of Lunatics : repealed by S.L.R., 1873]; where there has been no such commission, the matter is to be established on evidence. The statute has made provisions against such marriages, even in lucid intervals, till the commission has been superseded. In other cases, the court will require it to be shown by strong evidence, that the marriage was clearly had in a lucid interval, if it is first found that the person was generally insane.

Madness is a state of mind not easily reducible to correct definition, since it is the disorder of that faculty with which we are little acquainted; for all the study of mankind has made but a very moderate progress in investigating the texture of the mind, even in a sound state. In disease, where it has pleased the Almighty to envelope the subject-matter in the darkness of disease, it will probably always continue so; but the effects of this disordered state are pretty well known. We learn from experience and observation all that we can know, and we see that madness may subsist in various degrees, sometimes slight, as partaking rather of disposition or humour, which will not incapacitate a man from managing his own affairs, or making a valid contract. It must be something more than this, something which, if there be any test, is held, by the common judgment of mankind, to affect his general fitness to be trusted with the management of himself and his own concerns. The degree of proof must be still stronger, when a person brings a suit on allegation of his own incapacity, by exposing to view the changes of his mind.

Under these observations, I shall proceed to examine the evidence, which, in substance, I think I may now say, is sufficient to establish that this gentleman was

a person liable to accesses of lunacy. [His Lordship examined the evidence.] On this evidence, I am of opinion, that it is sufficiently proved that he was deranged at the time of the marriage, and that I am bound to pronounce the marriage null and void.

Decree granted.

AUBERT *v.* WALSH

[Court of Common Pleas (Sir James Mansfield, C.J., Heath, Lawrence and Chambre, JJ.), November 26, 1810]

[Reported 3 Taunt. 277; 128 E.R. 110]

Gaming—Illegal wager on future event—Right to recover money before occurrence of event.

Money deposited on an illegal wager depending on the occurrence of a future event may be recovered back before there has elapsed the period of time on the expiration of which the decision of the wager depends.

Notes. Section 18 of the Gaming Act, 1845 (10 Halsbury's Statutes (2nd Edn.) 755) which provides that all contracts by way of gaming and wagering shall be null and void and that sums deposited with a stakeholder shall not be recoverable at law does not preclude a party from recovering his deposit back from the stakeholder before the occurrence of the event.

Referred to: *Hastelow* v. *Jackson*, [1824–34] All E.R. Rep. 529.

As to recovery of money deposited on a wager, see 8 Halsbury's Laws (3rd Edn.) 250; and for cases see 25 Digest (Repl.) 428 et seq.

Cases referred to:

(1) *Lowry* v. *Bourdieu* (1780), 2 Doug. K.B. 468; 99 E.R. 299; 12 Digest (Repl.) 318, *2446*.

(2) *Tappenden* v. *Randall* (1801), 2 Bos. & P. 467; 126 E.R. 1388; 25 Digest (Repl.) 427, *90*.

(3) *Walker* v. *Chapman* (1772), Lofft, 342.

(4) *Lacaussade* v. *White* (1798), 7 Term Rep. 535; 101 E.R. 1118.

(5) *Howson* v. *Hancock* (1800), 8 Term Rep. 575; 101 E.R. 1555; 25 Digest (Repl.) 431, *127*.

(6) *Vandyck* v. *Hewitt* (1800), 1 East, 96; 102 E.R. 39; 29 Digest (Repl.) 353, *2732*.

Also referred to in argument:

Roebuck v. *Hammerton* (1778), 2 Cowp. 737; 98 E.R. 1335; 25 Digest (Repl.) 419, *32*.

Andree v. *Fletcher* (1789), 3 Term Rep. 266; 100 E.R. 567; 12 Digest (Repl.) 318, *2447*.

Cotton v. *Thurland* (1793), 5 Term Rep. 405; 101 E.R. 227; 25 Digest (Repl.) 429, *104*.

Foster v. *Thackery* (1781), 1 Term Rep. 57, n.

Rule Nisi obtained by the defendant to set aside the verdict and enter a nonsuit in an action for money had and received.

The plaintiff by this action sought to recover back the premiums which he had paid to the defendant upon an instrument or policy, dated Sept. 15, 1808, by which, in consideration of forty guineas for £100, and according to that rate for

every greater or less sum received of B. Aubert, jun., the defendant promised to pay the plaintiff the sum of money which he had thereunto subscribed, without any abatement whatever, in case a cessation of hostilities between Great Britain and France did not take place, followed up by a peace previous to the re-commencement of hostilities, or preliminaries of peace were not signed, on or before July 1, 1810. One thousand pounds was subscribed by B. Walsh: premium received Sept. 15, 1808. The defendant accompanied the general issue with a notice of set-off.

At the trial before Sir James Mansfield, C.J., it appeared that the defendant had received the premium, and signed the policy. On Oct. 31, 1808, a commission of bankruptcy had issued against the defendant, under which he was duly found and declared a bankrupt, and soon afterwards, and before July 1, 1810, the several other persons who had paid premiums upon similar policies, claimed to prove before the commissioners the amount of the premiums paid as a debt due from the bankrupt's estate; but the commissioners refused to permit the proofs. Upon which the plaintiff thought it useless to prefer his claim, and no direct demand was made for the re-payment of the premiums before this action.

The defendant contended that the plaintiff could not succeed, because if the wager were illegal, the parties were in pari delicto, and the law would not interfere to help either. For the plaintiff it was answered that it was competent for him at any time before the event was decided on which the wager was to depend to abandon the contract, as had been done here, and in that case to recover back the premium paid. Sir James Mansfield, C.J., reserved the point, subject to which the jury found a verdict for the plaintiff. *Serjeant Best* for the defendant, obtained a rule nisi for setting aside the verdict, and entering a nonsuit.

Serjeant Shepherd and *Serjeant Marshall* for the plaintiff, showed cause against the rule.

Serjeant Lens and *Serjeant Best* for the defendant, supported the rule.

Cur. adv. vult.

SIR JAMES MANSFIELD, C.J., delivered the following opinion of the court.—This is an action on a wager brought to recover back the premiums paid, and it is resisted on the ground that it is an illegal wager, and that before the period at which the wager was to be determined, the plaintiff claimed the money which he had advanced to be repaid. There have been many cases cited to prove that, in the case of payment of money on illegal transactions, potior est conditio possidentis; but the distinction is taken here that the demand of the money back before the day was a rescinding of the illegal contract. There is, however, some doubt on the soundness of that distinction, unless accompanied with some qualification, for it does not clearly appear what is the period before which the contract may be rescinded, because a man may wait till the event of the wager can be very clearly known and foreseen, and may he then rescind the contract, and save his money?

However in *Lowry* v. *Bourdieu* (1), Buller, J., took the distinction between a case where the event had happened and where a man had taken his chance of winning, and the case where he had not; and that distinction was expressly adopted by the judges of this court in *Tappenden* v. *Randall* (2), which was most clearly decided on that ground. Subject to the observation above made, I think there is good sense in that distinction. Why should not a man say: you and I have agreed so and so, but the agreement is good for nothing; I cannot bind you, and you cannot bind me, and, therefore, I desire before the event happens that you will pay me back my money. This is, in fact, a relieving against the effects which an illegal contract, persevered in, would produce. We, therefore, are of opinion that this distinction must be supported.

But there is a very strange case in Mr. Lofft's Reports, *Walker* v. *Chapman* (3). Lord Mansfield, however, there seems to have adopted the same doctrine; and it appears by his expressions as if the person came into court, not to have the money back again after the event decided, but to rescind the illegal contract. I must take

notice of one case, a very strong one, *Lacaussade* v. *White* (4), where the court said it was more consonant to policy that money paid on an illegal contract might be recovered back, than that it should be retained. That was a strong case certainly in favour of the present defendant; but this doctrine is directly contrary to what Lord Kenyon, C.J., said afterwards in *Howson* v. *Hancock* (5), where he seems to have entirely forgotten *Lacaussade* v. *White* (4). Lord Kenyon there says (8 Term Rep. at p. 577):

> "There is no case to be found where, when money has been actually paid by one of two parties to the other upon an illegal contract, both being participes criminis, an action has been maintained to recover it back again."

This is directly contrary to *Lacaussade* v. *White* (4); and he afterwards says, that *Howson* v. *Hancock* (5) is very different from that case, which he says "was the case of a stake recovered from a stakeholder, before it had been paid over." But here he certainly mistook *Lacaussade* v. *White* (4) entirely, for there is no stakeholder in the case, nor anything like it: and in *Vandyck* v. *Hewitt* (6), it was said by Lord Kenyon, that the rule had been settled in all times, that where both parties were in pari delicto, potior est conditio possidentis.

I mention these cases to show that the authority of *Lacaussade* v. *White* (4) is very much shaken, and cannot be relied on, and that we do not decide on the authority of that case. But here the plaintiff, before the time of deciding the event, rescinds the contract, as he is at liberty to do.

Rule discharged.

BEALEY *v.* SHAW AND OTHERS

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), February 7, 1805]

[Reported 6 East, 208; 2 Smith, K.B. 321; 102 E.R. 1266]

Water—Riparian rights—Easement—Diversion by upper riparian owner for long period—Right to increase quantity of water diverted.

Where the occupiers of premises adjoining a stream have for over sixty years diverted water through a sluice of certain dimensions, the right which they acquire by presumed grant is a limited one, to be measured by the extent of its enjoyment. Accordingly, the occupiers are not entitled to enlarge the sluice and divert more water to the prejudice of lower riparian occupiers.

Notes. Considered: *Saunders* v. *Newman* (1818), 1 B. & Ald. 258; *Williams* v. *Morland* (1824), 2 B. & C. 910. Applied: *Mason* v. *Hill*, [1824–34] All E.R. Rep. 73. Considered: *Wilts.* v. *Berks. Canal Navigation Co.* v. *Swindon Waterworks Co.* (1873), 9 Ch. App. 453, n.; *Dalton* v. *Angus* (1877), 3 Q.B.D. 85. Applied: *White* v. *White*, [1906] A.C. 72. Referred to: *Cross* v. *Lewis* (1824), 2 B. & C. 686; *Canham* v. *Fisk* (1831), 2 Cr. & J. 126; *Liggins* v. *Inge*, [1824–34] All E.R. Rep. 754.

As to riparian rights, see generally 39 Halsbury's Laws (3rd Edn.) 514–529; and for cases see 47 Digest (Repl.) 653–657.

Cases referred to in argument:

Prescott v. *Phillips* (1798), cited in 6 East, at p. 213; 102 E.R. 1268; 47 Digest (Repl.) 653, *129*.

Cox v. *Matthews* (1673), 1 Vent. 239; 3 Keb. 133; 86 E.R. 160; 19 Digest (Repl.) 42, *223*.

Rule Nisi obtained by the defendants for a new trial in an action for diverting water from a river which ought to have flowed to the plaintiff's premises.

The plaintiff declared that on Jan. 1, 1799, he was possessed of certain lands, mills, and other buildings and machinery used in his trade of a whitster, and that a stream of water used to flow out of the river Irwell through a watercourse through his land, and was used to work the said mills and machinery; and that the defendants then injuriously widened, deepened, and enlarged certain fenders, sluices, and watercourses, leading out of a part of the river Irwell higher than the commencement of the plaintiff's stream, and thereby drew off and diverted from the said river a greater quantity of water than used to flow and ought to have flowed into the defendant's fenders and sluices, and continued the same so widened, etc., and the water so drawn off from thence hitherto, and thereby prevented the same from flowing to the premises of the plaintiff, by which he was deprived of the advantage of the said stream. There were several other counts stating in substance the same grievance in different ways. The defendants denied liability.

At the trial before Graham, B., at the last Lancaster Assizes, it appeared that the plaintiff's and the defendants' mills and works were both situated near the banks of the river Irwell, from the water of which they were supplied. The first diversion of the river was in 1724, when a mill was erected on the defendants' premises by those from whom they claimed, and a weir was made above, and the water brought from the river by means of a sluice, adequate in quantity to the wants of the then owners; the remainder (which was more or less according to the season, and sometimes but little in dry weather) continuing to flow as before in the natural channel. Another weir was built by the owners of the same premises about forty years ago, and a third about twenty years ago: and as the works were from time to time enlarged, more water was taken from the Irwell to supply them. No objection was made, there being then no other mill on the stream in that part of the country. The present weir of the defendants was made by Messrs. Potter and Crompton (from whom the defendants immediately claimed) when they were in possession of the same premises in 1791. It was made about forty yards higher up the river; and at the same time, the sluice by which their works were supplied was considerably widened and deepened, so that nearly double the quantity of water was drawn from the Irwell which had ever before been taken. The plaintiff's works were first erected in 1787, and his weir and sluice then first made upon his premises, which were situated lower down the stream, and between the works of the defendants and the tail of their sluice where the water was again returned into the bed of the river, which there made a great bend.

In consequence of the alteration of the defendants' sluice in 1791, by which so much more water was taken from the bed of the river above the plaintiff's works than before, they were materially impeded, and sometimes obliged to stop working altogether. Before that time there was no complaint of want of water. But disputes began concerning it; and the defendants still attempted to exercise acts of exclusive occupancy of the water after the complaints originated, for they put a lock on the clough, the key of which was kept by them for three years together. Applications were several times made by the plaintiff's foreman to know when it would be convenient to the defendants to let the plaintiff have some water; and he was told that he should have it when Shaw's work was done. But it was agreed that a person should be kept to watch the management of the clough, so that the plaintiff might have the water immediately at all times when it was not necessarily used by the defendants. This person was paid by both parties for his trouble; though he was in the employ of the defendants, and was desired by one of them after the enlargement of their sluice was made to keep the plaintiff quiet.

The defendants called no witnesses; but they contended that they and the persons for whom they claimed, having since the year 1724 down at least to 1787 had the free and exclusive enjoyment of so much of the river as they thought proper to appropriate to themselves, increasing the quantity from time to time

as their occasions required, it was not competent to the plaintiff at the latter period to abridge their right by the erection of new works and making a new weir and sluice; but having placed himself between their weir and their mill-goit, he must take the river subject to the defendants' use of it. Further, that the plaintiff could acquire no right to the use of any part of the river water, adversely to the defendants, by any enjoyment short at least of twenty years; and here they had only had an enjoyment for less than four years of the superfluous water, which the defendants had then no occasion for: and they, having had an unlimited use of the river for so long before 1787, could not lose that right by a non-user for so short a period, but were at liberty to appropriate to themselves as much more as they wanted, in the same manner as they had several times done before the plaintiff's works and sluice were erected and made. But that if any action lay, it should have been brought against Potter and Crompton, by whom the increased quantity of water had been originally taken in 1791, which the plaintiff had acquiesced in, and not against the defendants who had purchased under such acquiescence.

The learned judge, however, considered that the important period for the jury to attend to as to the question of right was in 1791, when it was clear that an increased quantity of water had been drawn by the defendants from the river by means of the then newly enlarged and deepened sluice, before which time the plaintiff's works had been erected, and he was in the enjoyment of so much of the water as had not been before appropriated by those under whom the defendants claimed. That persons possessing lands on the banks of rivers had a right to the flow of the water in its natural stream, unless there existed before a right in others to enjoy or divert any part of it to their own use. That every such exclusive right was to be measured by the extent of its enjoyment; and if Potter and Crompton had in 1791 taken more water from the river than had ever been done before by themselves or those under whom they claimed, after the plaintiff had appropriated what was before left to himself, by means of which his works were injured, this was a damage to him, and the continuance by the defendants, who succeeded to the premises, of the sluice so deepened and enlarged, was a continuance of the injury, for which an action lay. That the applications by the plaintiff's foreman for leave to take the water, and the defendants having kept the key of the clough which regulated the supply of it, though strong were not conclusive evidence against the plaintiff, but might have been done under an ignorance or misapprehension of his rights at the time. Under this direction the jury found a verdict for the plaintiff with nominal damages.

The defendants moved in last Hilary Term to set this aside upon a supposed misdirection of the judge in point of law, upon the evidence, the grounds being: (i) That the evidence of exclusive enjoyment by the defendants and those from whom they claimed of as much of the water as they had occasion for, increased from time to time as more was wanted from 1724 downwards, was evidence to be left to the jury of their exclusive right to the whole of the river water, and that any other person erecting a mill afterwards on the same stream must take it subject to the defendants' prior right to use the whole, and could not acquire an adverse title against it under twenty years' quiet enjoyment; (ii) that here was evidence of an acquiescence on the part of the plaintiff in the defendants' claim.

Cockell, Serjeant Topping, Wood, and *Richardson,* for the plaintiff, showed cause against the rule.

Erskine, Park, Holroyd, and *Scarlett,* for the defendants, supported the rule.

LORD ELLENBOROUGH, C.J.—I see no ground for disturbing the verdict. If the whole evidence were left to the jury as stated by the learned judge, there can be no question upon it; and if the verdict had been for the defendants, I think it could not have been sustained. The general rule of law is, that, independent of

A any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water in his own land without diminution or alteration. But an adverse right may exist founded on the occupation of another. And though the stream be either diminished in quantity or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it have existed for so long time as may raise the B presumption of a grant, the other party whose land is below must take the stream subject to such adverse right. I take it that twenty years' exclusive enjoyment of the water in any particular manner affords a conclusive presumption of right in the party so enjoying it derived from grant or Act of Parliament. But less than twenty years' enjoyment may or may not afford such a presumption according as it is attended with circumstances to support or rebut the right. Here it appears C that from 1724 downwards there has been a partial enjoyment of the water of this river by those occupying the defendants' premises by means of a weir of a given height, and a sluice of given dimensions. In this state of things, the plaintiff in 1787 comes to a spot lower down the stream, and erects a weir, mill, and other works on his own land, and enjoys the rest of the water which the defendants had not been accustomed to divert; and this he does for four years without objec- D tion from any person. Supposing the question had arisen then on that enjoyment by the plaintiff of what I may say was less than his natural right, of a right abridged by the defendants' prior occupation of a part of the river for their own purposes, what objection could have been made to it? How could it have been shown that the occupiers of the defendants' premises were then in possession of all the water, when it is apparent that their use of it was not increased so as to E deprive the plaintiff of the benefit of it till 1791, when they enlarged their works, and for the very purpose of appropriating to themselves more of the water they enlarged their sluice? After this enlargement was made of the defendants' sluice in 1791 complaints began; and in order to avoid dispute it was agreed that the fender should be kept by a man who was employed for that purpose by both parties, and paid by both: and it appears that he was privately directed by one F of the defendants to keep the plaintiff quiet during the time. But why keep the plaintiff quiet if he had no right which it was apprehended he might assert? It is enough, however, to say, that after the enlargement of the defendants' sluice it was a disputed right of enjoyment of the water, and no grant could have been presumed by the jury on such a contested enjoyment. It amounts to no more than this, that the plaintiff to avoid litigation agreed during that time to receive G his right in a manner more abridged than he need have done: but afterwards, when the attempt was made to take all the water from him, he stood, as he lawfully might, upon his strict rights, and brought his action for the obstruction. On the whole, therefore, it is evident that down to 1791 the defendants' right to the water had only been exercised in a limited manner: and no objection can be made to H the direction of the learned judge. As to their enjoyment between 1791 and 1803, there was nothing to leave to the jury on which to presume a grant.

GROSE, J.—The verdict is neither against law nor fact. The plaintiff had a right to all the water flowing over his own estate, subject only to the easement which the defendants might have in it in respect of the premises which they I occupied higher up the river. To what extent then did that go? It appears that prior to the year 1791 the occupiers of the defendants' premises exercised the right of having a weir in the river to a certain height, and diverting the water from the natural channel by means of a sluice of certain dimensions. The plaintiff, on the other hand, had a right to all the water coming over that weir, which had not been carried off by such sluice. Then in 1791, Potter and Crompton convert the sluice, which was before a narrow channel, into what some of the witnesses call a canal, made both wider and deeper than before, and thereby prevented the

plaintiff from taking the water in the same manner that he had done for four years before, and as he was entitled to take it; by so doing they encroached on his right, and deprived him of a benefit which was attached to his estate. It was an extension of the right before exercised by them, and a material injury to the plaintiff. But then it is said, that subsequent to the enlargement of the defendants' sluice in 1791 they kept the key of the clough, and there was an acquiescence of the plaintiff, and that he asked leave to take the water when it was not wanted by the defendants. But the whole that it amounts to is this, that all the evidence of the right being with the plaintiff down to 1791, for a small space of time afterwards (about three years), rather than have a dispute with the defendants, he consented to this arrangement, by which he expected to have the benefit of the water with their consent. But that is not to be compared with the weight of evidence in support of the plaintiff's right: and if the verdict had been against him on that ground, I should have thought that there ought to have been a new trial. Consequently I cannot say that this verdict is wrong.

LAWRENCE, J.—I think the law was very correctly stated by the learned judge at the trial; and the objection now made by the defendants to the plaintiff's claim is inconsistent with the ground on which they attempt to rest their own case. For they contend that they had a right to appropriate as much of the water as they pleased from time to time to their own use; and yet they deny the same right to the plaintiff to appropriate to his use what had not been appropriated before by any other person. In this the defendants are wrong; for if the occupiers of their premises could before have appropriated to themselves any part of the water flowing through their own lands, by the same rule those through whose lands it afterwards flowed might appropriate so much as had not been appropriated before by others. The question then is reduced to this, whether there be any evidence to show that the plaintiff was attempting to obtain more water than he had before the enlargement of the defendants' works in 1791. The evidence relied on, of leave asked of them for the water by the plaintiff, by no means shows that: for though in a case of doubt concerning the right to a thing, leave asked by one party of the other for the use of it would be strong evidence of the right, yet here there is clear evidence of what the right was down to that period, namely, that the defendants had only a right to all the water which they could carry off in a sluice of certain dimensions, such as they had been used to enjoy prior to the year 1791, when they took upon themselves to enlarge it after the plaintiff had applied to certain uses what had before been unappropriated by them.

LE BLANC, J.—As to whether particular facts proved in a cause should or should not be pointedly left to the consideration of the jury, much must depend upon the manner in which the case is stated to the judge and jury at the time. Here the point insisted on by the defendants at the trial was that as prior to the year 1787 those who occupied the defendants' premises were the only persons who had works on this stream, and had taken from time to time as much water as they pleased, leaving the rest to flow in the natural channel, the plaintiff, who came in 1787 to an estate lower down the river, had only a right to take so much as the defendants did not choose to take at any future time. This position it was which my brother GRAHAM denied to be law, and I think he properly denied it. For the true rule is that, after the erection of works and the appropriation by the owner of the land of a certain quantity of the water flowing over it, if a proprietor of other land afterwards take what remains of the water before unappropriated, the first-mentioned owner, however he might before such second appropriation have taken to himself so much more, cannot do so afterwards. Therefore, the evidence of the defendants' taking more of the water after the appropriation by the plaintiff in 1787 did not interfere with the rule of law as laid down at the trial.

A And there is no evidence which goes to show that the verdict is wrong; for as to the particular facts which it is now said ought to have been pointedly stated for the consideration of the jury, if they were not relied on at the time, and the case was not put on that ground, it is not sufficient now to say that such or such a fact might have applied to another view of the case.

B *Rule discharged.*

C

RUSHFORTH AND OTHERS *v.* HADFIELD AND OTHERS

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), February 8, 1806]

[Reported 7 East, 224; 3 Smith, K.B. 221; 103 E.R. 86]

D *Carriage of Goods—Lien—Carrier's lien—General lien—General usage.*

A common carrier has no lien for his general balance for the carriage of goods of a customer on the ground of general usage unless there is an express or implied contract.

Notes. Referred to: *Judson* v. *Etheridge* (1833), 3 Tyr. 954; *United States Steel Products Co.* v. *Great Western Rail. Co.*, [1914–15] All E.R. Rep. 1049.

E As to a carrier's lien, see 4 Halsbury's Laws (3rd Edn.) 194, 195; and for cases see 8 Digest (Repl.) 162 et seq.

Rule Nisi obtained by the defendants to set aside the verdict in an action of trover in which the plaintiffs, the assignees of one Rushforth, a bankrupt, sought to recover from the defendants, who were common carriers, the value of a quantity of cloth.

F The bankrupt sent a quantity of cloth by the defendants, who were common carriers, and the carriage price for the cloth was tendered. The defendants claimed a lien on the cloth for their general balance due to them as carriers for other goods previously carried by them for the bankrupt. In an action of trover by the plaintiffs, the assignees of the bankrupt, to recover the value of the cloth, a verdict was found for the defendants, which the Court of King's Bench thought G was not sustained by the evidence, and, therefore, they granted a new trial (6 East, 519).

At the re-trial before Chambre, J., the defendants' book-keepers in London, at Stamford and at Huddersfield, swore to their practice to retain goods for their general balance, and particularised one instance in December, 1799, where an action was brought, which, being referred, was decided on another point; a second in May, H 1800, where there was no bankruptcy; a third in May, 1803, where the bankrupt's assignee demanded the goods, but afterwards paid the balance; a fourth and fifth in the same year, when the individuals paid the balance, but no bankruptcy intervened; and a sixth of the like sort as the last in 1804. In addition to these, Welch, a carrier from Manchester and Leeds, deposed to an instance of retention of goods for the general balance three years back, where a bankruptcy intervened, I and the assignees disputed the payment at first, but afterwards paid the balance; and to two other instances of goods sent to Glasgow, one where the carriage of the particular goods was £3 and the general balance £20, and the other where the carriage was a few shillings and the general balance £8. In both instances bankruptcies intervened, and the assignees paid the general balance. Hanley, a Northallerton carrier, spoke to two instances of retainer of goods twelve and thirteen years ago till the individuals paid the general balance; but neither were bankrupts. The book-keeper of Pickford, a carrier from London to Liverpool,

particularised an instance of retaining for the general balance in 1792, where the vendee became bankrupt, but there the vendor stopped in transitu and he paid the general balance at the end of two months; a second similar instance in the same year; a third instance in 1795, where the senders became bankrupts and their general balance was paid by the vendees; a fourth in 1795, where the goods of an individual, not bankrupt, were detained several years, but no account how the matter was finally settled; and two other like instances in 1794 and 1795. Clark, a Leicester carrier, also mentioned two instances, one in 1775, the other afterwards, of retaining the goods of solvent individuals till they paid their general balance. All these carriers, who had followed their occupation from twenty to thirty years and upwards, deposed generally to their custom of retaining goods for their general balance in other instances as well as in those particularised.

It was left to the jury to decide whether the usage were so general as to warrant them in presuming that the bankrupts knew it and understood that they were contracting with the defendants in conformity to it, in which case they were to find for the defendants; otherwise they were told that the general rule of law would entitle the plaintiffs to a verdict. On this direction the jury found for the plaintiffs, which was moved to be set aside as a verdict against all the evidence.

Serjeant Cockell for the plaintiffs, showed cause against the rule.
Park and *Wood* for the defendants, supported the rule.

LORD ELLENBOROUGH, C.J.—It is too much to say that there has been a general acquiescence in this claim of the carriers since 1775, merely because there was a particular instance of it at that time. Other instances were only about ten or twelve years back. and several of them of very recent date. The question, however, results to this: what was the particular contract of these parties? And, as the evidence is silent as to any express agreement between them it must be collected either from the mode of dealing before practised between the same parties, or from the general dealings of other persons engaged in the same employment, of such notoriety as that they might fairly be presumed to be known to the bankrupt at the time of his dealing with the defendants, from whence the inference was to be drawn that these parties dealt on the same footing as all others did, with reference to the known usage of the trade. But at least it must be admitted that the claim now set up by the carriers is against the general law of the land, and the proof of it is, therefore, to be regarded with jealousy. In many cases it would happen that parties would be glad to pay small sums due for the carriage of former goods rather than incur the risk of a great loss by detention of goods of value. Much of the evidence is of that description. Other instances again were in the case of solvent persons who were at all events liable to answer for their general balance. And little or no stress could be laid on some of the more recent instances not brought home to the knowledge of the bankrupt at the time. Most of the evidence, therefore, is open to observation. If, indeed, there had been evidence of prior dealings between these parties on the footing of such an extended lien, that would have furnished good evidence for the jury to have found that they continued to deal on the same terms. But the question for the jury here was whether the evidence of a usage for the carriers to retain for their balance were so general as that the bankrupt must be taken to have known and acted on it. They have in effect found either that the bankrupt knew of no such usage as that which was given in evidence or knowing, did not adopt it. Growing liens are always to be looked at with jealousy, and require stronger proof. They are encroachments on the common law. If they are encouraged, the practice will be continually extending to other traders and other matters. The farrier will be claiming a lien on a horse sent to him to be shod. Carriages and other things which require frequent repair will be detained on the same claim; and there is no saying where it is to stop. It is not for the convenience of the public that these liens should be extended further than they are already established by law; but if any particular

A inconvenience arise in the course of trade the parties may, if they think proper, stipulate with their customers for the introduction of such a lien into their dealings. But in the absence of any evidence of that sort to affect the bankrupt, I think the jury have done right in negativing the lien claimed by the defendants on the score of general usage.

B **GROSE, J.**—This lien is attempted to be set up by the defendants not on the ground of any particular contract or previous transactions between them and the bankrupt but on the ground of previous transactions between them and other parties, and between other carriers and their customers. And it is admitted that the question on this evidence was properly left to the jury that they might find a verdict for the defendants if the usage for the carriers to retain for their balance of account were so general as that they must conclude that these parties contracted C with the knowledge and adoption of such usage. The jury have found in the negative; and I take it to be sound law that no such lien can exist except by the contract of the parties expressed or implied.

LAWRENCE, J.—The most which can be said on the part of the defendants is that there was evidence which might have warranted the jury to find the other D way; but it was for them to decide. This is a point which the carriers need not be so solicitous to establish. It is agreed that they have a lien at common law for the carriage price of each particular article. If, then, it be not convenient for the consignee to pay for the carriage of the specific goods at the time of delivery, it is very easy for the carriers to stipulate that they shall have a lien for their balance on any other goods which they may thereafter carry for him. It is not E fit to encourage persons to set up liens contrary to law. The carriers' convenience certainly does not require any extension of the law for they have already a lien for the carriage price of the particular goods; and if they choose voluntarily to part with that without such a stipulation as I have mentioned, there is no reason for giving them a more extensive lien in the place of that which they were entitled to. I should not be sorry, therefore, if it were found generally that they have F no such lien as that now claimed on the ground of general usage.

LE BLANC, J.—This is a case where a jury might well be jealous of a general lien attempted to be set up against the policy of the common law, which has given to carriers only a lien for the carriage price of the particular goods. The party, therefore, who sets up such a claim ought to make out a very strong case; but, on G weighing the evidence which was given at the trial, I do not think that this is a case in which the court are called on to hold out any encouragement to the claim set up by overturning what the jury have done, after having the whole matter submitted to them.

Rule discharged.

BROWN AND OTHERS *v.* HIGGS AND OTHERS

[Rolls Court (Lord Alvanley, M.R.), April 11, 15, July 1, 1799, July 7, 18, 1800]

[Reported 4 Ves. 708; 5 Ves. 495; 31 E.R. 366]

[Lord Chancellor's Court (Lord Eldon, L.C.), November 19, 20, and other days, 1801, December 10, 1803.]

[Reported 8 Ves. 561; 32 E.R. 473]

[House of Lords, 1813]

[Reported 18 Ves. 192]

Trust—Execution by court—Failure of trustees—Execution of trust for exercise of power.

Where the execution of a trust fails by the death of the trustee, or by accident, or by the negligence of the trustee, the court will execute the trust. But if a mere power is not executed the court will not interpose to execute it unless the terms on which the donor conferred the power put on the donee a duty to exercise the power, giving him an interest extensive enough to enable him to discharge it. He is then regarded as a trustee for the exercise of the power, and the court will adopt the principle relating to trusts and will execute the power in the interests of its objects: per Lord Eldon, L.C.

Per Sir R. P. Arden, M.R.: A trust shall never fail by its non-execution or the inability of the trustee to exercise it. In such circumstances the court will execute the trust, however difficult it may be to select the persons intended to benefit and though it must depend on the opinion of the trustees as to the merits of the objects of the trust.

Notes. Considered: *Longmore* v. *Broom* (1802), 7 Ves. 124. Applied: *Birch* v. *Wade* (1814), 3 Ves. & B. 199; *Prevost* v. *Clarke* (1816), 2 Madd. 458. Distinguished: *Meredith* v. *Heneage* (1824), 1 Sim. 542. Considered: *Toldervy* v. *Colt* (1836), 1 M. & W. 250. Applied: *Burrough* v. *Philcox* (1840), 5 My. & Cr. 71; *Penny* v. *Turner* (1848), 2 Ph. 493. Considered: *Cowper* v. *Mantell* (*No. 2*) (1856), 22 Beav. 231; *Salusbury* v. *Denton* (1857), 3 K. & J. 529. Distinguished: *Bernard* v. *Minshull* (1859), John. 276. Considered: *Re White's Trusts* (1860), John. 656; *Re Eddowes* (1861), 1 Drew. & Sm. 395. Distinguished: *Goldring* v. *Inwood* (1861), 3 Giff. 139; *Re Strickland's Trust* (1862), 1 New Rep. 164. Applied: *Izod* v. *Izod* (1863), 32 Beav. 242; *Robson* v. *Flight* (1864), 34 Beav. 110. Considered: *Re Jeaffreson's Trusts* (1866), 12 Jur. N.S. 660; *Re Phené's Trusts* (1868), L.R. 5 Eq. 346. Applied: *Butler* v. *Gray* (1869), 5 Ch. App. 26; *Carthew* v. *Enraght* (1872), 26 L.T. 834. Considered: *Briggs* v. *Upton* (1872), 26 L.T. 485; *Pocock* v. *A.-G.* (1876), 3 Ch.D. 342. Distinguished: *Re Sprague, Miley* v. *Cape* (1880), 43 L.T. 236. Applied: *Wilson* v. *Duguid* (1883), 24 Ch.D. 244. Distinguished: *Re Weekes' Settlement*, [1897] 1 Ch. 289. Applied: *Re Hughes, Hughes* v. *Footner*, [1921] All E.R. Rep. 310. Considered: *Re Combe, Combe* v. *Combe*, [1925] All E.R. Rep. 159. Referred to: *Benson* v. *Whittam* (1831), 5 Sim. 22; *Hemming* v. *Whittam* (1831), 1 L.J.Ch. 94; *Foley* v. *Pardy* (1833), 2 My. & K. 138; *Prendergast* v. *Prendergast* (1850), 3 H.L. Cas. 195; *Sheffield* v. *Coventry* (1853), 17 Jur. 289; *Robinson* v. *Wheelwright* (1855), 21 Beav. 214; *Joel* v. *Mills, Harvey* v. *Mills* (1857), 3 K. & J. 458; *Howarth* v. *Dewell* (1860), 6 Jur. N.S. 1360; *Joel* v. *Mills, Hervey* v. *Mills* (1861), 30 L.J.Ch. 354; *Pilcher* v. *Randall* (1861), 4 L.T. 398; *Lambert* v. *Rendle* (1863), 3 New Rep. 247; *Meller* v. *Stanley* (1864), 2 De G.J. & Sm. 183; *Shattock* v. *Shattock* (1866), 35 L.J.Ch. 509; *Re Blight, Blight* v. *Hartnoll* (1881), 30 W.R. 513; *Re Brierley, Brierley* v. *Brierley* (1894), 43 W.R. 36; *Re Lowman, Devenish* v. *Pester*, [1895] 2 Ch. 348; *Re Llewellyn's Settlement, Official Solicitor* v. *Evans*, [1921] 2 Ch. 281; *Re Arnold's Trusts, Wainwright* v. *Howlett*, [1946] 2 All E.R. 579; *Re Wills' Trust Deeds, Wills* v. *Godfrey*, [1963] 1 All E.R. 390.

As to powers in the nature of trusts, see 30 HALSBURY'S LAWS (3rd Edn.) 210–213, and as to execution of trusts by the court on failure of trustees, see ibid., vol. 38, p. 911. For cases see 37 DIGEST (Repl.) 401 et seq.; 47 DIGEST (Repl.) 156 et seq.

Cases referred to:

(1) *Duke of Marlborough* v. *Lord Godolphin* (1750), 2 Ves. Sen. 61; 28 E.R. 41, L.C.; 37 Digest (Repl.) 119, *471*.

(2) *Harding* v. *Glyn* (1739), 1 Atk. 469; cited in 5 Ves. at p. 501; 26 E.R. 299; 37 Digest (Repl.) 408, *1373*.

(3) *Witts* v. *Boddington* (1790), 3 Bro. C.C. 95; 29 E.R. 428, L.C.; 37 Digest (Repl.) 411, *1402*.

(4) *Pierson* v. *Garnet* (1787), 2 Bro. C.C. 38, 226; 29 E.R. 126, L.C.; 47 Digest (Repl.) 51, *360*.

(5) *Richardson* v. *Chapman* (1760), 7 Bro. Parl. Cas. 318; 3 E.R. 206, H.L.; previous proceedings sub nom. *Potter* v. *Chapman* (1750), Amb. 98; 47 Digest (Repl.) 325, *2954*.

(6) *Bull* v. *Vardy* (1791), 1 Ves. 270; 30 E.R. 338; 37 Digest (Repl.) 407, *1358*.

(7) *Danvers* v. *Earl of Clarendon* (1681), 1 Vern. 35; 23 E.R. 290, L.C.; 49 Digest (Repl.) 775, *7273*.

Bill for the confirmation of a will and an account.

Henry Brown, by his will dated Jan. 13, 1795, and duly executed to pass real estate, reciting that by indentures executed before his marriage he had settled upon his wife Rupertia Brown his estate at Lower Swell to receive the rents and profits after his decease for her life, to prevent all dispute, he gave and bequeathed to her the estate at Lower Swell for her natural life to receive the rents and profits thereof for her own use without being accountable to anyone. After her decease he gave and bequeathed the estate at Lower Swell to his nephew John Brown and the heirs male of his body lawfully begotten

> "and in default of such heirs to one of the sons of my nephew Samuel Brown as the said John Brown shall direct by a conveyance in his lifetime or by his last will and testament."

The testator also gave and bequeathed unto his nephew John Brown in trust for the uses after mentioned his estate at Brize Norton, both which estates he declared were held by lease under the dean and chapter of the Cathedral Church of Christ, Oxford, that is to say, to permit his wife Rupertia to receive all the arrears of rent due to him in his life, and the next half-yearly payment after his decease, subject to the annual rent to the college, and also to permit the tenants of the Parsonage farm to pay to her yearly and every year during her natural life (except the years the leases for both the said estates are renewed, and the fines paid) the sum of £100 sterling in four quarterly payments to begin the first quarter-day after the half-yearly payment to his wife after his decease. He authorised and commanded his said nephew John Brown to let the two estates at Brize Norton as often as occasion should offer, to the best advantage and to apply the rents and profits to pay the rent and fines as they became due, to keep the buildings in repair, and to pay the principal and interest of the money owing upon his estate at Lower Swell and the Grange Farm at Brize Norton. Subject to two legacies of £200 and £100, and some other charges, the testator made the following disposition as to the estate at Brize Norton:

> "After the above trust is performed, I authorise and empower my said nephew John Brown to receive the remainder of the rent that arises from my estate at Brize Norton over and above the £100 I have directed to be paid to my loving wife Rupertia Brown, and to dispose of it in the following manner: that is to say, to take £100 of it every year to his sole and separate use, and to employ the remainder of the said rent, after paying the annual rent to the

college and the fines for the renewal of the leases and other necessary expenses about the farms, to such children of my nephew Samuel Brown as my said nephew John Brown shall think most deserving and that will make the best use of it, or to the children of my nephew William Augustus Brown, if any such there are or shall be."

The testator gave and bequeathed to his wife all his plate, china, household goods, cattle, and chattels not otherwise disposed of, and he appointed his wife Rupertia to be the residuary legatee and sole executrix.

The testator died without issue soon after the execution of his will. John Brown died in the testator's life, leaving a son and two daughters. Samuel Brown also died in the testator's life leaving the following children: Henry Valentine Brown, who was heir-at-law to the testator, Ann Wheeler, Martha Brown, Samuel Brown, Thomas Valentine Brown, and Charles Brown. The widow of the testator married Charles Higgs. William Augustus Brown, who was unmarried at the hearing of the cause, and Maria Sparrow were the next of kin of the testator, being his only surviving nephew and niece.

The bill was filed by the children of Samuel Brown against Charles Higgs and his wife and the next of kin, praying that the will might be established, that an account might be taken of the rents and profits of the Brize Norton estate received by the defendant Higgs and his wife, that what might be due upon that account and the future rents and profits might be applied in discharge of the money due upon the Lower Swell estate and the other charges according to the will, and that the surplus might be paid to the plaintiffs equally or in such proportions as the court should direct, also that an account might be taken of the personal estate of the testator with the usual directions. The defendant Higgs and his wife, by their answer, submitted that the whole of the said premises became vested in Rupertia Higgs, and that she and her husband in her right were entitled thereto free from any limitation made or intended by the will. The next of kin, by their answer, submitted that, if the surplus rents and profits of the Brize Norton estate were to be considered as personal estate undisposed of, they were entitled as next of kin.

Sir R. P. Arden, M.R., made a decree declaring that in consequence of the death of the testator's nephew John Brown in the testator's lifetime the rents of the estates at Brize Norton subject to the trusts declared by the will were well bequeathed in trust for all the children of the testator's nephew Samuel Brown and the children of his nephew William Augustus Brown, if any such there were or should be. An inquiry was directed as to what children of Samuel Brown and William Augustus Brown were living at the death of the testator and what children were living at the time of the decree.

July 7, 1800. On the petition of the defendant Higgs and his wife the case was re-heard.

July 18. **SIR R. P. ARDEN, M.R.,** in giving judgment, said: I am extremely glad this cause has been re-heard, for it has afforded me the opportunity of looking very narrowly into *Duke of Marlborough* v. *Lord Godolphin* (1). I have had the opportunity of giving myself every information upon a point which is certainly of no little difficulty and doubt, but, notwithstanding the arguments which for a time shook my opinion, upon full consideration I think the decree ought not to be altered.

It is to be observed upon the circumstances of this case that the whole interest the testator had in the Brize Norton estate is given to John Brown upon certain trusts, and after those trusts are performed he authorises and empowers him to dispose of the surplus rent in the manner indicated. Upon this disposition and the facts that have taken place the question is whether this sentence in the will, upon which the question arises, is to be considered as merely giving John Brown

A a power, if he thinks fit, to give the profits of the farm, of which he was the trustee, to the children of Samuel Brown or William Augustus Brown, or whether upon the true construction it is anything more or less than a mere trust in him with a power to single out any he might think more deserving, but a gift to him in trust for those children at all events. I am of the same opinion, upon very full consideration and after the very able arguments I have heard, that it is a B trust and not a power in John Brown, and that his non-exercise of that power or the circumstance of his being incapable of exercising it will not prevent the objects of the testator's bounty from taking in some manner, though the power of distribution on account of the death of the trustee cannot now be exercised.

There is no doubt as to the question between the residuary legatee and the next of kin. No petition of re-hearing has been presented by the next of kin, and, most C unquestionably, if this interest is not well given by the will, it passes by the residuary disposition.

As to the point, which is the subject of the re-hearing, the counsel have very properly endeavoured to prove this was not a trust but a power. If that is so, their argument must prevail, for I freely admit the power has not been exercised, and it is such a power as, I agree, the court cannot exercise. If it has not been D exercised by the party, it does not devolve upon the court. The question, therefore, is whether there is anything from which an intention appears that the children of Samuel Brown and William Augustus Brown were the objects to whom the testator meant to give this interest with a power only in John Brown to select or apportion if he saw any reason to give a preference.

The two cases most relied on upon both sides are *Harding* v. *Glyn* (2) in support E of the decree, and *Duke of Marlborough* v. *Lord Godolphin* (1) against it, as affording a proof that words of this sort are to be construed as powers and not as trusts. I have taken some time to look into these cases, and *Witts* v. *Boddington* (3) in order to be quite sure that the real state of those cases agrees with the reports, and I have extracted the small differences that do appear in the Registrar's Book as contrasted with the printed reports. First, as to *Harding* v. *Glyn* (2). It is not F reported by itself in VESEY, but is mentioned in the argument of *Duke of Marlborough* v. *Lord Godolphin* (1). The case is reported in ATKINS, but very briefly, and the statement pretty nearly agrees with the other book. But I will state it from the Register's Book, 1738 A.

The testator gives his wife all his estate, leases, and interest, in his house at Hatton Garden, and all the goods, etc., but he desired her at or before her death G to give such lease, etc., unto and among such of his own relations as she should think most deserving and approve of. The bill states that the wife made her will, by which she bequeathed to the plaintiff Elizabeth Stacy £500, to the plaintiff Harding Stacy £500, and proceeded:

"I give and bequeath to Henry Swindell of Tongeson all my estate, right, H title, and interest of and in all my messuage in Hatton Garden."

That messuage was the house which her husband bequeathed in manner aforesaid. The testatrix gave to Caleb Harding all her plate and £500, and after giving several legacies she gave the residue to Rokeby and Claget whom she made executors. Soon after she died, without having given at or before her death the goods in the house in Hatton Garden, or without having disposed of any of her I husband's jewels to his relations. The plaintiffs charged, that Elizabeth Harding, not having any property in the furniture and jewels, but only for life, and a limited power of disposing of the same to her husband's relations, which she had not done, therefore, they ought to be distributed among his relations according to the Statute of Distribution, 1670 [repealed by Administration of Estates Act, 1925; see now ss. 46 to 49 of that Act and the Intestates Estates Act, 1952, s. 4, Sched. 1]. The decree declares that the defendant Henry Swindell, the son, is entitled to the leasehold house in Hatton Garden devised to him by the will of

Elizabeth Harding pursuant to the power given her by the will of her husband. But it does not appear to me that this person, to whom that house was given, was one of the next of kin of the testator. The decree proceeds to declare that so much of the household goods in Hatton Garden and other personal estate of Nicholas Harding devised by his will, which Elizabeth Harding did not dispose of according to power given her thereby, in case the same remained in specie, or the value thereof, ought to go to the next of kin of the testator and be divided equally among them, to take place from the time of the death of Elizabeth Harding, and that the devise of the plate to Caleb Harding pursuant to the power given by her husband's will was a good devise. The court seems to have held that under the word "relations" she might, if she thought fit, include persons not next of kin, but as to so much as she had not disposed of it would go to such persons as were next of kin according to the Statute of Distribution.

Counsel for the defendants were so conscious of this case pressing, as it certainly does upon all principles, upon the determination of the present case, that they contended that, if that case did bear upon the present, it was overruled by *Duke of Marlborough* v. *Lord Godolphin* (1), and, indeed, if that case was contradictory of it, that might have been argued. But I do not find any opinion of Lord Hardwicke tending to show he disapproved of the former case. *Harding* v. *Glyn* (2) appears to differ in no other respect, but that in that case there are words of request and desire, for the power was as extensive. There is as great power of selection. It does not fix upon any particular persons, and it could go only to such as the person having the power should think deserving and approve of, and but for the words of desire and request there is no difference between this case and that. The court could not have exercised for the testatrix in that case that power of approbation and selection.

Another case, much relied upon in favour of this trust, was *Witts* v. *Boddington* (3). The report of that case is very short. It is very material to state that case accurately, for when it is considered it can hardly be said to bear upon this question, for there was a decisive intention that at all events, if there were grandchildren, they should take. The case is this (Register's Book, 1789, 660). Lee Steere by his will gave to his wife the use and enjoyment during her life of all his watches, jewels, etc., with power for her by will or otherwise to give and bequeath the same unto and among some one or more of the child or children of his daughter Martha in such manner and proportions as she, his wife, should think proper, but in case no such children of his daughter should be alive at the time of his wife's decease, then he desired or directed her to give or leave the same unto some one or more of his relations so that the same should not at any time or in any manner go to any of the family of Witts. Elizabeth Steere made her will as follows:

> "The family plate and jewels I will not bequeath to any grandchild; but as a sincere mark of esteem for my husband's memory leave them to be disposed of as he has mentioned in his will if I did not leave them to either of the children."

So I do not think that the great opinion of Lord Thurlow can be called in aid of the construction contended for in this case, for in that will there was that which is decisive that, if there were any grandchildren of the testator's daughter Martha, he intended such grandchildren or grandchild should have it.

Several other cases were mentioned which it is not material to detail, the question being only as to the principle to be deduced from them. There is one string of cases such as *Pierson* v. *Garnet* (4). Though they were not much relied upon, the principles of them apply directly to the present case. It appears to me upon looking very accurately into those cases that it is perfectly clear that though the power is given in such a manner as clearly to show that a great latitude of selection was intended, such as the court could not possibly take upon themselves to exercise,

and though there was as much reason in those cases as in this to contend that the testator meant only such as should be selected, yet in all those cases the court have held that there was a clear trust with a power to be exercised, and that the non-exercise of that power could not prevent the court from giving it to the objects of the trust. It is said that in that case it is hardly possible to know what the testator meant, and he had no wish to give to descendants, except those to be selected, and the argument urged is that in all those cases the court is to see whether an intention appears that the person shall have a trust reposed in him, leaving him nothing but a power of distribution, and, if so, though a power of selection is added, which, I admit, the court cannot exercise, yet the moment it is determined to be a trust, that trust shall never fail by the non-execution or the inability of the trustee to exercise it.

LORD KENYON in *Pierson* v. *Garnet* (4) refers to *Richardson* v. *Chapman* (5), which is a very material case. It went to the House of Lords from the decree of LORD NORTHINGTON. It shows that, however difficult it may be to select the persons intended and though it must depend from the nature of the trust upon the opinion of the trustees as to the merit of the persons who are the objects, yet the court will execute even a trust of that nature, if the trustee shall either neglect to execute or be disabled from executing, or shows by his conduct any intention not to execute it as the testator intended he should execute it. When one reads the nature of that trust, how difficult it was to make the selection, it is decisive to show that the court must do it, though the trust was in its nature so discretionary. In that case there was an absolute gift by the archbishop of his options upon a trust. See, what that trust is—to present such of persons mentioned, a very large number, not only particular persons, but domestics and other friends, according to their discretion. They could not have given among all the objects, which may be done in this case. In that there must have been some selection, and the persons to take could only take according to the sound discretion exercised by the trustees. That case is well known, and made a great noise. Therefore, there is no occasion to state it. The trustee tried first to give as much as he could to himself. At all events he could not give it to himself. He then fixed upon a person with whom he appeared to have made a bargain for a living by his presenting that person and then getting him to exchange. All this was put an end to, and, then, finding he could not make that exchange, he made a presentation to Mr. Venner, swearing positively that he made it without any condition or restriction whatsoever and that he did verily believe that person to be the most proper person according to the trust. LORD NORTHINGTON thought it that sort of trust which this court could not execute, that he could not judge of the merits of those persons, that it was left entirely to them, and he dismissed the bill, thinking he could not interfere. Upon the appeal, very luckily for the appellant, Dr. Richardson, the other person who stood prior to him not appearing, the House of Lords reversed the decree; and ordered the presentation to be made to the appellant Dr. Richardson. LORD KENYON alluded to *Richardson* v. *Chapman* (5) as establishing that, if a trust can by any possibility be exercised by the court, the non-execution by the trustee shall not prejudice the cestuis que trust.

Then it comes to the only question—whether this is a trust or a power. The distinction between a trust and a power is very nice, I admit, when we come to see *Duke of Marlborough* v. *Lord Godolphin* (1). In that case it was held to be a power. I confess, if it were not for that authority, I think there is great reason to contend that it was an absolute gift to the children, with a power of selection only. The testator by his will gave an absolute legacy of £30,000 to his wife. He appointed executors and made his eldest son residuary legatee. The Register's Book, 1750, 97, states the words of the codicil, as follows:

> "My further will and meaning is that the legacy given and bequeathed by this my will to my wife shall be to her own use and benefit for and during

her natural life only; and from and after her decease the said whole legacy be divided and distributed among such of my children and in such manner and proportions as the said countess shall by any deed or instrument in writing or by her last will direct and appoint, and to no other use or purpose whatsoever; and for the better performance of the same my will is that the said legacy and every part and parts thereof shall from time to time be placed out and disposed of by my executors, and the survivor and survivors of them, with the approbation of the said countess and for her benefit."

Lord Hardwicke, upon consideration of this case, was of opinion that it was a mere power and not a trust. The legacy was to such children as she should appoint and to nobody else. He could not find any intention in favour of the children, except as they were objects of her bounty as well as of his. His Lordship does not, as I have before observed, seem to quarrel with *Harding* v. *Glyn* (2), and he considered it merely upon the question whether it was a trust or a power.

If, therefore, this is a power, the power not being exercised, no person can claim to have it exercised at all. I think I am also warranted by *Harding* v. *Glyn* (2) to say that, wherever the whole interest is given, as it is in this case as to the Brize Norton estate, and in words which, I see, were much relied upon at the former hearing, viz., "to employ," John Brown is clearly made a trustee and for the whole interest. I cannot think, the words "authorise and empower" can have the effect of turning this into a mere power. Such words are little more than a declaration what are the trusts for which that person is already made a trustee. What does the testator authorise and empower him to do? To receive the remainder of the rent, to take £100 a year to himself, etc. Those words seem inserted, because he was to be a trustee for himself to a certain point. I was of opinion before, and upon full consideration I am still of opinion, that the court are bound under those words to hold that it was the intention that John Brown should give to the children of Samuel Brown, or William Augustus Brown, with a power to select as he should think proper, that the testator did not mean any part of the trust to remain unexecuted so long as there were children, and the fair construction is to give it to the children.

I have very fully considered this point. It is certainly a point of considerable difficulty, but upon the best consideration my opinion remains unaltered—that upon the true construction of this will and the principles laid down in *Pierson* v. *Garnet* (4) and the other cases, this is a trust, and the trustee having died without executing it, or transgressing or refusing to execute it, shall not prevent its being held an absolute benefit for the objects, with a power to give a preference. I put this case at the former hearing. Suppose there had been but one child. The trustee in that event could not possibly select, or strictly execute his trust. He could not say that child was more deserving, nor that he was undeserving. In *Pierson* v. *Garnet* (4) there is no doubt that if Mr. Pierson died without making the selection, if he thought proper not to give it to any, it would be a trust for all. It was not contended that it would be an intestacy in that event, as it must be if the argument now urged prevails. In *Butt* v. *Vardy* (6) the opinion and reasoning of Eyre, C.B., are in favour of my opinion. The testator did not give to his wife any interest in the general produce of his estate, so it was a mere power. The Chief Baron asks whether it can be considered that a testator giving a power to give £100 to A. intended A. to have that sum at all events, and that it is only a circuitous way of giving that sum to him. It is impossible from the very nature of it, for it would be an absolute gift at all events, whether the power was exercised or not. As to the £800 there were no objects pointed out. As to the other two sums it was a mere power, the testator not having bequeathed the thing or given any interest in it. The Chief Baron was of opinion they were words of power and not of trust, and I freely own I agree with him upon that will. But upon this will there is sufficient to show the testator meant a bounty to the children, and

A that he considered them as the objects, with a power only to John Brown to select if he should find any of them more deserving than another.

Nov. 19, 1801. The defendants Higgs and his wife appealed to the Lord Chancellor.

Romilly, *Fonblanque*, and *Stratford* for the defendants.

Mansfield, *Stanley*, and *Bell* for the plaintiffs.

B

Dec. 10, 1803. **LORD ELDON, L.C.**—This case appears upon the first hearing to have been very ably argued, and also to have been very much considered by Lord Alvanley (then Sir R. P. Arden, M.R.), of whom I never can express too strongly the opinion I hold, that he always gave great attention to his judgments before he pronounced them. In this case, after stating very much at length the C reasons on which his judgment proceeded, he thought that upon the whole there was sufficient to show the testator meant a bounty to the children, and, therefore, the court was bound to consider them as having that interest. From his decree the cause comes on upon appeal.

I have felt this cause, ever since it was argued, to be one of the most doubtful and difficult cases that has ever occurred. I know that the learned person who D decided it did decide it originally and in the second instance after great consideration. His judgment for that reason carries with it great authority, and it has great additional authority, for I know he has since considered and re-considered it and remains firmly of opinion that the judgment is right. It has, therefore, all the authority, that the most patient, diligent, conscientious, and elaborate consideration of the case can give it. The question upon the Lower Swell estate, if there was E an equitable estate in that, would take this turn, whether, supposing the residuary legatee entitled to it and there was an outstanding legal estate, it would not be the duty of the court to declare she was entitled to it, and to clothe her with the legal estate by drawing it to the equitable estate. I am not certain that what has been taken for granted throughout the cause, that there is no legal estate outstanding, is true, for the testator begins by stating that upon his marriage he by indenture F had settled upon his wife his estate at Lower Swell, to receive the rents and profits for her life. Then he gives her the estate for her life, and after her decease he gives it to his nephew John Brown and the heirs male of his body. If the bill prays no more with regard to the Lower Swell estate, than that the trust of the Brize Norton estate may be executed to the extent of exonerating the former from the mortgage, then clearly it is a bill upon which no declaration ought to be made G as to the interests in the Lower Swell estate beyond what will be sufficient to work an application of the rents and profits of the Brize Norton estate to that exoneration. On the other hand, if either under any trust in the settlement, or if under the will there is a trust of the Lower Swell estate, then the parties are right in praying a declaration of their equitable interests, and that the rents and profits may be applied accordingly, and the question upon it would be, first, whether H the limitation over to one of the sons of Samuel Brown, as John Brown shall direct, is a good limitation over, a limitation engrafted upon a prior limitation in which that estate is given to John Brown and the heirs male of his body, John Brown having died in the lifetime of the testator; and it was taken as clear, on one side at least, that, as that limitation failed, therefore, the limitation over is to take place, that as John Brown died in the lifetime of the testator, it is to be taken I as if that limitation was not in the will. If it was necessary to decide upon that, I should wish to hear much more argument upon it, for the commencement of the estate to one of the sons of Samuel is not merely in case John Brown die in the lifetime of the testator, but after a general failure of issue. It is not, however, necessary to touch that further.

The next point is whether any son of Samuel Brown could take. Upon that it is contended that, John Brown having died before the testator and having made no direction either by conveyance in his lifetime or by his will, and Samuel Brown

having several sons and no son being to take except the individual who should be the object of that direction, no son of Samuel Brown can take. In answer to that it is said that that is not the true meaning of this will, and, if it should happen that at the death of Rupertia Higgs there should be only one son of Samuel, he would take, whether John Brown did or did not, or could or could not, direct it. It is further said that until that event Mrs. Higgs is tenant for life of that estate, and she contends that, subject to the question whether, if the event should happen of only one son of Samuel Brown, he would take, she as residuary legatee is entitled to the estate, that being also a leasehold estate, and that she will remain entitled to it even if there should be but one son of Samuel living at her death. The next of kin, on the other hand, insist that it was not the intention that any interest in either estate should fall into the residue, and that they are entitled to the estate as undisposed of in consequence of John Brown's death without having done any act to give interests to others. LORD ALVANLEY was clearly of opinion that any interest undisposed of in either estate would belong to the residuary legatee on the principle that all that is undisposed of will belong to the residuary legatee unless an intention to the contrary appears. I agree with him perfectly in that, and the use to be made of the circumstance that it is not probable there was any actual intention that any interest in this estate shall fall into the residue, is to consider what may be due to that in considering the question, whether the children of Samuel were intended in all events to take an interest in these leasehold estates. But there is no circumstance as to the Lower Swell estate calling upon me to act at all, for, if nothing is prayed with respect to that estate except as to the exoneration, and if Mrs. Higgs's interest for life is a legal interest, and also her residuary interest, then no question can arise, or ever may arise, for non constat that there ever will be only one son of Samuel Brown. There is no necessity, therefore, to make any alteration in the decree as to that.

The next question is whether the children of Samuel Brown and William Augustus Brown, if he shall have any, or either and which of them, are entitled to the leasehold estate of Brize Norton, subject to the prior trusts, before the residuary interest can be collected. That is a most difficult question. It is perfectly clear that, where there is a mere power of disposing and that power is not executed, this court cannot execute it. It is equally clear that, wherever a trust is created, and the execution of that trust fails by the death of the trustee, or by accident, this court will execute the trust. One question, therefore, is whether John Brown had a trust to execute, or a power, and a mere power. There are not only a mere trust and a mere power, but there is also known to this court a power which the party to whom it is given is entrusted and required to execute, and with regard to that species of power the court considers it as partaking so much of the nature and qualities of a trust that, if the person who has that duty imposed upon him does not discharge it, the court will, to a certain extent, discharge the duty in his room and place. Upon that principle *Harding* v. *Glyn* (2) proceeded. That case cannot be got rid of by saying it is a singular case and that it is difficult to reconcile all subsequent cases with it, for that case has been treated as a clear authority, probably for the whole, certainly by my own experience for a very considerable part, of the time which has elapsed since that judgment was pronounced. MR. JODDRELL's note of that case is to the following effect:

> "This case was argued upon three points: first, whether by the devise the property vested solely in the wife: secondly, whether after her death it was to be considered undisposed of: thirdly, if not, who were entitled under the will. It is plainly intended that the wife should take beneficially only during her life. I mark the word 'beneficially;' for the first words vest it in her absolutely. The word 'but' is a restriction. Upon the second point; it is not undisposed of, for there are no technical words: but it is sufficient if the intention appears; and the word 'desire' amounts to a devise. Thirdly, if the

description of persons is so uncertain, that it is impossible to know who are meant, as if it had been 'his friends', it would be void for uncertainty. But the word 'relations' is a description known in the law. Shall her neglect make it void? It is a trust; and she not having executed it, it devolves upon this court. It is not to go according to the Statute of Distribution: but the devise is not void; and that statute is a good rule to go by; and as equality is a principle of equity, it shall go to such of his next of kin as were alive at the death of his wife."

On the other hand, it was insisted to be a mere power; and the argument is very well conceived, for the argument is that, if it is a trust, it ought to be so at the death of the testator for those who were to take at the death of his wife, and, if not, it is a mere power, and, the wife not having executed it, it is a void devise and so to go according to the statute as undisposed of, so either way it ought to go to those who were the next of kin at his death; and *Danvers* v. *Earl of Clarendon* (7) is cited upon that. This argument is added to by the consideration that, if it was a trust, and the relations at the death of the testator were to take, the gift to Swindall could not be good, for he was not one of the next of kin at the death of the testator or of his wife, but was the son of one of the next of kin. The court appears to have taken this course. The wife took the whole legal interest in terms what may be called a power to give to his relations, and though in ordinary cases that means next of kin at the death of the testator, yet, where the will itself affords the means of avoiding the inconvenience of a construction giving a greater latitude to that word, the court holds that persons more remote may take, viz., that she might give to anyone de facto answering the description. Swindell might be a legatee, and, if she had given all to persons of whom none was a next of kin, but all were relations, it would have been good.

The next consideration was what became of that property she did not give to anyone? Was it undisposed of? If so, of necessity it would have gone to those who were next of kin at the death of the testator, or the representatives of any who died in the life of the wife. But the court seem to have considered that there was a duty imposed upon the wife, and that a latitude was to be given to enable her to discharge the duty according to the power which she was desired and commanded to discharge. Then having the power of naming during her whole life, the court said, those relations who were relations at her death were to take. That could not be because they were strictly cestuis que trust, but those to whom she might have given the instant before she died were those to whom she ought to have given. She was entrusted with a power, and then they applied the doctrine of the inconvenience of applying it with more latitude than relations according to the statute existing at that period. That was a case, therefore, of a power in her which he required her to execute, which enabled her to give to any relations, and the court, looking at it as a power coupled with a duty to execute it, were bound, as she had not executed it, to execute it, consistently with its own rules not giving more latitude to the word "relations" than in ordinary cases and adopting what it supposed her duty, viz., giving to those, who stood in that character at her death. The case establishes that, though upon a mere power this court will not interpose if it is not executed, yet, if it is so given as to vest the power in the person having the whole legal interest and to call upon that person to execute the purpose, sufficiently expressed to make it the duty of that person, if he fails in that duty, the court will execute it for him.

This doctrine was also meant to be enforced in *Pierson* v. *Garnet* (4), a case that made much noise at the time and was much relied on in this cause. In the argument of that case all the difficulties were stated who were to be the descendants, and how were they to take in case of no disposition. Lord Kenyon was clearly of opinion that this was a power to distribute in such manner as the party thought fit, likewise a power to give that the court would not control, but that it was also clear that, if he did not give at all, the court would give for him to such descendants as

at his death the court should hold entitled. I think that Lord Kenyon would have looked to *Harding* v. *Glyn* (2) as an authority for the opinion he seemed to hold upon the point who the descendants were. Mr. Ambler and I were not quite satisfied with that decree, and it came before Lord Thurlow, but the opinion of my younger days is not that which I now hold.

The principle of that case and of *Richardson* v. *Chapman* (5), which went to the House of Lords, and all these cases, is that, if the power is a power which it is the duty of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator who has given him an interest extensive enough to enable him to discharge it, he is regarded as a trustee for the exercise of the power and not as having a discretion whether he will exercise it or not, and the court adopts the principle as to trusts and will not permit his negligence, accident, or other circumstances to disappoint the interests of those for whose benefit he is called upon to execute it.

In that view of this case, with all the doubts and difficulties I have stated, I think that the conclusion of the Master of the Rolls is the right conclusion. I do not know whether this is a property of great value. If it is, I should very much wish, as Lord Alvanley does, that this cause should go to the House of Lords. I do not say it is of the first impression in point of principle, but there is as much difficulty as in any case of bringing it within the reach of the principle. The devise of the Lower Swell estate is conceived in terms that ought to have a fair operation upon the devise of the Brize Norton estate, for the power in the same will as to the Lower Swell estate, if not a mere discretionary power, looks as like it as words can render it. The words as to the Brize Norton estate leave it extremely difficult except by implication to say, John Brown had the whole of the legal estate. There is not a single act he is directed to do that is not directed in terms personal to himself. But when it is considered that they are to be done during the continuance of leases that might not expire in his life, and to be renewed, the true construction is that the testator meant to give him the absolute interest as effectually as if it was given to his executors and administrators, and that those claiming interests under him should continue to do the several acts. Then the construction of Mrs. Higgs must be that what is not given will fall into the residue. But then the question is upon the whole will: Was that the intention? Supposing John Brown survived, what makes that improbable is that partial interests in the rents and profits are given to this residuary legatee. Next, the acts John Brown was meant to do were those by which in one year he was to give to the children the rents and profits, in another year he might give the whole rents and profits to the children, in another he might give part to some, and none to others, in another, part to the children, part to the wife.

Upon the probable intention my inclination to the opinion of Lord Alvanley is too strong to permit me upon any doubts I entertain upon this obscure will to say there is not intention enough to justify the declaration, that has been made. In fair construction also of the clause comprehending the children of William Augustus Brown, the word "or," may be construed, as if it was "and", which will get rid of Mr. Romilly's argument upon the possible profligacy of the children of William Augustus Brown. I doubt also whether this will can be stated to be like those cases where something is required to be given to all.

Duke of Marlborough v. *Lord Godolphin* (1) is certainly very difficult to reconcile with *Harding* v. *Glyn* or with this case. But the question is not whether one case is to be reconciled with others, but, whether all the cases have gone upon a principle which professes to save whole *Harding* v. *Glyn* (2). Lord Hardwicke in *Duke of Marlborough* v. *Lord Godolphin* (1) does not say that, where there is a power and it is made the duty of the party to execute it and he will not execute it, in such a case this court would not act, but he collected from the scope and object of the disposition in that case, taken altogether, the opinion that it was a case in which the person having a power to dispose of the sum of £30,000 had a mere power,

not clothed with any duty requiring her to execute it, and, therefore, as to what was not disposed of the court could not interfere. However difficult it is to reconcile all the cases upon this subject, I think that the principle I have stated is the principle upon which the court ought to proceed, and adopting that I have not confidence enough in the doubts I have entertained, and shall never cease to entertain, upon this will to reverse this decree.

Decree affirmed.

1813. The decree in this cause was affirmed on appeal to the House of Lords.

ATTORNEY-GENERAL *v.* PARMETER AND OTHERS

[Court of Exchequer (Macdonald, C.B., and other judges), Trinity Term, 1809, Easter and Trinity Terms, 1810, December 23, 1811]

[House of Lords (Lord Eldon, L.C., Lord Redesdale and other Lords), February 13, 1813]

[Reported 10 Price, 378, 412; 147 E.R. 345, 356]

Foreshore—Right of Crown—Land between high-water and low-water marks—Grant to private person—Grant subject to public right of navigation.

All the soil between high-water mark and low-water mark is the property of the Crown. That property has certainly been in a great many instances transferred to the subject, but that is always subservient to the public right of navigation possessed by the King's subjects generally. The private right of the Crown may be disposed of, but the public right of the subject cannot, even if it be within the grant. The King can in no degree affect the public right of the subject passing and re-passing on the salt water. He cannot affect that by anything which can be done by him. The public right cannot be waived. There might be a grant of the soil, but such grant must be considered as subject to that public right, which cannot be disturbed: per Lord Eldon, L.C.

Crown Property—Grant—Surrender—Presumption—Grant never acted on.

Where the Crown has made a grant of property of which no advantage has been taken and which has never been acted on for, e.g., a century and a half the presumption is that the grant has been surrendered.

Notes. Referred to: *A.-G. to Prince of Wales* v. *St. Aubyn* (1811), Wight. 167; *A.-G.* v. *Chambers*, [1843–60] All E.R. Rep. 941; *A.-G.* v. *Lonsdale* (1868), L.R. 7 Eq. 377; *A.-G.* v. *Simpson*, [1901] 2 Ch. 671.

As to the Crown's right to the foreshore and the public right to navigation, see 7 Halsbury's Laws (3rd Edn.) 453–462; ibid., vol. 39, pp. 533–540. For cases see 47 Digest (Repl.) 707 et seq.

Cases referred to:

(1) *A.-G.* v. *Richards* (1795), 2 Anst. 603; 145 E.R. 980; 47 Digest (Repl.) 708, *537*.

(2) *Kingston-upon-Hull Corpn.* v. *Horner* (1774), 1 Cowp. 102; Lofft, 576; 98 E.R. 989; 11 Digest (Repl.) 658, *817*.

(3) *Powel* v. *Milbank* (1772), 2 Wm. Bl. 851; 1 Cowp. 103, n.; 3 Wils. 355; 96 E.R. 502; sub nom. *Bowell* v. *Milbank*, 1 Term Rep. 399, n.; 19 Digest (Repl.) 392, *1928*.

Information filed by the Attorney-General against the defendants, praying that the defendants and their agents, servants, and workmen might be restrained from

proceeding further in erecting certain buildings, and works, and directed to remove buildings and works already erected, on the Gosport side of Portsmouth Harbour. A

The information alleged that the defendants some time in the year 1784 erected and made, within the high and low water marks, and near to a place which had been commonly used for the mooring of His Majesty's ships, called the King's Moorings, a wharf, quay or stage, 67 feet or thereabouts in breadth at the west end and at the east 80 feet or thereabouts, and in length 226 feet or thereabouts, B extending from the shore or high-water-mark towards the low-water-mark 336 feet or thereabouts, in which wharf, quay or stage, the defendants placed a large ship for the purpose of a dry dock, with gates to prevent the entrance of the water into the same, and that the defendants also at the west end of the wharf erected a wooden bridge supported by piles of wood driven into the mud land of the harbour to communicate from the shore on the Gosport side of the harbour with the wharf. C It was further alleged that the defendants on the south side of the west end of the wharf had erected a storehouse, of the length of 70 feet or thereabouts and of the breadth of 19 feet or thereabouts, and on the north side thereof two small erections for an office or counting-house, and a pitch-house; and that on the north side of the wharf they had placed on the mud land of the harbour another large ship also intended for a dock, and had deposited soil, stones and rubbish between this ship D and the wharf up to the side of the ship for the purpose of embanking the mud land lying between the ship and the wharf. The defendants, it was stated, had enclosed with wooden piles driven into the mud and secured by planks or pales, a parcel of mud land to the south-west of the town of Gosport between high and lower water marks, which mud land so enclosed was used for a timber pound, and contained in length, from north to south, 200 feet or thereabouts, and in breadth at the north E end thereof 63 feet or thereabouts and at the south end 88 feet or thereabouts. This piece of mud land, so enclosed, was bounded by the shore at Gosport on the east, by a timber yard or pound and store-house in the occupation of one John Whitcomb on the north and by other mud land on the west and south.

At all times previous to the erecting of the wharf and other buildings the sea at spring tides flowed over the soil or mud land between high and low water marks on F which the wharf and other works were erected, and at neap tides the sea flowed over the same, or the greatest part thereof. His Majesty's ships of war and all other ships, vessels and boats of His Majesty's subjects and others had free passage over this soil when covered with water and might cast anchor and lie there, or otherwise use and enjoy the same, in such manner as any other parts of the arm of the sea in question between high and low water marks had been used or enjoyed G or been free and open for the passage and re-passage, anchorage, and lying of ships or vessels, and boats. The Attorney-General, by his information, stated that the wharf and other buildings which had been erected were a nuisance and injury, and if continued, would be a great nuisance and injury to the harbour, would prejudice the aforesaid moorings, and would also be an obstruction to a quantity of water proportionable to their dimensions coming into and going out of the harbour on each H flux and reflux of the tide, and thereby prevent a great scouring and cleansing of the lower part of the channel of the harbour of soilage there, and greatly endanger the loss of the harbour. If similar buildings and works should be made in all parts of the harbour between high and low water marks they would entirely destroy the harbour or render it useless so that His Majesty's ships, and other vessels of burthen would not be able to come into or go out of the harbour as they had always I been used to do, or, if such ships and vessels should be able to come into or go out of the harbour, they would not be able to remain long there, or ride with any safety.

The Attorney-General charged that no person or persons had been in possession of such part of the harbour under colour or pretence of the grant, or otherwise, until the defendants began to make the wharf and other buildings, and that at all times before such time, the sea flowed and re-flowed on and over such parts of the harbour and His Majesty's ships, and all other ships, vessels and boats, had free

A passage and re-passage over the same, and used or might have used the same for the anchoring, mooring and lying of ships, vessels and boats, without any interruption whatsoever. His Majesty and his subjects were, in that manner, in the possession or enjoyment of the same.

The defendants, by their answer to the information, after admitting the prerogative of the Crown respecting the coasts of the kingdom and that His Majesty had B the right of superintendency over the coasts; that the harbour of Portsmouth was an arm of the sea and a public port and sea-mark, and there was a dock near the harbour belonging to His Majesty; and that certain parts of the harbour were commonly used for the mooring of His Majesty's ships and vessels, and were called the King's Moorings; stated that they did not know that the wharf or other buildings were prejudicial to the harbour, that they were jointly in the possession and C occupation of a wharf, quay or stage, and a dock, bridge, storehouse, and a small building used as a counting-house and another small building used as a pitch-house, all situate on the Gosport side of the harbour, and within the high and low water marks of the sea there; and that they were in possession of the same as the absolute owners thereof in fee simple; and that the wharf and other buildings were made and erected by them, the defendants, in or about 1784. They said that they had D ever since been in the possession or enjoyment thereof without any interruption or disturbance, and that the land on which the wharf and other buildings were made and erected, and the fee simple and inheritance thereof, were purchased by them in 1784.

The defendants substantially admitted the facts stated in the information and stated that they believed that King Charles I by letters-patent granted to Dame E Mary Wandesford, wife of Sir George Wandesford, and to Sir George Wandesford, their heirs and assigns for ever, certain pieces of saltmarsh and oozy lands and grounds, and they insisted that the words of the letters-patent were sufficiently comprehensive to include the lands upon which the wharf and other buildings had been erected. After referring to the Crown Suits Act, 1769 [repealed by the Limitation Act, 1939] they said that they purchased the land on which the wharf F and other buildings were erected in 1784, from James Francis Perkins, then of Winkton, in the parish of Christchurch Twyneham, in the county of Southampton, and John Compton, then of Harbridge in the same county, and that such land was by indentures of lease and release dated Sept. 28 and 29, 1785. From what appeared from the title deeds and writings relating to the lands so purchased by and conveyed to them they believed that James Francis Perkins and John Compton G derived their title to such land from or under the other persons named in the indenture of release, and that those persons derived their or his title thereto under conveyances made by Dame Mary Wandesford who survived Sir George Wandesford and became solely entitled to the whole of the lands granted by the letters patent.

The cause came on to be heard in Trinity Term, 1809, and in Easter and Trinity Terms, 1810, upon a great mass of evidence furnished by the depositions of the H various witnesses on either side, principally as to the question of nuisance.

The Solicitor-General (Sir Thomas Plumer), Jervis and *Wyatt* for the Crown.

Sir Arthur Pigott, Hart and *Johnson* for the defendants.

The questions made on either side were (i) The validity of the title or grant; (ii) the extent of it, if valid, and whether it included the locus in quo or ground on I which the alleged obstructions were erected; (iii) whether the grant had not been abandoned, and (iv) whether the erections complained of were or were not a public nuisance injurious to the harbour.

Dec. 23, 1811. **MACDONALD, C.B.,** delivered the following judgment of the court.—In this cause the judgment of the court has stood over for some time, and that not so much by reason of any difficulty in the case as of its extreme importance.

It was an information filed by the Attorney-General complaining of a nuisance in the harbour of Portsmouth in several instances. A previous discussion referring

to *A.-G.* v. *Richards* (1) has attracted the attention of the court to the deed itself, by which it is supposed that the spot upon which the nuisance complained of is erected was conveyed. It was argued at first upon the single ground of the fact of nuisance, making the question one of mere fact, whether the erections were a nuisance or not. In *A.-G.* v. *Richards* (1) the nuisance was very manifest, and it was abated. In the course, however, of agitating the question in the way in which it has been now put, it has become necessary to examine the nature of this instrument itself, not that I myself entertained the least doubt as to its validity in the case of *A.-G.* v. *Richards* (1); though there was no occasion at that time to examine the instrument itself: but it being thought necessary, in the further agitation of this question, to have the deed examined and debated at the Bar, that has been done, and done with great ability.

The importance of this question is made manifest by the testimony of two, I suppose, of the ablest men in the world upon subjects of this kind, namely, Mr. Rennie and Mr. Mylne. Those gentlemen are clearly of opinion that, although of no very great magnitude in the present instance, yet, as far as it goes it is a nuisance and an obstruction in the harbour. There are several witnesses, it is true upon the part of the defendants, who go the length of saying that it is not only no nuisance, but that it is of great service in the harbour. However, these gentlemen themselves surveyed the harbour, and they are of opinion that it is a nuisance detrimental to the harbour, and, except one small spot, that it is not within the grant itself. But it is either within the grant or it is not. If it is within the grant, I think it may be easily shown that the grant is good for nothing. It is perfectly clear that all the soil under the salt water between high-water mark and low-water mark is the property of the Crown. Such property has certainly been (as it may be) communicated in a great many instances to the subject, but that is always subservient to the public right of the King's subjects generally. It is compared by Lord Hale, with his usual simplicity, to the case of a highway. The private right of the Crown may be disposed of, but the public right of the subject cannot, even if it be within this grant.

Upon the first argument which took place in this case it was simply contended that the erection was a nuisance, but upon the second argument the grant itself was impeached. I take it that nothing can be clearer than that the King can in no degree affect the public right of the subject passing and re-passing upon the salt water; he cannot affect that by anything which can be done by him. Sir Matthew Hale lays down clearly, that ports, creeks, and havens are the subjects of the public right. He describes what those are—a port more immediately accommodated for protection, both naturally and artificially—a haven, that which does naturally protect, and where ships may ride or lie in safety—and a creek, a member of a port where there is no customer or comptroller, but where there are certain officers for the purpose of collecting the King's revenues. In none of these places, therefore, can the public right be waived, although there might be a grant of the soil, but such grant must be considered as subject to that public right, which cannot be disturbed.

The grant at present in question is a grant that was made in the year 1628 and down to the year 1785 nothing was ever done upon it. The commission which issued in order to hold the inquisition upon which the grant proceeded, it will be necessary somewhat to examine. It will be found that there is granted in its terms considerably more than the commission warranted, for the inquisition goes greatly beyond it. The letters-patent recite the commission and the inquisition. They recite that a commission issued on Feb. 13, 1625, directed to the mayor of the borough of Lymington and some others, directing them by jury to make the following inquiries. They were to survey and view, as well by the oaths of lawful men of the county of Southampton, as by the examination and deposition of credible persons, all and singular the ports, creeks, lakes and lands which theretofore were surrounded and overflown with the sea, and which lie and

abut on or near the town of Emsworth and a variety of other places, and among the rest the town of Lymington and the port called Key-Haven. They were to inquire whether the aforesaid lands and other premises so surrounded and overflown with the sea could or could not be gained and secured from the overflowing of the sea, and of the number of acres of the same lands, and to what castles, towns, or other particular places they are situated and abutted, and whether the gaining and acquiring of the lands and other premises so to be recovered from the overflowing of the sea would be any damage or prejudice to any person or persons, and also whether the gaining and acquiring the said lands and other premises so overflown by the sea would be for the benefit and advantage of the several parts of the county aforesaid, and to the increase of the revenue of His Majesty and his successors. They were commanded that they should deliver the survey and inquisition as soon as they could and at longest from the day of Easter in one month next following to the barons of the Exchequer. So that we see promptitude is one object in this proceeding, for it is to be executed in a very little time, that is, between Feb. 13 and the Easter following, about three weeks, which will be observed on by and by.

The letters-patent state an inquisition taken in the county of Southampton, which is very material. The commissioners say that they have considered all the circumstances mentioned in the commission relating to the premises by the oaths of certain persons, and that they find the lands in the commission mentioned extend themselves from the town of Emsworth, situate in the east part of the county of Southampton westwards to a point including Portsmouth harbour. The inquisition states that the jurors say

> "that all the small ports, creeks, lakes, and parts of great ports above specified, described in two geographical tables or maps of survey made by Edward Mansel, Gent., and shown as evidence to the jurors aforesaid upon the taking of his inquisition, amount in the whole to 3,923 acres, overflown and surrounded with the sea; and that the aforesaid lands overflown and surrounded described likewise in the said two maps of survey, amount in the whole to 1,500 acres, and that the acquiring and obtaining of the aforesaid lands from the overflowing or surrounding of the sea will not be, as it is reported, any prejudice or damage to any person or persons; and that the acquiring or obtaining of the aforesaid lands from the overflowing and surrounding with the sea, as it is said, are and for the future will be for the great advantage, benefit and profit of the several parts of the county aforesaid respectively adjoining."

Here there is nothing said with respect to the interest of the Crown. The commission directed that it should be matter of inquiry how far it would be for the advantage of the Crown. No return is made to that part of the commission in this inquisition, but it expressly transgresses the direction in the commission, and lays the foundation of a future grant of those smaller ports and creeks and part of the port of Portsmouth.

Perhaps I might stop here at once and say, if in point of fact these ports and creeks and part of the port of Portsmouth is comprehended in the grant, that is by no means what the Crown could grant so as to affect the jus publicum which is the right of the subject universally.

It does on and says that these surveys were remitted to the Exchequer. They are not, however, to be found, and it is very much to be lamented that they are not. The grant proceeds to state:

> "Whereas, for and in consideration of the good, true, faithful and acceptable service done and bestowed for our most dear father deceased and us by our late beloved servant Robert Pamplin, deceased, late one of the yeomen of the wardrobe of our robes, we intended and made our royal promise to give to him, his heirs and assigns for ever, all and singular the lands and marshes

surrounded and overflown, or subject to the overflowing of the sea, in our said county of Southampton."

"All and singular the lands and marshes surrounded and overflown." If that means all lands which are overflown, it comprehends the whole here specified. The grant states that Mary Wandesford, widow of George Wandesford, was a daughter of Robert Pamplin and continues:

"Know ye that in consideration and in compensation of the great expense heretofore, as we are informed, as well by Mary Wandsford and William Wandsford done and bestowed as by the said Mary Wandsford and William Wandsford, their heirs and assigns, for the future to be expended and bestowed in fencing in with walls and recovering the said premises from the sea, or so much of them as could be fenced in and recovered from the sea, or they shall undertake or attempt for the increase of the revenue of our Crown of England, and for divers other causes and considerations. . . ."

We have here the purpose for which these marsh lands were granted. They are to be fenced in and recovered from the sea, and that too with walls which they shall undertake or attempt. If Portsmouth Harbour composes, or any part of it composes, any share of this grant, that part which is comprehended within the grant is to be walled in and the subject excluded, and that "for the increase of the revenue of the Crown of England." "Such as they shall undertake or attempt." Are they to undertake or attempt at the distance of 10,000 years? Does not undertake and attempt necessarily mean within a reasonable time? What is a reasonable time may be in some cases matter of law and in others matter of fact, but the distance between 1628 and 1784 is not what the Crown expected when it contemplated that there should be an undertaking and attempt. Then it proceeds to enumerate a vast variety of different parcels, very great in point of number, amounting to some thousands of acres, and, among others, that part is supposed to be comprehended upon which these erections are made.

In contradiction to that it is contended by the Crown that this is not, except as to some little spot, comprehended within this grant, but that, if it be comprehended within the grant, the grant cannot operate upon it according to law, and if it is not comprehended there is no pretence for retaining it.

The grant, after having enumerated a vast number of marshes and oozes, proceeds to grant in general words

"all other our lands, feedings, pastures, meadows, marshes, salt marshes and glibses, wracks and lands, which formerly were or now are overflown, or subject to the overflowing of the sea, shores, coasts, gravel and sands, with all the increments of the sea, and all our profits, emoluments, and hereditaments whatsoever, with all and singular their rights, members, and appurtenances incident and belonging thereto, and which were lately recovered, forsaken, or left bare and dry by and from the sea, with all benefit of the sea, and all their rights, members, and appurtenances incident or appurtenant, and which at any time, from time to time hereafter, shall be recovered, forsaken, or left bare and dry by and from the sea, in, upon, near or about the aforesaid towns of Emsworth."

And so forth, and, among the rest, the island of Portsea, the castle and town of Porchester, the port of Portsmouth, Fareham haven, etc. Then it proceeds further to grant all those subject-matters, by whatever name they be known or understood

"situate, lying and being, coming, growing, renewing, happening or arising in or near the aforesaid towns, islands, castles, creeks, ports, rivers and havens, or within any of them, or any of the aforesaid lands, tenements, meadows, feedings, pastures, salt marshes, marsh lands overflown or subject to the overflowing of the sea, shores, creeks, ports, havens, and other premises above

A by these presents granted, whenever the same shall be banked, fenced, gained and recovered from the sea, or otherwise forsaken and left bare by the sea."

So that we have in every part of this grant creeks and ports of every denomination, the port of Portsmouth included.

There then follow provisions which show most manifestly that it was intended B that this grant, if it were to take effect at all, should take effect speedily, for it gives a remission of tithes, when this soil should be recovered by banking, for the term of seven years. It was considered, therefore, that the grant, if to take effect at all, was to take effect speedily, and that for the first seven years after the ground was recovered no tithe should be paid. It goes on further to reserve a rent of fourpence an acre for some parts, and a penny an acre in other parts, C and that rent is specially provided to commence on the succeeding St. Andrew's Day in the year 1630. The grant itself was made in 1628, and, therefore, it was expected that in the course of those two years something would arise to the Crown in the shape of rent.

This is the nature of the grant. As I stated before, it does comprehend, as it does in terms, Portsmouth harbour (and it does so in consequence of the D inquisition that was made, which inquisition greatly exceeded the commission, for that had expressly excluded them by directing that they should survey and view those parts which abutted upon the harbour, but no part of the harbour itself), it is in that view also clearly void.

Let us next examine the common doctrine in the case of a grant made, of which no advantage has been taken and which has never been acted upon for a century and a E half. It is most manifestly clear either that the grant was never acted upon at all or we must presume that it was surrendered if ever the grantees did avail themselves of it. It has been argued that, supposing this was the case of a subject who had not acted upon such a grant for one hundred and forty years, the presumption must be the same as it was in *Kingston-upon-Hull Corpn.* v. *Horner* (2), and *Powel* v. *Milbank* (3). In those cases there was nothing produced but a grant made F at a distant time. The court said that time must determine the title. Wherever we see a length of possession of this kind, we must presume, from the lapse of time, that an adverse grant is surrendered. So where we find the King by his subjects still in possession of this soil, by the passing and re-passing of such vessels as can pass and re-pass, we must conclude that, if it ever existed in force, this grant had been in the interim surrendered to the Crown. But it is much more probable that G when the grantees came to look at it, they were told that the King could not grant such creeks and ports, including the greatest port in the kingdom and one of the most important.

Upon all or any of these grounds, first, the existence of a nuisance, the illegality of any grant affecting the jus publicum between high and low water mark, and the great length of time and no fruit having come of this grant—a grant certainly, H by the terms of it, expected to take effect immediately, and to be acted on by the grantees who were to go on progressively as well as they could, whereas nothing has been done—upon all and every one of these grounds, it appears to the court that this grant can be of no avail whatever. The consequence is that there must be the same decree as was made in *A.-G.* v. *Richards* (1), grounded upon the illegality of the grant itself: and that this nuisance must be abated.

I The defendants appealed to the House of Lords.

Hart and *Johnson* for the defendants.
Jervis and *Wyatt* for the Crown.

Feb. 13, 1813. **LORD ELDON, L.C.**—My Lords, I shall not break in upon your Lordships' usage by offering any reason for the affirmance of this judgment, but I am anxious to say this, and this only, that, as I conceive, where there has been a possession for sixty years under this grant, nobody can be removed, so

I desire not to be understood to imply one way or the other what may be the effect of these letters-patent with respect to any one part of the land which this instrument covers except the soil on which these buildings are erected. It is my judgment that in the circumstances now before your Lordships there is matter sufficient to put in issue on this record the question of the validity of this grant —that looking to these letters-patent with respect to this soil I am of opinion that the Court of Exchequer have stated a proposition, true in law, that the title is in his Majesty. I give no opinion as to the effect of any use that has been made of the land. On the grounds I have stated, I think that this judgment ought to be affirmed.

Appeal dismissed.

MORRIS *v.* COLMAN

[Lord Chancellor's Court (Lord Eldon, L.C.), January 14, 1812]

[Reported 18 Ves. 437; 34 E.R. 382]

Contract—Illegality—Public policy—Restraint of trade—Partnership of theatre proprietors—Clause in articles restraining one proprietor from writing for other theatres.

A clause in the partnership articles of the proprietors of a theatre restraining one of the proprietors from writing dramatic pieces for any other theatre is not invalid as a covenant in restraint of trade.

Notes. Distinguished: *Clarke* v. *Price* (1819), 2 Wils. Ch. 157. Explained and Distinguished: *Kemble* v. *Kean* (1829), 6 Sim. 333. Applied: *Dietrichsen* v. *Cabburn* (1846), 1 Coop. temp. Cott. 72. Considered: *Lumley* v. *Wagner*, [1843–60] All E.R. Rep. 368. Referred to: *Taylor* v. *Davis* (1834), 4 L.J.Ch. 18; *Kimberley* v. *Jennings* (1836), 6 Sim. 340; *Hills* v. *Croll* (1845), 1 Coop. temp. Cott. 83; *Stevens* v. *Benning* (1855), 6 De G.M. & G. 223; *Merchants' Trading Co.* v. *Banner* (1871), L.R. 12 Eq. 18; *Donnell* v. *Bennett* (1883), 31 W.R. 316; *Whitwood Chemical Co.* v. *Hardman*, [1891) 2 Ch. 416.

As to one partner restraining the others from carrying on business to the prejudice of the first partners, see 28 Halsbury's Laws (3rd Edn.) 559; and for cases see 45 Digest (Repl.) 206–208. As to the development of the principle relating to restraints by agreement and the classification of such agreements as affecting particular trades, etc., see 38 Halsbury's Laws (3rd Edn.) 17, 18, and 44–50; and for cases see 45 Digest (Repl.) 443 et seq., and 486, 487.

Cases referred to:

(1) *Waters* v. *Taylor* (1808), 15 Ves. 10; 33 E.R. 658, L.C.; 45 Digest (Repl.) 209, *146*.

(2) *Ex parte Ford* (1802), 7 Ves. 617; 32 E.R. 248, L.C.; 45 Digest (Repl.) 209, *145*.

Motion to dissolve an injunction.

Various disputes having arisen among the proprietors of the Haymarket Theatre, a bill was filed praying an execution of the articles of agreement, an injunction to restrain the defendant Colman from acting as manager, and a reference to the Master for the appointment of a manager. An injunction was granted;* and a reference directed to the Master to inquire whether the defendant Colman had

* As to the jurisdiction upon this subject considered as a partnership, see *Waters* v. *Taylor* (1), and *Ex parte Ford* (2).

A performed the duties of manager, and what he was doing and could do in the discharge of those duties. Upon a motion to dissolve the injunction, a question arose upon the validity of a clause in the articles restraining Colman from writing dramatic pieces for any other theatre, or, as the construction was represented for the plaintiff, giving the Haymarket Theatre a right of pre-emption.

B *Hart* and *Shadwell* for the defendant Colman, in support of the motion, compared this provision to covenants in restraint of trade, which are void on principles of public policy.

Sir Samuel Romilly and *Bell* for the plaintiff, contended that this provision was no more against public policy than a stipulation that Mr. Garrick should not perform at any other theatre than that at which he was engaged would have been.

C **LORD ELDON, L.C.**—I cannot perceive any violation of public policy in this provision. The case of trade, to which it has been compared, is perfectly distinct. It is well settled upon that principle that, notwithstanding such a covenant restraining trade in general, a man shall be at liberty to engage in commerce; but that has been broken in upon to the extent of giving effect to covenants restraining trade within particular limits. In partnership engagements, a covenant that the D partners shall not carry on for their private benefit that particular commercial concern in which they are jointly engaged, is not only permitted but is the constant course.

If that is so with regard to trade, it is impossible to maintain that theatrical performers, who act only under a licence, and are treated as vagrants if not licensed, may not enter into such engagements. The contract is not unreasonable E upon either construction; whether it is that Colman shall not write for any other theatre without the licence of the proprietors of the Haymarket Theatre or whether it gives to those proprietors merely a right of pre-emption. If Mr. Garrick was now living, would it be unreasonable that he should contract with Colman to perform only at the Haymarket Theatre, and Colman with him to write for that F theatre alone? Why should they not engage for the talents of each other? The ground might be supposed that nothing could be made of the theatre without exhibiting the talents of such a man; and in this instance, that he may get more to himself and the other proprietors by this contract than he could by hard bargains at other theatres.

I cannot, therefore, see anything unreasonable in this; on the contrary, it is G a contract which all parties may consider as affording the most eligible, if not the only, means of making this theatre profitable to them all, as proprietors, authors or in any other character which they are by the contract to hold.

EARLE AND OTHERS *v.* ROWCROFT

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), November 27, 1805]

[Reported 8 East, 126; 103 E.R. 292]

Insurance—Marine insurance—Barratry—Defined—Ship seized in consequence of master trading with the enemy—Act done for owners' benefit but without their consent.

Barratry is a fraudulent breach of duty by the master of a ship in respect to his owners or, in other words, a breach of duty in respect to his owners, with a criminal intent, or ex maleficio. With respect to the owner of a ship or goods whose interest is protected by a policy of insurance against, inter alia, barratry it can make no difference whether the prejudice he suffers be owing to the act of the master, induced by motives of advantage to himself, malice to the owner, or a disregard to those laws which it was the master's duty to obey and which his owners relied upon him observing.

By a policy of marine insurance on the ship *Annabella* at and from Liverpool to the coast of Africa during her stay and trade there and to the port of sale in the West Indies with liberty to exchange goods, the plaintiffs, the owners of the ship, were insured against, inter alia, loss by barratry. The master of the ship had been given general instructions to make the best purchases with dispatch. In order to barter his goods, consisting of arms and other warlike stores, for slaves more expeditiously and advantageously he, without the consent of the owners, went into an enemy trading settlement, this being permitted by the enemy, and as a result of this illegal traffic his ship was seized and confiscated by an English frigate. In an action on the policy the owners alleged a loss by barratry of the master.

Held: the trust reposed in the captain of a vessel obliged him to obey the written instructions of the owners where they gave any, and where his instructions were silent he was to do nothing but what was consonant to the laws of the land whether with or without a view to his advantage; in the absence of express orders to the contrary obedience to the law was implied in the owners' instructions, and a master of a vessel who did an act in contravention of those laws was guilty of a breach of the implied orders of his owners; the act of the master in the present case was, therefore, barratry, notwithstanding that he did it for the owners' benefit.

Notes. By s. 30, Sched. I, rule 11 of the Marine Insurance Act, 1906 (13 Halsbury's Statutes (2nd Edn.) 62), the term "barratry" is defined as "every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer."

Considered: *Wilson* v. *Rankin* (1865), 6 B. & S. 208. Distinguished: *Grill* v. *General Iron Screw Collier Co.* (1866), L.R. 1 C.P. 600. Considered: *Australasian Insurance Co.* v. *Jackson* (1875), 33 L.T. 286. Approved: *Cory & Sons* v. *Burr*, [1881-5] All E.R. Rep. 414. Referred to: *Westport Coal Co.* v. *McPhail*, [1898] 2 Q.B. 130; *Forestal Land, Timber and Railways Co.* v. *Rickards, Middows, Ltd.* v. *Robertson, Howard Bros. & Co.* v. *Kahn*, [1940] 4 All E.R. 96.

As to barratry, see 22 Halsbury's Laws (3rd Edn.) 82, and ibid., vol. 35, p. 296. For cases see 29 Digest (Repl.) 257 et seq., and 41 Digest (Repl.) 296.

Cases referred to:

(1) *Knight* v. *Cambridge* (1724), 8 Mod. Rep. 230; 2 Ld. Raym. 1349; 1 Stra. 581; 88 E.R. 165; 29 Digest (Repl.) 258, *1943*.

(2) *Stamma* v. *Brown* (1742), 2 Stra. 1173; 93 E.R. 1108; 29 Digest (Repl.) 258, *1941*.

(3) *Vallejo* v. *Wheeler* (1774), 1 Cowp. 143; Lofft, 631; 98 E.R. 1012; 29 Digest (Repl.) 257, *1925*.

(4) *Nutt* v. *Bourdieu* (1768), 1 Term Rep. 323; 99 E.R. 1119; 29 Digest (Repl.) 259, *1963*.

(5) *Lewen* v. *Swasso* (1742), 1 Postlethwayt's Dictionary of Trade and Commerce, 147, L.C.; 41 Digest (Repl.) 296, *1078*.

(6) *Lockyer* v. *Offley* (1786), 1 Term Rep. 252; 99 E.R. 1079; 29 Digest (Repl.) 167, *1029*.

(7) *Robertson* v. *Ewer* (1786), 1 Term Rep. 127; 99 E.R. 1011; 29 Digest (Repl.) 234, *1760*.

(8) *Moss* v. *Byrom* (1795), 6 Term Rep. 379; 101 E.R. 605; 29 Digest (Repl.) 183, *1223*.

Also referred to in argument:

Elton v. *Brogden* (1747), 2 Stra. 1264; 93 E.R. 1171; 29 Digest (Repl.) 180, *1178*.

Salucci v. *Johnson* (1785), 4 Doug. K.B. 224; 99 E.R. 852; 29 Digest (Repl.) 213, *1540*.

Garrels v. *Kensington* (1799), 8 Term Rep. 230; 101 E.R. 1361; 29 Digest (Repl.) 211, *1526*.

Havelock v. *Hancill* (1789), 3 Term Rep. 277; 100 E.R. 573; 29 Digest (Repl.) 258, *1946*.

Phyn v. *Royal Exchange Assurance Co.* (1798), 7 Term Rep. 505; 101 E.R. 1101; 29 Digest (Repl.) 258, *1942*.

Rule Nisi obtained by the defendant to set aside the verdict for the plaintiff and enter a nonsuit in an action on a policy of insurance, dated Jan. 28, 1804, on the ship *Annabella*, against, inter alia, barratry of the master and crew, at and from Liverpool to the coast of Africa, during her stay and trade there, and to the port of sale in the West Indies, with liberty to exchange goods, etc. The plaintiff averred a loss by barratry of the master.

It appeared at the trial before Lord Ellenborough, C.J., at Guildhall that the master, who was also supercargo, on his arrival off Cape Coast Castle, a British settlement on the coast of Africa, let go an anchor, and began to trade there for two days. Receiving intelligence, however, that he could barter his goods for slaves more expeditiously and advantageously at D'Elmina, a Dutch fort about seven miles to windward, he weighed anchor and proceeded to this latter place, which had the Dutch flag flying and guns mounted, where he exchanged his goods, consisting among other things, of muskets and gunpowder, with the Dutch governor and another resident there, for slaves: Holland being at that time at war with Great Britain, and he having a letter of marque on board against the French and Dutch. After taking on board a number of slaves, the captain, who was then on shore at D'Elmina, receiving information that an English frigate was in sight, sent a note on board the *Annabella*, directing her to sail immediately from thence to Cape Coast, to prevent, as he expressed himself, mischief; but before she reached the latter place she was pursued and captured by the English frigate, and sent to Jamaica, where she was condemned as prize, for having traded with the enemy. It appeared further, that it had been usual to keep up a trading intercourse, in boats and small craft, between the English and Dutch settlements on this part of the coast, even in times of war between the mother countries; and that the captain's object in going to D'Elmina was to complete his cargo as cheaply and expeditiously as he could. It was admitted that he had no particular instructions to go there, but that he was directed generally to make the best purchases with dispatch. It was also in proof, that when the ship was about to go to D'Elmina, the surgeon asked the captain if there was no impropriety in going there; to which he answered that they should be gone soon, and nobody would know it. Also, that besides his usual pay as captain, he had a commission on purchases and sales, which he was entitled to receive at the end of the voyage.

LORD ELLENBOROUGH, C.J., was of opinion, that this trading with the enemy by the captain, without the authority of his owners, though intended principally for their benefit, being in contravention of his duty to them, and subjecting their property to confiscation, was barratry, on which the plaintiff was entitled to recover in this action: but the case being new in specie, his Lordship gave the defendant leave to move the court to set aside the verdict for the plaintiff and enter a nonsuit. A rule nisi was accordingly obtained for that purpose.

Sir Vicary Gibbs, *Park*, *Topping*, *Serjeant Marshall*, and *Scarlett*, for the plaintiff, showed cause against the rule.

Garrow and *Marryat*, for the defendant, supported the rule.

LORD ELLENBOROUGH, C.J.—As the question raised involves in it the nature and definition of barratry in general the court will look into the cases, and particularly that of the port duties, if any further information can be obtained of it, before they deliver their opinion. But I cannot refrain from making a few observations at present upon the argument which has been urged. It has been asked: How is this act of the captain in going to D'Elmina, in order to purchase the cargo for his owners cheaper and more expeditiously, a breach of trust as between him and them? I conceive that the trust reposed in the captain of a vessel obliges him to obey the written instructions of his owners where they give any, and where his instructions are silent he is at all events to do nothing but what is consonant to the laws of the land, whether with or without a view to their advantage, because in the absence of express orders to the contrary, obedience to the law is implied in their instructions. Therefore, the master of a vessel who does an act in contravention of the laws of his country is guilty of a breach of the implied orders of his owners. I cannot, therefore, for a moment suffer it to be supposed that a captain is not guilty of a breach of trust to his owners who, in contravention of the law, the observance of which, nothing being expressed to the contrary, is implied in their orders, does an act which is injurious to them.

The question in this case is whether a loss of a ship incurred by an illegal act of the master, not authorised by his owners, in going into D'Elmina, a Dutch and enemy's port on the coast of Africa, and trading there for slaves by a barter of arms and warlike stores, on account of which illegal traffic the vessel insured was seized by a King's ship, and afterwards condemned in the West Indies, be barratry, or whether, as contended on the part of the defendant, in order to constitute barratry, the act should not appear to have been done with a view of promoting the master's benefit to the prejudice of his owners. It is extraordinary that this species of loss, occasioned by the misconduct of the master, selected and appointed as he is by the owners themselves, and liable to be dismissed by them only, should ever have been made the subject of insurance, and it is the more so as it has an impolitic tendency to enable the master and owners, by a fraudulent and secret contrivance and understanding between themselves, to throw the ill success of an illegal adventure, of which the benefit, if successful, would have belonged solely to themselves, upon the underwriters. So, however, it is that this description of loss has from the earliest times held its place as a subject of indemnity in British policies of insurance.

The original meaning of this term is to be collected from the Italian language, and is, according to DUFRESNE'S GLOSSARY, verbum barratria, "fraus, dolus, qui fit in contractibus et venditionibus." He does not apply it in any marine sense, or with reference to the particular relation of master and owners. In that sense, however, in which it is peculiarly used as applied to subjects of British marine insurance, in the earliest reported case which we find on the subject it is considered as being precisely tantamount to fraud in the particular relation which subsists between master, mariners, and owners, being such by which a loss may happen to the subject-matter insured. In *Knight* v. *Cambridge* (1) (1 Stra. 581), where the breach was assigned in a loss "per fraudum et negligentiam" of the master, and where it was objected in arrest of judgment that the fraud and negligence of the

master were not within the policy, being more general than the word barratry, RAYMOND, J., in the report of the same case in 8 Mod. Rep. 23, held that "per fraudem aut negligentiam would not have been good."* So that the negligence was considered as immaterial, and the fraud as being the substantial matter constituting the barratry. The court (in the report in STRANGE) held that negligence was not within the policy, but that fraud was. As no limitation is put upon that term in the record in *Knight* v. *Cambridge* (1), we must understand the court as holding that fraud and barratry were in effect words of coextensive import, that is, that barratry included every species of fraud in the relation of the master to his owners, by which the subject-matter insured might be endangered. The particular manner in which the loss was in that case occasioned does not appear in any of the reports of it, either in STRANGE, LORD RAYMOND, or 8 Mod. Rep. But a manuscript note of MR. FORD of the argument in *Stamma* v. *Brown* (2), referring to *Knight* v. *Cambridge* (1), describing the question in that case upon the record, and stating that "fraud was barratry," adds: "If the master sail out of the port, without paying port duties, whereby the goods are forfeited, lost, or spoiled, that is barratry." This probably was the question of fact decided at the trial, or upon a case in the Common Pleas.

From what is said of the facts of *Knight* v. *Cambridge* (1), in *Vallejo* v. *Wheeler* (3) (Cowp. at p. 153) both by counsel and by LORD MANSFIELD, it was a case in which the captain, whose duty it was to have paid the port duties before the ship went out of port, had not done so, and is, therefore, most probably the same case as is alluded to by LEE, C.J., in *Stamma* v. *Brown* (2), where he compared the case then in question

> "to the case of a sailing out of port, without paying duties, whereby the ship was subjected to forfeiture; and which has been holden to be barratry."

In a manuscript note of *Stamma* v. *Brown* (2), which was read to us by LAWRENCE, J., LEE, C.J., defines barratry as being "some breach of trust in the captain ex maleficio." In the note of the same case with which I have been furnished from MR. FORD'S manuscript LEE, C.J., says:

> "Barratry must be ex maleficio with intent to destroy, waste, or embezzle the goods, [that, it must be remembered, was a policy on goods] and, therefore, although this might be a deviation, yet I do not see how it can be considered as barratry. I make no question that there may be such a deviation as will amount to barratry; as where the master deviates to burn, sink, destroy, or throw the ship into the enemy's hands; or where he has benefit by the deviation; as if he himself had insured the goods: and, therefore, it was a material part of the case whether the master had any benefit by this alteration of the voyage: for that might have been evidence of fraud in him, etc."

Of course, he did not consider the benefit of the master as a necessary ingredient in the constitution of barratry in all cases, but only as a pregnant circumstance to prove the existence of such a fraud in point of fact, in a particular case.

In *Nutt* v. *Bourdieu* (4), LORD MANSFIELD defines barratry nearly in the same terms, viz., as partaking of something criminal, and as committed against the owner by the master or mariners. LORD HARDWICKE, in *Lewen* v. *Swasso* (5), had before defined it to be "an act of wrong done by the master against the ship and goods" WILLES, J., in giving the judgment of the court in *Lockyer* v. *Offley* (6)—a case decided just before that of *Nutt* v. *Bourdieu* (4); and upon which occasion he must be understood as speaking in conformity with the opinion upon this point of BULLER, J., who was then present: and probably after some communication on the

* This is stated in the margin of the second edition of the 8th volume of MOD. REP. in 1769. Vide the preface to that edition; but it is not in the first edition of 1730, nor in the last, the fifth edition of 1795. The concluding sentence of the case, as it stands in the edition of 1730 (which is not to be found in the two other editions I have referred to) is as follows: "And they [the whole court] all agreed that fraud is barratry, though negligence might not; So the judgment was affirmed."

subject with Lord Mansfield also, who happened then to be absent—defines barratry as including

> "every species of fraud or knavery of the master of the ship, by which the freighters or owners (the freighters in that case were owners pro tempore) are injured."

In *Vallejo* v. *Wheeler* (3), Aston, J., after stating that the conduct of the master was clearly barratry, adds, as the reason which induced him to form that conclusion (1 Cowp. at p. 155): "for he was acting for his own benefit, and without the consent or privity or any intended good to his owner:" Here considering, as Lee, C.J., had done before in *Stamma* v. *Brown* (2), the circumstance of private benefit accruing to the master as evidence of fraud in him in the particular case, and not essential to its constitution in all cases whatever. He adds afterwards:

> "I am clearly of opinion that this change of the voyage for an iniquitous purpose was barratry; which is not confined to the running away with the ship, but comprehends every species of fraud, knavery, or criminal conduct in the master, by which the owners or freighters are injured."

He does not add: "and by which the master is benefited;" which he must have done, if he had considered the actual or intended benefit of the master as essential to the definition of barratry.

In *Robertson* v. *Ewer* (7), Buller, J., upon the trial, was of opinion, and it does not appear upon the argument to have been denied by the court, that sailing out of port without leave, in breach of an embargo, in consequence of which the owners afterwards sustained a loss, in respect of seamen's wages and provisions, by the detention of the ship, was barratry. The only question made by the court was whether a loss of this kind were recoverable on a policy upon the body of the ship. Although it was urged in argument for the defendant, that what was done by the master had been intended for the benefit of the owners, the court did not advert to it as a point at all material to the decision of the question. In *Moss* v. *Byrom* (8), where a master, under letters of marque defective in point of validity for want of a certificate, and which had been put on board by the owners with a view to encourage seamen to enter, and without any intention of their being used for the purpose of cruising, had cruised for and taken a prize, and had afterwards libelled such prize for condemnation in the name of himself and his owners, in a port in the West Indies, and during his stay there on that occasion was lost; this was held by Lord Kenyon and the rest of the court to be barratry.

After these various decisions of courts of law, we are certainly warranted in pronouncing that fraudulent breach of duty by the master, in respect of his owners, or, in other words, a breach of duty in respect to his owners, with a criminal intent, or ex maleficio, is barratry. With respect to the owner of the ship or goods, whose interest is to be protected by the policy, it can make no difference in the reason of the thing whether the prejudice he suffers be owing to an act of the master, induced by motives of advantage to himself, malice to the owner, or a disregard to those laws which it was the master's duty to obey, and which (or it would not be barratry) his owners relied upon his observing. It has been strongly contended on the part of the defendant that if the conduct of the master, although criminal in respect of the State, were in his opinion likely to advance his owners' interest, and intended by him to do so, it will not be barratry. To this we cannot assent. For it is not for him to judge in cases not entrusted to his discretion, or to suppose that he is not breaking the trust reposed in him, but acting meritoriously, when he endeavours to advance the interest of his owners by means which the law forbids, and which his owners also must be taken to have forbidden. not only from what ought to be, and, therefore, must be presumed to have been, their own sense of public duty, but also from a consideration of the risk and loss likely to follow from the use of such means. In laying down this doctrine we feel ourselves supported by the several eminent

authorities already referred to. And in giving this opinion we do not feel any apprehension that simple deviations will be turned into barratry, to the prejudice of the underwriters; for unless they be accompanied with fraud, or crime, no case of deviation will fall within the true definition of barratry, as above laid down.

Another argument was used, which hardly appears to have been used seriously; namely, that the captain in this case united in himself the two characters of supercargo and captain: and that as captain he must be considered as obeying the directions of his owners, given to himself, the captain, by himself in his character of supercargo. It is sufficient to state such an argument, to show that it can have no weight. The directions of the owners as to the conduct of the voyage, and as to places where the trade was to be carried on, are to be looked for in their instructions: which coupled with their duty to their country, must, during every moment of the voyage, be considered as either expressly or impliedly directing the captain to conduct the ship to those places only where trade might be carried on without violating the laws of their country. For these reasons we are of opinion, that the rule nisi which has been obtained in this case, must be discharged.

Rule discharged.

BANBURY PEERAGE CASE

[ADVICE TO THE HOUSE OF LORDS (Sir James Mansfield, C.J., and other judges), May 2, 13, 30, July 4, 1811]

[Reported 1 Sim. & St. 153; 57 E.R. 62]

Legitimacy—Presumption of legitimacy—Rebuttal—Onus of proof—Child born in wedlock—Principles on which evidence allowed in rebuttal of prima facie legitimacy.

The presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved impotent and having opportunities of access to each other during the period in which a child might be conceived and born in the course of nature, may be rebutted by circumstances inducing a contrary presumption, but the onus of proof must always be upon the person calling such legitimacy in question and such evidence must be lawfully proved by strict evidence of a kind which would be admissible in any case where a physical fact has to be proved.

Where proof is given of access between husband and wife which could give rise to the birth of a child, no evidence is admissible except to falsify the proof that intercourse had taken place between the parties.

In every case where a child is born in lawful wedlock, the husband not being separated from the wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife until that presumption is rebutted by satisfactory evidence that no sexual intercourse has taken place between the husband and wife at any time, when by such intercourse the husband could by the laws of nature be the father of such child, and the question whether the husband be the father of such child is one to be left to the jury.

Notes. Applied: *Head* v. *Head* (1823), 1 Sim. & St. 150; *Morris* v. *Davies*, [1835–42] All E.R. Rep. 270; *Legge* v. *Edmonds* (1855), 25 L.J.Ch. 125; *Plowes* v. *Bossey* (1862), 2 Drew. & Sm. 145; *Atchley* v. *Sprigg* (1864), 33 L.J.Ch. 345; *Hawes* v. *Draeger* (1883), 23 Ch.D. 173. Considered: *Re Bromage, Public Trustee* v. *Cuthbert*, [1935] All E.R. Rep. 80; *Francis* v. *Francis*, [1959] 3 All E.R. 201. Referred to: *Re Perton, Pearson* v. *A.-G.* (1885), 53 L.T. 707; *Re Westhead's*

Settlement Trusts (1885), 1 T.L.R. 651; *Bosvile* v. *A.-G.* (1887), 57 L.T. 88; *Burnaby* v. *Baillie* (1889), 42 Ch.D. 282; *Gordon* v. *Gordon*, [1903] P. 141; Gaskill v. *Gaskill*, [1921] All E.R. Rep. 365; *Warren* v. *Warren*, [1925] P. 107; *Ettenfield* v. *Ettenfield*, [1946] 1 All E.R. 293; *Re Heath, Stacey* v. *Bird*, [1945] Ch. 417; *Preston-Jones* v. *Preston-Jones*, [1951] 1 All E.R. 124; *Re Jenion, Jenion* v. *Wynne*, [1952] 1 All E.R. 1228; *Cotton* v. *Cotton*, [1954] 2 All E.R. 105.

As to the presumption of legitimacy and its rebuttal, see 3 HALSBURY'S LAWS (3rd Edn.) 87–92; and for cases see 33 DIGEST (Repl.) 398 et seq.

Questions put to the judges by the House of Lords in the case of the Banbury claim of peerage and the answers returned thereto, extracted from the printed report of the proceedings in this case belonging to Lincoln's Inn Library.

(i) "Whether the presumption of legitimacy, arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other during the period in which a child could be begotten and born in the course of nature, can be rebutted by any circumstances inducing a contrary presumption?"

SIR JAMES MANSFIELD, C.J., having conferred with his brethren, stated that they were unanimously of opinion that the presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other during the period in which a child could be begotten and born in the course of nature, may be rebutted by circumstances inducing a contrary presumption; and he gave his reasons.

(ii) "Whether the fact of the birth of a child from a woman united to a man by lawful wedlock be always or be not always, by the law of England, prima facie evidence that such a child is legitimate; and whether in every case in which there is prima facie evidence of any right existing in any person, the onus probandi be always, or be not always, upon the person or party calling such right in question. Whether such prima facie evidence of legitimacy may always, or may not always, be lawfully rebutted by satisfactory evidence that such access did not take place between the husband and wife, as by the laws of nature is necessary in order for the man to be in fact the father of the child; whether the physical fact of impotency, or of non-access, or of non-generating access (as the case may be) may always be lawfully proved, and can only be lawfully proved, by means of such legal evidence as is strictly admissible in every other case in which it is necessary, by the laws of England, that a physical fact be proved?

SIR JAMES MANSFIELD, C.J., delivered the following unanimous opinion of the judges upon this question: The fact of the birth of a child from a woman united to a man by lawful wedlock is generally by the law of England, prima facie evidence that such child is legitimate. In every case in which there is prima facie evidence of any right existing in any person, the onus probandi is always upon the person or party calling such right in question. Such prima facie evidence of legitimacy may always be lawfully rebutted by satisfactory evidence that such access did not take place between the husband and the wife, as, by the laws of nature, is necessary in order for the man to be in fact the father of the child. The physical fact of impotency or of non-access or of non-generating access, as the case may be, may always be lawfully proved by means of such legal evidence as is strictly admissible in every other case in which it is necessary, by the law of England, that a physical fact be proved.

(iii) "Whether evidence may be received and acted upon to bastardise a child born in wedlock, after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of such child, the husband not being impotent, except such proof as goes to negative the fact of generating access?"

A (iv) "Whether such proof must not be regulated by the same principles as are applicable to the legal establishment of any other fact?"

In answer to the said questions, **SIR JAMES MANSFIELD, C.J.,** delivered the following unanimous opinion of the judges on them: After proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of a child (by which we understand proof of sexual intercourse between them), no evidence can be received except it tend to falsify the proof that such intercourse had taken place. Such proof must be regulated by the same principles as are applicable to the establishment of any other fact.

(v) "Whether, in every case where a child is born in lawful wedlock, sexual intercourse is not by law presumed to have taken place, after the marriage between the husband and wife (the husband not being proved to be separated from her by sentence of divorce) until the contrary is proved by evidence sufficient to establish the fact of such non-access, as negatives such presumption of sexual intercourse within the period, when, according to the laws of nature, he might be the father of such child?"

(vi) "Whether the legitimacy of a child born in lawful wedlock (the husband not been proved to be separated from his wife, by sentence of divorce), can be legally resisted by the proof of any other facts or circumstances than such as are sufficient to establish the fact of non-access, during the period within which the husband, by the laws of nature, might be the father of such child; and whether any other question but such non-access can legally be left to a jury upon any trial, in courts of law, to repel the presumption of the legitimacy of a child so circumstanced?"

The judges being agreed in their opinion, in answer to the said questions propounded to them, **SIR JAMES MANSFIELD, C.J.,** delivered their unanimous opinion upon the same, as follows: In every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when, by such intercourse, the husband could, according to the laws of nature be the father of such child.

The presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove, to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and wife, at any time, when, by such intercourse, the husband could, by the laws of nature, be the father of such child. Where the legitimacy of a child, in such a case, is disputed on the ground that the husband was not the father of such child, the question to be left to the jury is whether the husband was the father of such child, and the evidence to prove that he was not the father, must be of such facts and circumstances as are sufficient to prove to the satisfaction of a jury that no sexual intercourse took place between the husband and wife at any time, when, by such intercourse, the husband could, by the laws of nature, be the father of such child.

The non-existence of sexual intercourse is generally expressed by the words "non-access of the husband to the wife," and we understand these expressions as applied to the present question, as meaning the same thing, because in one sense of the word "access," the husband may be said to have access to his wife as being in the same place or the same house; and yet, under such circumstances as instead of proving, tend to disprove, that any sexual intercourse took place.

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BORASTON *v.* GREEN

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Le Blanc and Bayley, JJ.), June 5, 1812]

[Reported 16 East, 71; 104 E.R. 1016]

B

Agriculture — Agricultural holding — Custom of country — Away-going crop — Holding over by outgoing tenant at expiration of lease—Excessive removal of crop on termination of lease—Remedy of incoming tenant.

The defendant was the assignee of a lease of farms and lands which he continued to hold after the expiration of the lease in 1803 as tenant from year to year ending at Lady Day. He gave up the tenancy on Lady Day, 1810. The plaintiff was the incoming tenant. The lease reserved to the defendant the right at the end of the term "to fence in and preserve all such hard corn as should be sown on the premises the winter seedness precedent thereto, so that the same exceeded not twenty-nine acres, and was summer fallowed and well manured, etc., and at harvest to reap and carry away the same." The plaintiff proved a custom of husbandry that every tenant of any farm and lands holding from year to year, such year ending Lady Day, who had sown any of his lands with wheat on a clover brush at the wheat seedness next before the expiration of his tenancy and had afterwards reaped the wheat on such lands as and for a part of his away-going crop was entitled as of right to take to his own use two-thirds only of such wheat and to leave the other third for the incoming tenant. The plaintiff alleged that the defendant did not leave one-third but took away the whole. He also alleged bad husbandry in that the defendant did not summer fallow, etc., during the former term.

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Held: (i) trover was not the form of action in which the right of the incoming tenant to recover the value of the away-going crop when severed could be tried; (ii) the landlord was the proper party to have the remedy for any mismanagement of the land during the former term upon his covenant or agreement and not the incoming tenant; (iii) the incoming tenant might, however, maintain an action against the offgoing tenant for a breach of the custom of husbandry in not leaving one-third of the away-going crop of wheat sown upon the clover brush, but the custom of the country could have no place where the offgoing tenant held under a lease expressly making a different provision in respect of the away-going crop, or where he continued to hold over after the expiration of such lease without coming to any fresh agreement with the landlord by which he must be taken to hold under the same terms; and, therefore, the plaintiff was not entitled to succeed.

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Notes. Distinguished: *Davis* v. *Connop* (1814), 1 Price, 53. Applied: *Knight* v. *Benett* (1826), 3 Bing. 364. Referred to: *Evans* v. *Ogilvie* (1828), 2 Y. & J. 79; *Holding* v. *Pigott* (1831), 7 Bing. 465.

H

As to rights and liabilities at the termination of the tenancy, away-going crops, see 1 Halsbury's Laws (3rd Edn.) 301; and for cases see 2 Digest (Repl.) 23 et seq.

Case referred to:

(1) *Beavan* v. *Delahay* (1788), 1 Hy. Bl. 5; 126 E.R. 3; 2 Digest (Repl.) 25, *120.*

I

Rule Nisi obtained by the defendant to enter a nonsuit in an action by the incoming tenant against the outgoing tenant for converting wheat, etc., to his own use contrary to a custom of the country that the outgoing tenant should leave one-third part of the wheat, etc., sown for the incoming tenant.

The first count of the declaration stated that the defendant, on Jan. 1, 1806, and from thence till Lady Day, 1810, was the tenant and occupier of a certain

farm and lands in the parish of Stoke St. Milborough, in the county of Shropshire, which he held as tenant from year to year for so long as he and his landlord pleased; such year ending at Lady Day. The defendant quitted the farm and lands at Lady Day, 1810, and ceased to be tenant thereof; and the plaintiff was the next succeeding and incoming tenant and occupier of the farm. Long before, and at the time when the defendant entered upon and quitted the farm there was, and still is, an ancient custom within the parish that every tenant of any farm and lands within the parish, holding from year to year, such year ending at Lady Day, and who had sown any of his lands with wheat on a clover brush at the wheat seedness next before the expiration of his tenancy, and had afterwards reaped the wheat growing on such lands as and for a part of his away-going crop, had been used and accustomed, and of right ought to have and take to his own use, two-third parts only of such wheat, and to leave the other third for the incoming tenant. The plaintiff then averred that the defendant, at the wheat seedness next before the expiration of his said tenancy, and of his so quitting the farm, sowed fifty acres of the land with wheat on a clover brush; and afterwards, and while the plaintiff was the tenant of the farm, to wit, on Aug. 1, 1810, cut down and reaped the wheat growing on the lands so sown by him; but did not leave one-third part of the wheat for the plaintiff as such incoming tenant, but took and carried away the whole, and converted it to his own use, contrary to the custom. There were other counts laying the like custom in case of tenancies for term of years ending at Lady Day; and there was another count in trover for so many sheaves of wheat in the straw, and so many quarters of wheat and loads of straw: to all which the general issue was pleaded.

At the trial before Serjeant Marshall, who sat for Lawrence, J., at Shrewsbury, the plaintiff proved that he entered upon the farm at Lady Day, 1810, at which time there was a field of five acres in turnips, and sixteen acres of clover brush. The defendant was then sowing wheat for the offgoing crop on all the fallows, which were eight or ten acres, but only on six acres of the clover brush, leaving the other ten acres unsown. According to good husbandry, the turnips ought to have been eaten off by stock during the winter, which would have fitted the land for Lent corn in the spring. Lent corn and not wheat, ought, according to good husbandry, to have been sown after the turnips, and was much better for the incoming tenant; and the sowing with wheat was bad husbandry. The best of the turnips were drawn and carried into an adjoining piece, and were consumed there by the cattle; the rest were eaten off. The land had been fallowed for turnips, and ploughed and manured several times in the summer of 1809. It was admitted on the part of the defendant that he had reaped and carried away all the wheat sown on the fallow, on the clover, and on the turnips. It was also proved to be the custom that the incoming tenant should have a third of all wheat sown upon a clover brush, which was explained to be what was sown at one ploughing on clover; and that it was so called whether eaten or mown off; though eating off enriched and hardened a light soil, as this was, which made it hold the wheat better; while mowing the land impoverished it.

The defendant proved a lease, by which this farm was demised by Mr. Hall, the landlord, to one Hudson, for twenty-one years from April 5, 1782. By the lease Hudson covenanted not at any time during the term to sow any part of the lands demised upon the brush, but at all times to manage and manure them in a good and husbandlike manner, and not wilfully to impoverish and make barren the same. Hall covenanted that it should be lawful for Hudson to make use of convenient pieces of land belonging to the said premises until May Day next after the end of the said term for his and their cattle to eat and spend all such hay, straw, or fodder, as should then be or remain upon the demised premises; and until harvest then next following, to fence in and take care of and preserve all such hard corn as shall be sown on the said premises the winter seedness precedent thereto, so as the same exceeded not twenty-nine acres in the whole,

and be summer fallowed, and well manured with muck or lime: and at such harvest to reap, order, carry, and place such hard corn in a convenient part of the barns belonging to the said demised premises, and there to thresh out, etc., and carry away the same before corn harvest then next following, leaving the straw thereof upon the premises for the use of the said Hall, his heirs and assigns. Hudson had assigned the remainder of his lease after some years to the defendant, who continued to hold after the expiration of it in 1803, the same as before, till Lady Day, 1810, when he gave it up.

It was thereupon contended for the defendant that the custom could not apply to this case, where the holding was upon a special contract, at first under the indenture, and afterwards by an implied agreement under the same terms, by which the defendant had a right to take hard corn sown, not exceeding twenty-nine acres, as an away-going crop; and, therefore, that this action could not be sustained. To this it was answered for the plaintiff, that the defendant, whose term was now expired, had no right to take any part of the produce grown upon the land afterwards, unless by custom or special agreement: that if he disclaimed to be bound by the custom, he must make title to the corn under the terms and conditions of the covenant, which he could only do by showing that the land so cropped (not exceeding twenty-nine acres) had been summer fallowed, and well manured: whereas, the corn taken by him was proved to have been sown partly upon a clover brush, and partly upon turnip land ploughed and sown contrary to good husbandry and the terms of the covenant. In reply, it was contended for the defendant that he was at all events entitled to the corn, and if improperly raised, he was answerable for it to his landlord; but that no question could be made of that between him and the incoming tenant. The cause, however, was permitted to proceed; the judge reserving leave to the defendant to move to enter a nonsuit.

The defendant then went into evidence to negative the custom, which is not material to be stated: and finally two questions were left to the jury: (i) As to the existence of any custom, as stated in the special counts of the declaration; and if they found the custom, then they were directed to find a verdict for the plaintiff, and give him the value of one-third of the wheat sown upon the clover brush, which was £21. But if they thought the custom was not proved, then they were to find for the defendant on the four special counts. (ii) Whether the sowing of wheat on turnip land at the season, and in the manner described by the plaintiff's witnesses was contrary to good husbandry: and if so, then they were instructed, that, by the construction of the covenant, the defendant could have no claim to the away-going crop from land so sown, and were directed to find for the plaintiff upon the fifth count, in trover, and give him the value in damages of the crop so sown and taken away by the defendant; otherwise, to find for the defendant. The jury found for the plaintiff on both the grounds submitted to them, and gave him £63 in damages.

Jervis moved in the last term to enter a nonsuit, or to reduce the damages from £84 to £21.

Dauncey and *Abbott* for the plaintiff, showed cause against the rule.

Jervis and *Puller* for the defendant, supported the rule.

LORD ELLENBOROUGH, C.J.—The defendant held the farm upon the terms of the expired lease, which puts an end to the question. The plaintiff claims the £21 for the one-third of the wheat sown upon the clover brush, according to the custom of the country; but the terms of the defendant's holding had no reference to the custom, for that is only a contract which the law raises in the absence of any particular contract between the parties; and here there was at one time a subsisting lease between them, and after that was expired the tenant must be taken to have continued to hold under the same terms, for the breach of which the landlord would have a similar remedy, varying only in the form of the action. Then as to the £63 for the remainder of the wheat, the plaintiff's argument is, that the defendant being only entitled to hold under the terms of the lease, and not having complied with the

A condition of manuring and summer fallowing the ground on which the crop was raised, he is denuded of all right to the crop, and that having cut it down and carried it away, the incoming tenant is entitled to maintain trover for it.

Looking at the lease, it appears that there are, not one, but three conditions, on the non-performance of which it must be contended that the lease entitled the landlord or the incoming tenant to claim as his own the growing crop sown by the off-
B going tenant: these are, that the quantity sown should not exceed twenty-nine acres, that it should have been summer fallowed, and well manured with muck or lime. Then would it be contended, that if the quantity sown had exceeded the twenty-nine acres by a pole, that would have given the growing corn to the landlord, or the incoming tenant, as his property, and made the offgoing tenant a trespasser for entering on the land. Then would the neglect of summer fallowing,
C or of not well manuring the land, change the property. That is a matter, we all know, which is open to great difference of opinion: and is the claim of property to be in abeyance till that question is ascertained? It would introduce strange confusion into the remedies of the law if the crops sown by the tenant were to be considered as his own, or the landlord's property, according as he had or had not complied with the terms of his covenant. We cannot per saltum treat the whole
D of his claim to take the growing crop as a wrong and damage done to the landlord or the succeeding tenant, to enable them at once to bring trover or trespass; and it would be most incongruous to say that trover lies by the incoming tenant for the offgoing crop when severed, because there has been an inadequate performance of the conditions on which the offgoing tenant was to raise and take such crop.

E **GROSE, J.,** agreed.

LE BLANC, J., not having returned into court till after the argument of the case, declined giving any opinion upon it.

BAYLEY, J. It is not true, as stated in the declaration, that in every case of a tenancy from year to year, expiring at Lady Day, the incoming tenant is entitled
F by the custom of this parish to one-third, and the offgoing tenant to two-thirds of the away-going crop of wheat sown on a clover brush: it is so where there is no express agreement to the contrary; and it may be so even in the case of a deed which is altogether silent as to the away-going crop: but if the parties provide for it by their special contract, the right to the crop must depend entirely upon the provisions of the lease: and it will be the same where the tenant holds on after the
G lease is expired. That disposes of the plaintiff's claim for the £21 which is founded upon the alleged custom of the country.

But when it is contended that the offgoing tenant's right to the away-going crop depending upon the terms of the lease, he cannot claim it unless he has complied with all those terms by which he bound himself to cultivate the land for raising the
H offgoing crop: and that not having done so, the incoming tenant may maintain trover for the value of it when severed and taken away. But trover is not the form of action in which such a question can be tried. If he sow the land, it is on a claim of right to reap the crop, and he continues in fact in possession of the land on which the crop grows for that purpose. It is said, however, that he is not the legal tenant of the land at the time of the offgoing crop taken; but that is begging the
I question; for it is considered that the right reserved to the tenant to take the crop is a prolongation of the term as to the land on which it grows, and that the possession of the land continues in the tenant till the crop is taken. It has been held that the landlord may distrain upon the offgoing crop for the old rent. On what ground could that have been so held but that the tenancy still continued as to that part of the land? At common law the landlord could only distrain during the term; then the Landlord and Tenant Act, 1709, extended that remedy to six months afterwards: but in *Beavan* v. *Delahay* (1), the Court of Common Pleas held that the landlord was entitled to distrain on the offgoing crop, though more than six months had

elapsed after the end of the term. Therefore, as to that part of the land on which the crop was growing, I consider that the possession of the offgoing tenant continued. Then it would be unheard-of to be trying in an action of trover for the produce, whether the land had been properly summer-fallowed or manured by the tenant. If it has not, the landlord will have his remedy against the tenant upon his covenant or agreement for the abuse of the land; but the landlord is the proper party to have that remedy, and not the incoming tenant.

Rule absolute.

SIMPSON *v.* VICKERS

[ROLLS COURT (Sir William Grant, M.R.), March 16, August 11, 1807]

[Reported 14 Ves. 341; 33 E.R. 552]

Will—Condition—Condition precedent—Devise subject to release to be executed within six months—Release not executed in time owing to devisee contesting validity of will—Probate of will granted—Effect of condition.

A devise of real estate was made subject to the condition that within six months of the testatrix' death the devisee would execute a valid release for her estate in respect of a legacy given to him by a previous will of her brother of which the testatrix had been sole executrix. In default of the devisee complying with the condition the estate was given over to the executrix of the present will. The devisee was unable to comply with condition within the period owing to his contesting the validity of the testatrix's will of which probate was subsequently given.

Held: the estate should go as if it had actually been settled according to the condition; it was immaterial that the executrix and the devisee over was the same person; and, the devisee not having complied with the condition, the devise to him did not take effect.

Notes. As to conditions in a will binding on donee and the time of the performance of a condition, see 39 HALSBURY'S LAWS (3rd Edn.) 928, 930, 931; and for cases see 48 DIGEST (Repl.) 296 et seq., 341 et seq.

Cases referred to:

(1) *Cage* v. *Russel* (1681), 2 Vent. 352; 86 E.R. 481, L.C.; 48 Digest (Repl.) 341, *2923*.

(2) *Avelyn* v. *Ward* (1750), 1 Ves. Sen. 420; 27 E.R. 1117, L.C.; 49 Digest (Repl.) 1120, *10394*.

(3) *Earl of Northumberland* v. *Earl of Aylesford* (1760), Amb. 540; sub nom. *Earl of Northumberland* v. *Marquis of Granby*, 1 Eden, 489; affirmed sub nom. *Duke of Northumberland* v. *Lord Egremont* (1768), Amb. 657; 27 E.R. 427, L.C.; 48 Digest (Repl.) 248, *2233*.

(4) *Duke of Montagu* v. *Duke of Beaulieu* (1767), 3 Bro. Parl. Cas. 277; 1 E.R. 1317; sub nom. *Lord Beaulieu* v. *Lord Cardigan*, Amb. 533, H.L.; 48 Digest (Repl.) 337, *2897*.

Also referred to in argument:

Taylor v. *Popham* (1782), 1 Bro. C.C. 168; 28 E.R. 1059, L.C.; 48 Digest (Repl.) 337, *2893*.

Cleaver v. *Spurling* (1729), 2 P. Wms. 528; Mos. 179; 24 E.R. 846; 48 Digest (Repl.) 332, *2849*.

Bill claiming benefit of a devise.

John Simpson by his will, dated Mar. 8, 1792, bequeathed to his brother Michael Simpson the sum of £1,000, to be paid by him within six calendar months after the testator's decease upon his then executing to the testator's executrix a release of all claims and demands: provided, that in case of his said brother's refusing or declining to execute such release, then and in such case the testator revoked the said bequest of £1,000. The testator appointed his sister, Elizabeth Simpson, sole executrix.

The testator died on Mar. 10, 1792. Elizabeth Simpson by her will, dated Oct. 31, 1793, devised all her freehold and copyhold estates at Hemingborough to her brother and heir-at-law, Michael Simpson, his heirs and assigns for ever, upon express condition nevertheless that her said brother did within six calendar months next after her decease at his own expense make, execute, deliverer or tender to her executor a good and valid release, receipt, or discharge for the legacy of £1,000 bequeathed to him by the will of her brother, John Simpson, and also of all other claims and demands whatsoever upon the estate of John Simpson or upon her estate on account of her executorship or otherwise, declaring her will and intention that the said devised premises at Hemingborough should be accepted and taken by her brother Michael, in full satisfaction and discharge of the said legacy and of all such other claims and demands, as aforesaid: but, if her brother Michael should refuse or neglect to comply with the condition, she declared her will and intention to be that at the expiration of the said six calendar months after her decease the devise to him should become void. In that case from and after the expiration of the said six calendar months she gave and devised all her freehold and copyhold estates at Hemingborough to Sarah Milner, her heirs and assigns for ever, appointing her sole executrix.

The testatrix died on Dec. 2, 1794. Michael Simpson contested the validity of her will in the Prerogative Court, and afterwards by appeal to the Court of Delegates; but probate was on July 15, 1798, granted to Sarah Vickers, formerly Sarah Milner.

The bill was filed by Michael Simpson against Vickers and his wife and purchasers under them stating that within six months after probate had been granted to the defendant Sarah Vickers, viz., Jan. 14, 1799, the plaintiff had proposed to execute the release, required by the testatrix and to pay the costs, on having the estate at Hemingborough conveyed to him and praying a conveyance accordingly.

Richards, *Hart* and *Bell* for the plaintiff.
Alexander, *Hall* and *Wellfitt* for the defendants.

Aug. 11, 1807. **SIR WILLIAM GRANT, M.R.**—The question arises upon the will of Elizabeth Simpson. For the plaintiff it was contended first that there is no forfeiture, as he could not perform the condition until the question touching the validity of the will was determined; and that he is, therefore, in sufficient time. To that it is answered that if there is no breach of the condition, there is no occasion to come into a court of equity: besides, that it was by the plaintiff's own act that the probate was delayed so long; and it may be doubted whether it would be competent to him to take advantage of his own groundless resistance to the proof of the will.

But it is said, this court relieves against forfeitures and breaches of condition. To that it was answered by the defendants that this is not a mere breach of condition, but a conditional limitation over in a given event; and, where there is a devise over to any other than that person who would by disposition of law take the estate, the court never relieves and for that distinction *Cage* v. *Russel* (1) was referred to. That this is a conditional limitation, and not a mere condition, is clear from *Avelyn* v. *Ward* (2). The question there was not of the same kind, but the limitation in the will was precisely the same as this: a limitation to the heir-at-law upon condition of giving a release within a certain period; and that was held a conditional limitation

not a strict condition. If this be a conditional limitation, it seems to follow that the event having taken place, the court cannot possibly relieve. Though the estate is given over to the executrix, who would have been benefited by the release, yet it is a real estate, which she could not take as executrix; and, therefore, the circumstance that she is so makes no difference. A

It is then contended upon the case of *Earl of Northumberland* v. *Earl of Aylesford* (3) that Michael Simpson by entering into possession of the devised estate was obliged upon the doctrine of election to make the release, when called upon to do so, and, therefore, it is to be considered as executed. In that case Algernon never did release his claim: but it was decreed that his executors should then execute a release: as, by taking the benefit he had contracted the obligation to execute it. But the circumstances of this case are not the same, for Michael Simpson cannot be considered as possessing the estate under the devise. He was the heir-at-law. He entered, contesting the will. During that time he cannot be considered in possession as devisee. Afterwards, when the question was determined, he offers a release; but clogged with a condition that it should be accepted within three days; which implied that if that condition was not complied with, he would hold adversely to the will, and as no longer bound to comply with those terms. B C

This is quite different, therefore, from that case, where the possession taken could be ascribed to nothing but the will. Besides, that decision is materially shaken by *Lord Beaulieu* v. *Lord Cardigan* (4), in the House of Lords, which had been determined by Lord Northington upon the same principle and in the same way: viz., that the estate should go, as if it had been actually settled according to the condition. The House of Lords, however, declared that the estate not being settled pursuant to the condition, the devise made on that condition did not take effect. D E

That applies precisely to this case. Michael Simpson not having complied with the condition of giving a release of all claims upon Elizabeth Simpson is not entitled to the benefit of the devise, made upon that condition. There is no doubt that he is entitled to an account of what is due to him for his legacy of £1,000. I direct an account as to that upon his releasing all demands upon Elizabeth or John Simpson and declare, that he is not entitled to the estate. F

CRAYTHORNE *v.* SWINBURNE

[Lord Chancellor's Court (Lord Eldon, L.C.), July 11, 16, 27, 23, 1807]

[Reported 14 Ves. 160; 33 E.R. 482]

Guarantee—Surety—Covenant to pay creditors on default of principal debtor and surety—Surety for both principal debtor and surety, not co-surety—Proof by parol evidence.

In order to raise a loan for S., the defendant arranged for the execution of a bond whereby S., as principal, and the plaintiff, as surety, were jointly and severally bound to the lenders in the sum of £1,200. A second bond was executed in consequence of a conversation between the lenders and the defendant to the effect that the lenders did not like to trust the security of S. and the plaintiff, but that, if the defendant would become security to the lenders on the default of S. and the plaintiff, they would advance the money. The money was advanced, and the defendant executed the second bond which recited the first bond and stated a condition that the second bond should be void if S. and the plaintiff, or either of them, repaid the lenders. In the event the plaintiff, on the death of S. insolvent, repaid the lenders in full. On the hearing of a bill whereby he claimed contribution from the defendant as co-surety, the question arose whether parol evidence of the defendant's conversation with the lenders should be admitted.

Held: parol evidence of the conversation between the lenders and the defendant was admissible to show that the defendant was a surety for both the principal debtor, S., and the plaintiff and was not a co-surety with the plaintiff, and, therefore, not liable to contribute.

Notes. Considered: *Newton* v. *Chorlton* (1853), 2 Drew. 333; *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1; *Re Denton's Estate, Licenses Insurance Corpn. and Guarantee Fund* v. *Denton*, [1904] 2 Ch. 178. Referred to: *Hodgson* v. *Shaw* (1834), 3 My. & K. 183; *Davies* v. *Humphreys*, [1835–42] All E.R. Rep. 101; *Kemp* v. *Finden* (1844), 12 M. & W. 421; *Farebrother* v. *Wodehouse* (1856), 23 Beav. 18; *Pearl* v. *Deacon* (1857), 24 Beav. 186; *Watts* v. *Shuttleworth* (1860), 5 H. & N. 235; *Reynolds* v. *Wheeler* (1861), 10 C.B. N.S. 561; *Bevan* v. *Whitmore* (1863), 15 C.B. N.S. 433; *Whiting* v. *Burke* (1870), L.R. 10 Eq. 539; *Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas. 755; *Wolmershausen* v. *Gullick*, [1891–4] All E.R. Rep. 740; *Stirling* v. *Burdett*, [1911] 2 Ch. 418; *Littlewood* v. *George Wimpey & Co. and British Overseas Airways Corpn.*, [1953] 2 All E.R. 915.

As to the right to contribution between sureties, see 18 Halsbury's Laws (3rd Edn.) 484 et seq.; and for cases see 26 Digest (Repl.) 143 et seq.

Cases referred to:

(1) *Dering* v. *Earl of Winchelsea* (1787), 1 Cox, Eq. Cas. 318; 29 E.R. 1184; sub nom. *Deering* v. *Earl of Winchelsea*, 2 Bos. & P. 270; 26 Digest (Repl.) 145, *1065*.

(2) *Swain* v. *Wall* (1641), 1 Rep. Ch. 149; 21 E.R. 534; 26 Digest (Repl.) 149, *1093*.

(3) *Cooke* v. —— (1686), Freem. Ch. 97; 22 E.R. 1082; sub nom. *Cooke's Case*, 2 Eq. Cas. Abr. 223; 26 Digest (Repl.) 145, *1062*.

Bill filed by the plaintiff claiming a contribution from the defendant as alleged co-surety.

Hamersley & Co., bankers, being creditors of Henry Swinburne and calling in their money, an application was made by Sir John Swinburne, the nephew of Henry Swinburne, to the Newcastle bank who advanced the money on the security of two bonds, one the joint and several bond of Sir John Swinburne as principal, and the plaintiff Craythorne as surety, for £1,200; the other by Sir John Swinburne,

reciting the former bond and the advance of the money to Henry Swinburne and Craythorne, at the request of Sir John Swinburne, with condition to be void on payment by Henry Swinburne and Craythorne, or either of them. The £1,200 advanced was applied accordingly in discharge of the debt to Hamersley & Co. Afterwards Henry Swinburne died abroad insolvent. Craythorne, having paid the whole sum, filed the bill, praying contribution by Sir John Swinburne who insisted that he was not a co-surety with the plaintiff but merely a collateral security to the bank in default of payment by Henry Swinburne and Craythorne. The bill offered evidence of his conversation with one of the partners in the bank, stating their objection to the security of Henry Swinburne and Craythorne, and requiring, as the condition of the advance, a bond from Sir John Swinburne to pay the money, in case they should not pay it.

Sir Samuel Romilly and *Wear* for the plaintiff: This is a plain case for compelling contribution by this defendant, as a co-surety with the plaintiff. The court looks to the real transaction: and whether they are sureties by one or by several instruments, is, therefore, immaterial. The liability depends on, not the form, but the essence of the contract. In *Deering* v. *Earl of Winchelsea* (1) three joint and several bonds were given by Thomas Deering and each surety separately, that Thomas Deering should duly account to the Crown. It was held that the circumstance that the bonds were distinct could not make a difference. The evidence in this case proves that the whole of this sum £1,200 was advanced to Henry Swinburne; and the plaintiff had no part of it, being merely a co-surety with Sir John Swinburne whose bond recites that the advance of the bank for his uncle's benefit was at the special instance and request of Sir John Swinburne.

Richards and *Bell* for the defendant: This case is distinguishable from *Deering* v. *Earl of Winchelsea* (1). Previously to that decision the point was a subject of much doubt, and on that authority it would not have been prudent to abstain from parol evidence.

Sir Samuel Romilly replied: The whole doctrine of principal and surety rests on the established principles of a court of equity, not on contract, except as it may be so represented on the implied knowledge of those principles. There is no express contract for contribution. The bond, generally, if not universal, being joint and several, creating several obligations by each. The contribution results from the maxim that equality is equity, proceeding, where the instruments are several, on this, that a surety will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety; having a right to have those securities transferred to him, though there was no stipulation for that, and to avail himself of all those securities against the debtor.

This right of a surety also stands, not on contract, but on a principle of natural justice: that one surety is entitled to contribution from another. The creditor may resort to either for the whole or to each for his proportion and, as he has that right, if he from partiality to one surety would not enforce it, the court gives the same right to the other surety and enables him to enforce it. Natural justice requires that the surety having become security with others, shall not have the whole thrown on him by the choice of the creditor not to resort to remedies in his power, the effect of which would be an equal contribution.

That being the principle for enforcing contribution, established by *Deering* v. *Earl of Winchelsea* (1), there can be no difference whether they become sureties by one or by different instruments; or whether a surety knew at the time that he was co-surety with others. These are distinctions, which must determine the extent of liability if it arose from contract.

The question then is whether this defendant's engagement was to be surety for the plaintiff, the other surety, and not for the principal debt: whether the defendant

A was a surety only in default of payment by the plaintiff; whether that appears on the face of the instrument or can be established by evidence; and whether parol evidence can be received.

There was certainly an omission in not making this bond void on the payment of the debt. It will still be absolute at law though the money might have been paid by Sir John Swinburne, but there can be no doubt, that is an omission. The inten-
B tion was that the bond should be void by the payment at any day by him as well as by the other two. Though the bonds treat them all as principals, the fact is admitted that Henry Swinburne was the only principal and the other two were sureties. Then on established principles, one surety has a right to call on the other to contribute equally with himself, or to compel the creditor, the instant the day was past and the bonds were absolute, to enforce both bonds against both, not one
C only.

The evidence produced to prove that this defendant was a surety only in default of payment by the plaintiff, cannot be received. It consists only of declarations, to which the plaintiff was no party and made in his absence. This case has no distinction from the common case of co-sureties.

D **LORD ELDON, L.C.**—On the relation of principal and surety some things are clear. It has been long settled that, if there are co-sureties by the same instrument, and the creditor calls on either of them to pay the principal debt, or any part of it, that surety has a right in this court, either on a principle of equity, or on contract, to call on his co-surety for contribution. That right is properly enough stated as depending rather on a principle of equity than on contract, unless in this sense,
E that the principle of equity being in its operation established, a contract may be inferred on the implied knowledge of that principle by all persons. It must be on such a ground of implied assumpsit, that in modern times courts of law have assumed a jurisdiction on this subject.

However, whether this depends on a principle of equity or is founded in contract, it is clear that a person may by contract take himself out of the reach of the
F principle, or the implied contract. In *Deering* v. *Earl of Winchelsea* (1), persons not united in the same instrument were made to contribute, and it was decided that there is no distinction whether they are bound in the same obligation or by several instruments. That case also established that, though one person becomes a surety without the knowledge of another surety, that circumstance introduces no distinction. If the relation of surety for the debtor is formed (and the fact is not
G that the party becomes surety for both the principal debtor and another surety, not for the principal alone) it is decided that, whether they are bound by several instruments or not, whether the fact is or is not known, whether the number is more or less, the principle of equity operates in both cases on the maxim that equality is equity. The creditor who can call on all, shall not be at liberty to fix one with payment of the whole debt, and on the principle requiring him to do justice, if he will
H not, the court will do it for him.

When once it is admitted, as it was in that case, that a man may by contract place himself out of the reach of the principle, you must in every case consider whether the party has done so. It was admitted in that case that, one bond being for £10,000, and the surety having paid it, Lord Winchelsea, having executed a bond for £4,000 only, though he was a surety, yet he had by contract taken himself out
I of the reach of the £6,000, and was liable only to the extent of £4,000. It must then be admitted that, if one surety can provide that another shall have no demand against him for a moiety of the debt, he may also contract that the other shall have no demand whatsoever against him.

The question then, is whether the meaning of this instrument executed by the defendant is that he will be a co-surety or that the surety in the first instrument was with reference to him to be considered a principal. If the real nature of the transaction is to be understood thus: that Henry Swinburne and the plaintiff

entered into a bond for £1,200 to the Newcastle bank, Swinburne as principal, and the plaintiff as surety, and Sir John Swinburne, who had no communication, as it appears, with them, proposed to the bank that he should become a co-surety, there is an end of the question. But if, not constituting himself co-surety with the plaintiff, he proposed to the bank only that he would engage to pay them, if they could not get payment from either of the others, then he has by contract withdrawn himself from the reach of the principle, and the plaintiff cannot complain, as the transaction was without his knowledge that the defendant bound himself only to the extent he thought proper. I take the case to be this, that Henry Swinburne was the only original debtor to Hamersley & Co. who called for their money and it, therefore, became necessary for him to raise the money elsewhere. Sir John Swinburne appears to have applied to the bank at Newcastle and, according to the proposal made to those bankers, the sum of £1,200 was to be raised on the credit of Henry Swinburne and the plaintiff, to be applied to discharge the debt to Hamersley & Co. In that transaction, so proposed, Henry Swinburne was to be the principal and the plaintiff the surety. The Newcastle bank on a discussion that took place between them and Sir John Swinburne, intimated their dislike to deal on the security of Henry Swinburne and that they were not satisfied to deal on the security of both him and Craythorne.

One bond was executed and tendered to the bank, in which Henry Swinburne as principal, and Craythorne as surety, are jointly and severally bound for the sum of £1,200. Another bond was executed in consequence of some conversation between the bank (by one of the partners) and Sir John Swinburne, which I think is admissible evidence. The cause may be decided without reference to that question but as it has an effect on my mind, it is proper that the parties should know that. The substance of that communication is, that the bank did not like to trust to the security of Henry Swinburne and Craythorne but, if Sir John Swinburne had a good opinion of the credit that might be given, if not to Henry Swinburne, to Craythorne, and would become security to the bank, that he would pay if they [Henry Swinburne and Craythorne] did not, by entering into a bond to pay the debt if they did not pay it, the bank would advance the money.

The sum of £1,200 was advanced accordingly. The bond, executed by Sir John Swinburne, recited the former bond for the money advanced to Henry Swinburne and Craythorne, and the condition is that it shall be void if Henry Swinburne and Craythorne or either of them, pay the money. The banker says he understood it to be a collateral security, by which he means a supplemental security.

The question is, first, whether Sir John Swinburne is, under this instrument, to be considered as a co-surety with Craythorne or, whether the effect is that Sir John Swinburne did not undertake to stand as a co-surety with Craythorne but was surety for both and to pay only if both should make default. It must be considered as entirely clear of any objection that Craythorne could take, that Sir John Swinburne was not at liberty to deal thus, as the proposition to the bank was that Henry Swinburne and Craythorne were to be their debtors and Sir John Swinburne, voluntarily adding his security, cannot be bound beyond the extent to which he thought proper to bind himself.

It was contended for the first time in *Deering* v. *Earl of Winchelsea* (1), that there is no difference whether the parties are bound in the same or by different instruments, provided they are co-sureties in this sense for the debt of the principal. Further, that there is no difference if they are bound in different sums, except that contribution could not be required beyond the sums, for which they had become bound. Eyre, C.J., decided that this obligation of co-sureties is not founded in contract but stands on a principle of equity. Counsel for the plaintiff has ably argued that, after that principle of equity has been universally acknowledged, then persons acting in circumstances to which it applies, may properly be said to act under the head of contract, implied from the universality of that principle. On that ground stands the jurisdiction assumed by courts of law. This jurisdiction is

attended with great difficulty where there are many sureties, though not in the simple case where there are only two; one of whom may bring his action for a moiety on the implied undertaking. But whether this stands on contract or a principle of equity, it is clear that a party may take care by his engagement, that he shall be bound only to a certain extent. That is proved by *Swain* v. *Wall* (2) where, the engagement being to pay in thirds, that contract was held to take them out of the principle that would have required a moiety; and also by *Deering* v. *Earl of Winchelsea* (1) where it was admitted that Lord Winchelsea, though liable as a surety, had by contract withdrawn himself from any liability by virtue of which he should be charged beyond £4,000.

If, therefore, by his contract, a party may exempt himself from the liability or that extent of liability, in which without a special engagement he would be involved, it seems to follow that he may, by special engagement, contract so as not to be liable in any degree. That leads to the true ground, the intention of the party to be bound, whether as a co-surety or only if the other does not pay, that is, as surety for the surety not as co-surety with him.

As to the bond itself, it is clear on the face of it and according to its language, that the bank and Sir John Swinburne, if at liberty to do so, did consider that this sum of money was to be an advance as between Sir John Swinburne and the bank, to the other two. They have no right to complain of it for there is no contract by Sir John Swinburne with the other two. He might limit his engagement with reference to them, as he thought proper, and the bond on the face of it makes him surety only for the principal and the other surety. It is clear, however, on the parol evidence, and why is not that competent evidence? Evidence is admitted to show who is the principal and who the surety, and, in order to determine that, to show to whom the money was advanced. Why is it not to be admitted to show to whom the money was advanced as between Sir John Swinburne and the others. But this goes further; for the evidence is not in contradiction to but in support of, the instrument, and whether the demand is founded on the equity only or upon the implied contract, why should not evidence be admitted to show that the equity ought not to be applied and the contract ought not to be inferred?

I do not state that the fact that Sir John Swinburne entered into this security without the knowledge of Craythorne, would have repelled the doctrine of contribution; as that stands on this, that all sureties are equally liable to the creditor and it does not rest with him to determine on whom the burden shall be thrown exclusively; that equality is equity and if he will not make them contribute equally, this count will finally by arrangement, secure that object.

Then the question arises whether that is according to the contract or engagement with the surety. My opinion is wrong, if Sir John Swinburne is a co-surety. Having considered this much, and given great attention to the case in FREEMAN (*Cooke* v. —— (3)), I think he is not a co-surety; but, as between him and Craythorne, the latter is just as much a principal as Henry Swinburne. The consequence is that the equity does not apply, Sir John Swinburne being liable only in case the other two do not pay and not being liable with them.

Bill dismissed.

CLOWES *v.* HIGGINSON

[Vice-Chancellor's Court (Sir Thomas Plumer, V.-C.), May 14, 17, 21, 1813]

[Reported 1 Ves. & B. 524; 35 E.R. 204]

Specific Performance—Sale of land—Defence—Mistake—Evidence dehors contract—Statements by auctioneer at sale.

Where mistake cannot be established without evidence equity will allow a defendant in an action for specific performance to support a defence founded on mistake by evidence dehors the written contract if the evidence be introduced, not to explain or alter the contract, but consistently with its terms to show circumstances of mistake which would make specific performance of the contract, as executed, inequitable.

In an action for specific performance of a written contract for the sale of land, the purchaser sought to lead parol evidence in the form of declarations made by the auctioneer at the auction sale to show that he had purchased under a mistake.

Held: the real object of introducing the auctioneer's declarations was to explain, alter, or contradict the written contract, in effect to substitute another contract, and evidence of such declarations could not be admitted.

Notes. Considered: *Manser* v. *Back* (1848), 6 Hare, 443; *Price* v. *Ley* (1863), 4 Giff. 235. Referred to: *Dear* v. *Verity* (1869), 38 L.J.Ch. 297; *Douglas* v. *Baynes*, [1908] A.C. 477; *Holliday* v. *Lockwood*, [1916–17] All E.R. Rep. 232; *Berners* v. *Fleming*, [1925] All E.R. Rep. 557.

As to mistake as a defence to an action for specific performance, see 26 Halsbury's Laws (3rd Edn.) 894, 895; as to remedies in case of mistake, see ibid. 905 et seq.; and for cases see 35 Digest (Repl.) 98 et seq.

Cases referred to:

(1) *Gunnis* v. *Erhart* (1789), 1 Hy. Bl. 289; 126 E.R. 169; 3 Digest (Repl.) 18, *134*.

(2) *Higginson* v. *Clowes* (1808), 15 Ves. 516; 33 E.R. 850; 44 Digest (Repl.) 67, *518*.

(3) *Drewe* v. *Warmington* (1800), April 24, unreported.

(4) *Savage* v. *Taylor* (1736), Cas. temp. Talb. 234; 25 E.R. 753; 44 Digest (Repl.) 49, *352*.

(5) *Woollam* v. *Hearn* (1802), 7 Ves. 211; 32 E.R. 86; 44 Digest (Repl.) 149, *1304*.

(6) *Clinan* v. *Cooke* (1802), 1 Sch. & Lef. 22; 40 Digest (Repl.) 40, **211*.

(7) *Marquis of Townshend* v. *Stangroom*, *Stangroom* v. *Marquis of Townshend* (1801), 6 Ves. 328; 31 E.R. 1076, L.C.; 35 Digest (Repl.) 143, *350*.

(8) *Jenkinson* v. *Pepys*, cited 6 Ves. at p. 330; 15 Ves. at p. 521.

(9) *Ramsbotham* v. *Gosden* (1812), 1 Ves. & B. 165; 35 E.R. 65; 35 Digest (Repl.) 150, *397*.

Bill for specific performance of an agreement for the sale of land by auction.

The vendor's bill for specific performance of the contract having been dismissed, the purchaser now instituted this suit, as plaintiff, praying a specific performance of the contract according to his construction, that is, including the timber, except on lots 4 and 5, to which, as he represented, the separate valuation was to be confined. The defendants, the vendors, insisted that under the eighth condition of sale all the timber was to be separately valued. The purchaser ought to introduce parol evidence in order to support his construction of the written contract, as to the valuation of the timber.

Hart and *Bell* for the vendors opposed the introduction of parol evidence, insisting, on the authorities, that it could not be admitted to vary, add to or explain a written contract, as it may to show fraud or surprise.

A *Sir Samuel Romilly* and *Heald* for the purchaser: Evidence may clearly be admitted in support of the defence to a suit in a court of equity for the specific performance of a contract against the plain intention, where it can be clearly established that the one did not understand that he was selling what the other conceived that he was buying. In such a case, existing bona fide, and established by clear evidence, the court would refuse to execute the agreement, leaving the B party to law. The object of this evidence is to explain an ambiguity on the face of the conditions of sale. Its nature is that the auctioneer, before the sale, stated to the company in the presence of persons bidding for the purchaser that the timber on the different lots was to be paid for at a valuation; that several persons would have bid considerably more if they had not by that explanation been led to conclude that they should have a further sum to pay for the timber.

C *Gunnis* v. *Erhart* (1), respecting evidence of declarations by the auctioneer against the printed conditions, was not followed by any decision until *Higginson* v. *Clowes* (2); and in *Drewe* v. *Warmington* (3) LORD ALVANLEY, with *Gunnis* v. *Erhart* (1) before him, admitted evidence to explain, and almost to contradict, the printed particular, certainly not understanding himself as contradicting that case, but clearly expressing his opinion that such evidence ought to be received, D and deciding on it.

If, however, these declarations cannot be received as evidence to explain an ambiguity, it cannot be refused as a defence to a bill for specific performance of a contract which is a suit in which the defendant may show, not only what the agreement was but, in what circumstances it took place. In this instance the sale, including the timber at the price that was bid, proceeded from misapprehension, E not only on his part, but under which all persons present laboured, influencing them to limit their bidding. This is, therefore, a case of extreme hardship sufficient of itself, without fraud, to induce a court of equity to refuse its aid to the purchaser to obtain so great an advantage. This distinction between cancelling and specifically performing an agreement, receiving parol evidence in the one case to rebut an equity, refusing it in the other to alter, explain or add to the written contract, F was established in *Savage* v. *Taylor* (4); and has been followed in many modern cases: *Woollam* v. *Hearn* (4); *Ramsbotham* v. *Gosden* (9); was admitted by LORD REDESDALE in *Clinan* v. *Cooke* (6); and is particularly illustrated in *Marquis of Townshend* v. *Stangroom* (7).

G **SIR THOMAS PLUMER, V.-C.**—The exclusion of parol evidence, offered to explain, add to or in some way to vary a written contract relative to land, stands on two distinct grounds, not simply as being in direct opposition to the Statute of Frauds, but also on the general rule of evidence, independent of that statute. The writing must speak for itself and can receive no aid for extrinsic evidence of this more loose and unsatisfactory nature. That rule of law prevails equally in H courts of equity which admit no different rule of evidence on this subject. Thus far the rule is perfectly clear, rejecting parol evidence offered by the plaintiff to constitute, vary or explain a contract in writing concerning land of which he seeks the specific performance in a court of equity.

The difficulty is, how far evidence offered as a defence against a bill for specific performance is admissible. There are many cases on that where the evidence I has been received; and without enumerating the authorities, it may clearly be admitted for that purpose on a plain and obvious principle, namely, that a court of equity is not bound to interpose by specifically performing the contract; and though the subject and import of the written contract are clear, so that there is no necessity to resort to evidence for its construction, yet if the defendant can show any circumstances dehors, independent of the writing, making it inequitable to interpose for the purpose of a specific performance, a court of equity, having satisfactory information on that subject, will not interpose.

The rule, admitting evidence in those cases, is intelligible and clear. It is admitted, not to vary an agreement as it is expressed open to no objection, and, therefore, on the better binding, but to show circumstances of fraud, making it unconscientious in the party who so obtained it to insist on, and unjust in the court to decree, the performance. Fraud is not the only head on which parol evidence may be received and, if made out satisfactorily, a specific performance may be refused. On clear evidence of mistake or surprise, that the parties did not understand each other, it is introduced not to explain or alter the agreement but, consistently with its terms, to show circumstances of mistake or surprise, making a specific performance, as in the case of fraud unjust, and, therefore, not conformable to the principles on which a court of equity exercises this jurisdiction.

There is, however, considerable difficulty in the application of evidence under this head, calling for great caution, especially on sales by auction, lest under this idea of introducing evidence of mistake, the rule should be relaxed by letting it in to explain, alter, contradict and, in effect, get rid of a written agreement. In sales by auction, the real object of introducing declarations by the auctioneer or other persons is to explain, alter or contradict the written contract; in effect to substitute another contract. Independently of authority, I should be much disposed to reject such declarations as open to all the mischief against which the statute was directed, and also violating the rule of law which prevailed previously: I should be disposed to reject the declarations whether offered by a plaintiff seeking a performance, or by a defendant to get rid of the contract, a distinction which it is difficult to adopt where the evidence is introduced to show that the writing, purporting to be the contract, is not the contract; that there is no contract between them if that which is proved by parol does not make a part of it. That does not depend on the principle on which a defendant is permitted to show fraud, mistake or surprise, collateral to and independent of, the written contract; the object in the other case being to get rid of the contract by explaining it away.

I do not recollect any instance where evidence, offered in that view, has been received; but there are cases in which it has been rejected. *Jenkinson* v. *Pepys* (8) was very hard on the vendor who clearly intended that the plantation in the nursery should be valued distinctly from the timber which the defendant was to take with the estate. It was pressed that at the auction a distinct statement was made that there was to be a separate valuation of the nursery, and that the defendant, or his agent, was present and heard that declaration; but the opinion of the court was clear, that evidence of that declaration could not be received, being offered to supply a defect, to alter in some respect the written import of the contract.

The same decision has been made in other cases. The nearest case to the present is *Ramsbottom* v. *Gosden* (9), in which the parol evidence seems to have had the effect, in some degree, of altering the written contract which was silent as to the expense of making out the title; but according to the general rule the vendor, without stipulation to the contrary, must bear the expense of making out his own title. If the evidence there offered can fairly be brought under the head of mistake, the defendant who sold reluctantly, having uniformly intended and given instructions accordingly, that the expense should be borne by the purchaser, that does not infringe on the principle I have stated, that parol evidence of fraud, mistake or surprise may be received as a ground of defence against a specific performance.

No authority having decided that evidence can be received except on one of those grounds, these declarations are offered where the parties have contracted in writing on a subject distinctly adverted to in their written contract which makes a provision for it, whether explicit and satisfactory is not material. As there is here no fraud, mistake or surprise, the evidence of these declarations must be

rejected. My opinion is that this evidence is offered to contradict, explain or vary the written contract, and not for any of the purposes I have stated as forming exceptions, the evidence is inadmissible in this case.

His Lordship, having rejected the parol evidence, considered the construction of the contract, came to the conclusion that both parties had suffered from an innocent mistake, and dismissed the bill.

Bill dismissed.

CRUTTWELL *v.* LYE

Lord Chancellor's Court (Lord Eldon, L.C.), November 20, 21, 1810]

[Reported 1 Rose, 123; 17 Ves. 335; 34 E.R. 129]

Business—Goodwill—Sale—Right of purchaser to conduct competing business—No express covenant not to compete—No fraud.

The sale of a trade with the goodwill does not prevent the vendor's setting up again a similar trade in the absence of any express covenant, or fraud such as representing it as being a continuation of the old trade, or conduct encouraging others to believe that he would not engage in such trade again.

Under a commission of bankruptcy the bankrupt's carrying trade from Bath and Bristol to London was sold, with the goodwill, to the plaintiff. Another concern, carrying from Bath and Bristol to Warminster and Salisbury, having been purchased in trust for the bankrupt, he, having obtained his discharge, began trade again to London by that road. He solicited customers by advertisement and handbills, stating generally that, having been reinstated by his friends in the carrying trade, his wagons set out at the usual hours. On a motion for an injunction to restrain him from carrying on his trade,

Held: without any express covenant or fraud the bankrupt had asserted that he had set up the like but not the same trade and was justified in so doing; the injunction would, therefore, be refused.

Notes. Applied: *Harrison* v. *Gardner* (1817), 2 Madd. 198. Explained: *Churton* v. *Douglas* (1858), John. 174. Considered: *Ginese* v. *Cooper* (1880), 14 Ch.D. 596. Followed: *Walker* v. *Mottram* (1881), 19 Ch.D. 355. Considered: *Pearson* v. *Pearson* (1884), 27 Ch.D. 145; *Trego* v. *Hunt*, [1895–9] All E.R. Rep. 804; *Simpson* v. *Charrington & Co.*, [1934] 1 K.B. 64. Referred to: *Bozon* v. *Farlow* (1816), 1 Mer. 459; *Jennings* v. *Jennings* (1898), 67 L.J.Ch. 190; *Hill* v. *Fearis*, [1905] 1 Ch. 466; *Whiteman, Smith Motor Co.* v. *Chaplin*, [1934] 2 K.B. 35.

As to trade and goodwill generally, see 38 Halsbury's Laws (3rd Edn.) 8 et seq.; and for cases see 45 Digest (Repl.) 520 et seq.

Cases referred to:

(1) *Hogg* v. *Kirby* (1803), 8 Ves. 215; 32 E.R. 336, L.C.; 13 Digest (Repl.) 52, *29*.

(2) *Keene* v. *Harris* (undated), cited in 17 Ves. at p. 338; 1 Rose, at p. 125.

(3) *Chandler* v. *Gardiner* (undated), cited in 17 Ves. at p. 338; 1 Rose, at p. 124; 34 E.R. 130, L.C.; 5 Digest (Repl.) 996, *8037*.

Motion for an injunction.

In 1804, George Lye, being at that time engaged in the carrying trade by wagons from Bristol through Bath and Warminster to Salisbury, purchased from the executor of Wiltshire his carrying trade by wagons from Bristol through Bath to London, with the business premises, consisting of a warehouse in Peter Street,

Bristol, and extensive warehouses in Bath. He afterwards took his son Edward Lye into partnership with him, and they continued to carry on both those concerns, until, having extended the Warminster and Salisbury concern by setting up a wagon from Salisbury to London, a commission of bankruptcy issued against them.

The assignees in bankruptcy put up to sale by auction the whole of this carrying business in different lots. The particulars described lot 1 as the carrying business of George and Edward Lye, together with the goodwill of the extensive premises in Broad Street, Bath, used for many years in the business of a common carrier from Bath to London, etc.; also the premises in Peter Street, Bristol, together with the goodwill of the long established trade, etc. Lot 2 was described generally as the interest of the bankrupts in the carrying trade from Bristol to Warminster and Salisbury, stating that the purchaser was to take the stock on the respective premises, and specifying some particulars, as to the hours at which the wagon would be at the respective places, etc.

The first lot was purchased by the plaintiff for £4,000. The second lot was purchased by the nephew of one of the assignees. After Edward Lye had obtained his certificate, he was again put into business in that concern, on which occasion he stated, both by advertisement and by handbills, that being reinstated by his friends in the carrying business, he informed the public that his wagons set out at the usual hours, describing the course, not by the direct road to London, but by the road through Warminster and Salisbury. It was stated by affidavit that one of the assignees, an uncle of the bankrupt, assisted him by the use of his books in soliciting the customers.

The plaintiff moved for an injunction restraining the bankrupt from carrying on his trade.

Sir Samuel Romilly and *Heald*, for the plaintiff, supported the motion: The right of the bankrupt to set up and carry on again the same trade in the same place, is not disputed; but the objection is that, after this trade has been sold, as the goodwill of the old established trade, he has set up the same trade which he represented as the continuation of that trade, and soliciting the customers of that ancient establishment.

The question is not whether the defendant has a right to prosecute the business of a carrier from Bristol to London, but whether he can represent himself as continuing the same trade which had been sold with the goodwill attached, not to the premises but to the name; and whether he is justified in soliciting the customers not to deal with the person to whom the sale was made. It is evident from the advertisement that this is not the trade of a carrier generally. It represents the bankrupt as being reinstated by his friends in the carrying business and enumerates all the particulars of that trade which he had carried on before the bankruptcy. The result is that this is a trade set up in direct opposition to the old trade which the plaintiff purchased. It is in violation of good faith with him and by the assistance of one of the assignees, affording facilities from the books, the bankrupt is endeavouring to attract the customers from that concern to the rival trade. That conduct falls directly within the principle of *Hogg* v. *Kirby* (1); and is the proper object of restraint by injunction, without interfering in any degree with the personal right of a bankrupt to set up trade again. *Keene* v. *Harris* (2) and *Chandler* v. *Gardiner* (3) also support the principle.

Sir Arthur Piggott and *Leach* for the bankrupt; and *Richards* for the assignees: This is an attempt to interfere with the personal right of the bankrupt of which he cannot be deprived by the assignees or any other person. It is a right which, not being forfeited by the bankruptcy, could not be disposed of and cannot be affected by any fraudulent or improper conduct of the assignees. The advertisement is expressed in the usual terms on the sale of any premises where a particular business was carried on, and has nothing peculiar. This jurisdiction, dealing with the contracts of the assignees according to their expression, or their necessary

implication, touches no personal right of the bankrupt who was no party to the contract.

The proposition is, that the assignees of a bankrupt have the power, by their contract, to limit his future means of existence, to regulate his future life and to determine that he shall not, in any subsequent period, establish the same trade in the same place. In effect they seek to establish against him a monopoly of this carrying trade from Bath to London, preventing him from ever setting up the same trade between the same limits. The assignees have not affected to sell more than the advantage attached to the premises as having long been the site of a particular trade. That is the meaning of "goodwill" in this case. They could not bind the bankrupt to serve the purchaser in this trade for a term of years on the principle that it would be beneficial to his estate. These are two distinct trades, and, though the representation in the particular for sale is that Lye had been engaged in the ancient concern from Bath direct to London, when he speaks of being reinstated in the carrying business, he must be understood as alluding to the Warminster concern alone, which was the subject of the purchase of lot 2. *Keene* v. *Harris* (2) and *Chandler* v. *Gardiner* (3) are distinguishable.

LORD ELDON, L.C.—This motion is novel in its circumstances if not in principle, and it is of very great importance. On the one hand, if this court does not interpose, the plaintiff cannot possibly have what he really intended to purchase. On the other hand, if the defendant has a right to carry on this trade, I should, by interfering, destroy that right to an extent which I could never remedy. The plaintiff's right must be founded either in the covenant of the bankrupt, or in considerations arising out of his conduct, or in the fact that he is not carrying on that trade which he purchased, or which, independent of purchase, he has a right to carry on; but under that colour is carrying on the trade purchased by the plaintiff.

I do not enter into the question as to the effect of a covenant by a bankrupt whose property has been sold by his assignees with the goodwill, never to engage again in such a trade. The circumstances do not lead to that because here is no such covenant. As to conduct, a man might stand by and give encouragement, generating a confidence that he would not engage in such a trade, thereby inducing other persons to involve themselves. On that ground this court might interpose. It does not appear to me that, either by the effect of the contract, attending to the description of the subject comprised in lot 2, or by any circumstances connected with it, the purchaser would have been, or the bankrupt now is, precluded from carrying on the trade he is now engaged in.

The question is whether, on a fair understanding or representation, this bankrupt is carrying on the plaintiff's trade. I refer to *Hogg* v. *Kirby* (1), where the defendant had a clear right to publish a similar work, under the same title as the plaintiff's, represented as distinct and original; but was prevented from publishing his book as the work of the plaintiff (which had been partly published), the injunction not going further than to restrain the publication as the same with or a continuation of the plaintiff's work. So there can be no doubt that this court would interpose against that sort of fraud which has been attempted by setting up the same trade, in the same place, under the same sign or name, the party giving himself out as the same person. *Keene* v. *Harris* (2) has not much relation to this subject and *Chandler* v. *Gardiner* (3) has little bearing on it.

This defendant cannot carry on the trade from Bristol to London, holding himself out as carrying on the trade which the purchaser of lot 1 bought. There is no doubt that he gave a very considerable part of his purchase-money for the goodwill. This leads to a consideration of the facts under which this injunction is sought. The advertisement published by the bankrupt, having obtained his certificate, has very incautious expressions if he meant merely to hold out that he was about to set up again in business (as there is no doubt he was entitled

to do) and to give the public that general information. [His Lordship considered the terms of the defendant's advertisement, and continued:] I take this to be the short result of the facts of this case. Excluding what passed between 1804 and the sale, the Warminster concern was originally distinct. The representation as to lot 2 gives no notice that the purchaser of that lot would have any concern with any wagon transactions connected with London. It is also clear that Lye, one of the bankrupts, having purchased lot 2, did set up the wagon trade from Bristol through Bath, and by a different road to London. It was, in a sense, the same trade as that wagon trade purchased by the plaintiff. It is clear that direct solicitation was addressed by Lye to the public, inviting their custom in the trade between Bristol, Bath and London and, according to the true interpretation, by a different line of road. That solicitation was made, not merely by advertisement, but by bills handed about. There is, further, on the affidavits, so much probability of direct solicitation to the customers of the old concern in some few instances, that the fact may be fairly assumed. In these circumstances the question is whether the injunction can be maintained against the bankrupt carrying on this trade between Bristol, Bath and London; or, more broadly, whether, if he carried it on in a more direct course than appears on these affidavits, the injunction would be justified.

Attending to the fact that, carrying on the trade from Bristol to London, though by a different course, the bankrupt must convey goods which would otherwise be conveyed by the plaintiff, it is also clear that there may be a great proportion of business between those termini, in which the plaintiff really would have no concern. One of the difficulties that have pressed me throughout this cause, is to what extent on the principle this injunction is to go. There is no doubt that the defendant by taking goods from Bristol to Hounslow, where the roads meet, would to a certain extent prejudice the plaintiff; and so every removal from Bristol towards London would be an injury to him in a greater or less degree.

It is necessary first to consider whether the sale under the bankruptcy of lot 1, and the goodwill belonging to those premises, or the trade established on them, would, by themselves, on any principle, prevent the bankrupt's immediately again setting up the trade from Bristol to London by the very same road. I cannot say that any of those interests which a bankrupt is supposed to have by the effect of his certificate, or in the surplus of his estate, after payment of his debts, form a principle on which he should not be permitted to engage again in the like trade which, in this sort of case, is materially distinguished from the same trade. In *Hogg* v. *Kirby* (1) the defendant's magazine, being published as a continuation of the plaintiff's, was the same. Supposing the bankrupt, therefore, not to have had any other interest, there is no principle on which this court could hold that he should not engage in the direct trade by the same road.

The bankrupt, however, happens to become the purchaser, at the same sale, of the Warminster interest. The question then is whether that fact affords a principle (not arising out of any engagement, expressed as between the vendor and vendee of lot 1, or any description of lot 2, of which the bankrupt was purchaser) on which it can be maintained that, being at liberty to use the Warminster trade, he shall not be at liberty to become a trader in the like trade from Bath to London. The converse must also hold, that the plaintiff, by a similar equity, cannot convey anything from Bristol through Bath and Warminster to Salisbury. That is a great deal too much to be inferred from anything that has passed.

The goodwill, which has been the subject of sale, is nothing more than the probability that the old customers will resort to the old place. Fraud would form a different consideration; but if that effect is prevented by no other means than those which belong to the fair course of improving a trade, in which it was lawful to engage, I should, by interposing, carry the effect of injunction to a much greater length than any decision has authorised, or imagination ever suggested.

What further was done? The bankrupt advertises that he is reinstated in the

carrying business. Though that expression may have a tendency to misconception, yet he is in a fair sense reinstated if, being at liberty, he has availed himself of that situation to set up again that carrying business. It amounts to no more than that he asserts a right to set up this trade, and has set it up as the *like* but not the *same* trade with that sold. He has taken only those means which he had a right to take, to improve it, and there is no fact amounting to fraud on the contract made with the plaintiff.

The question whether in the circumstances, the plaintiff is to carry the agreement into execution, if the assignees have actively taken from him the benefit of that contract, is very different. But, whatever opinion may be held on this transaction in that view of it, I do not see the fraud on which, as a judge in equity, I can lay my hand, and I dare not so deal with it.

Injunction refused.

GILLETT *v.* MAWMAN

[Court of Common Pleas (Sir James Mansfield, C.J., Heath and Chambre, JJ.), February 5, 1808]

[Reported 1 Taunt. 137; 127 E.R. 784]

Custom—Usage—Right of workman to compensation if work destroyed before completion—Printer—Usage that printer not entitled to be paid until work completed and delivered to employer—Usage controlling general law.

Although a workman is, in general, entitled to recover compensation for his work and labour where the work is destroyed without any fault on his part before it is completed or delivered to the employer, yet the law in this respect may be controlled by the usage of a particular trade.

Where it was proved that a printer by the general usage was not entitled to be paid for any part of his work until the whole was completed and delivered,

Held: this custom was the law of the trade, and, as far as it extended, controlled the general law.

Notes. As to usages of particular trades, see 11 Halsbury's Laws (3rd Edn.) 202 et seq.; and for cases see 17 Digest (Repl.) 64.

Case referred to:

(1) *Menetone* v. *Athawes* (1764), 3 Burr. 1592; 97 E.R. 998.

Rule Nisi obtained by the plaintiff to increase the damages found by the jury or for a new trial of an action for work and labour, with the usual counts for money, etc., tried before Sir James Mansfield, C.J., at Guildhall. The defendant pleaded the general issue, and delivered a notice of set-off for money had and received, etc., and also "for £5,000 due and payable to the defendant from the plaintiff as the insurer of certain goods and chattels, books and papers of the defendant, insured by the plaintiff for the defendant against loss or damage by fire, and which were destroyed by fire while they were so insured by the plaintiff as aforesaid."

The plaintiff was a printer, and the amount of his demand, as proved upon the trial, was £1,819. One of the items of his charge was for printing, on account of the defendant, a translation of the Travels of Anacharsis. The work was nearly completed when a fire accidentally broke out upon the plaintiff's premises, and the whole impression was destroyed. It was contended on the part of the defendant that, as the work was not completed, the plaintiff by the custom of the trade was not entitled to be paid for any part of this printing. It was also

insisted that the defendant might deduct, upon the set-off, the value of his paper which had been destroyed on the plaintiff's premises, and which the plaintiff was bound to insure, as well by his express undertaking, as by the general custom of the trade. It was proved that the plaintiff had received £5,000 from the Imperial insurance office, in consequence of a loss occasioned by this fire. No policy had been executed, but a deposit was paid by the plaintiff about a month before the accident occurred. There was some evidence offered for the purpose of proving that this deposit had been paid partly on account of goods in trust.

The jury found a verdict for the plaintiff, damages £145, deducting from his whole demand the charge for printing the above work, and the value of the defendant's paper which had been destroyed. They also found that there was no general custom of the trade by which the printer was bound to insure the property of his employer while it remained on his premises, but that the plaintiff in this instance had rendered himself liable by an express undertaking. The Chief Justice was of opinion that the loss occasioned by the omission on the part of the plaintiff to effect the insurance could not be made the subject of a set-off, and permission was accordingly given to the plaintiff to move that the verdict might be increased by the addition of £1,105, the sum which had been deducted upon that account. A rule nisi was obtained on a former day, calling on the defendant to show cause why the damages found by the jury should not be increased to £1,819, or why a new trial should not be had between the parties. *Serjeant Vaughan*, in moving for the rule, observed that he meant to contend that the plaintiff was entitled to be paid for the printing, although the whole work was not completed.

Serjeant Shepherd and *Serjeant Lens* for the defendant, showed cause against the rule.

Serjeant Vaughan and *Serjeant Onslow* for the plaintiff, observed that by the general rule of law the plaintiff was entitled, under the circumstances of this case, to recover a compensation for his work and labour, although no benefit had been derived from it to the defendant. They cited *Menetone* v. *Athawes* (1) in support of this contention. It was true that upon the trial reliance was placed by the defendant on a supposed custom of the trade; but the evidence given in support of that custom was not sufficient to authorise the jury in finding a verdict contrary to the general law. On the question of the set-off they were stopped by the court.

SIR JAMES MANSFIELD, C.J.—The evidence, as to the point which has been argued by the counsel for the defendant, was all upon one side. The custom of the trade was very fully established. It was proved that the printer, by the general usage, was not entitled to be paid for any part of his work until the whole was completed and delivered. This custom is the law of the trade, and, as far as it extends, it controls the general law. As to the set-off, it was proved upon the trial that the plaintiff's own loss much exceeded the sum which he had recovered from the insurance office. The deposit was made in his name, and, as far as it appeared, in respect of his own property; it was not proved that any part of it was paid for goods in trust, or anything received by the plaintiff upon that account. There was no evidence then of money had and received to the use of the defendant. The jury indeed found that the plaintiff had undertaken to insure. He neglected to fulfil his engagement, in consequence of which the defendant sustained a considerable loss. But this loss cannot be made the subject of a set-off; the defendant must seek his remedy by a distinct action.

HEATH and **CHAMBRE, JJ.**, concurred.

Rule absolute to enter the verdict for £1,251, being the amount of the damages found by the jury, increased by addition of the sum deducted under the set-off, and part of the rule which had for its object to increase the verdict to £1,819, discharged.

GOODTITLE d. RADFORD *v.* SOUTHERN

[Court of King's Bench (Lord Ellenborough, C.J., Le Blanc, Bayley and Grose, JJ.), May 8, 1813]

[Reported 1 M. & S. 299; 105 E.R. 112]

Will—Evidence—Identification of property—Evidence to extend devise of "all that farm called Trogues farm now in the occupation of A.C." to other lands not in his occupation.

The testator devised to the defendant "all that farm called Trogues farm now in the occupation of A.C."

Held: extrinsic evidence was admissible to show that the devise was not necessarily limited to lands in Trogues farm in the occupation of A.C., but extended to other lands of Trogues farm not in his occupation.

Notes. Considered: *Press* v. *Parker* (1825), 2 Bing. 456; *Miller* v. *Travers*, [1824–34] All E.R. Rep. 233. Distinguished: *Richardson* v. *Watson*, [1824–34] All E.R. Rep. 572. Considered: *Doe d. Hubbard* v. *Hubbard* (1850), 15 Q.B. 227. Approved: *Slingsby* v. *Grainger* (1859), 7 H.L. Cas. 273. Distinguished: *Smith* v. *Ridgway* (1865), 14 W.R. 207. Referred to: *Doe d. Beach* v. *Jersey* (1818), 1 B. & Ald. 550; *Doe d. Ashforth* v. *Bower* (1832), 3 B. & Ad. 453; *Hall* v. *Fisher* (1844), 1 Coll. 47; *Stanley* v. *Stanley* (1862), 2 John. & H. 491; *Webber* v. *Stanley* (1864), 16 C.B.N.S. 698; *White* v. *Birch* (1867), 36 L.J.Ch. 174; *Hardwick* v. *Hardwick* (1873), L.R. 16 Eq. 168; *Keogh* v. *Keogh* (1874), 22 W.R. 508.

As to the admissibility of extrinsic evidence to identify property, see 39 Halsbury's Laws (3rd Edn.) 967; and for cases see 48 Digest (Repl.) 496 et seq.

Cases referred to:

(1) *Roe d. Conolly* v. *Vernon* (1804), post; 5 East, 51; 1 Smith, K.B. 318; 102 E.R. 988; 49 Digest (Repl.) 825, *7775*.

(2) *Marshall* v. *Hopkins* (1812), 15 East, 309; 104 E.R. 861; 48 Digest (Repl.) 465, *4186*.

(3) *Goodright d. Lamb* v. *Pears* (1809), 11 East, 58; 103 E.R. 925; 48 Digest (Repl.) 554, *5197*.

Motion by the plaintiff for a rule nisi to set aside a nonsuit in an action of ejectment of two closes of land in the parish of Darley, in the county of Derby, tried before Gibbs, J., at the last assizes for that county.

The defendant claimed under the following devise in the will of Richard Southern:

"I give and devise all that my farm, lands, and hereditaments called Trogues farm, situate within the parish of Darley, in the county of Derby, now in the occupation of A. Clay, unto my brother John Southern, and to his heirs and assigns for ever."

The lessor of the plaintiff claimed under the residuary clause in the same will, which, it was admitted, would entitle him to the premises in question, provided they did not pass to the defendant under the above devise.

On the part of the lessor of the plaintiff it was proved that Trogues farm was in the occupation of A. Clay; but the closes in question were not in his occupation, but in the occupation of one Marsden: and in order to show that they were not parcel of Trogues farm, and that the testator Richard Southern did not take them as such, the will of one Houghton, deceased, was produced, which contained the following devise (inter alia) to R. Southern:

"Also all that piece or parcel of ground situate in the liberty of Wansley, and in the parish of Darley, commonly called or known by the name of Trogues, otherwise Trough's pasture; and also all those two closes of land situate at the bottom of the pasture called Trogues, otherwise Trough's pasture, called by the name of the Dale closes."

R. Southern, when he became entitled to this land under Houghton's will, about thirteen years since, let the two closes to Marsden, and evidence was offered of payment of rent by Marsden to R. Southern, in order to show that R. Southern knew in whose occupation the land was. A

On the part of the defendant a notice to quit was proved which had been given to Marsden by R. Southern a few months before the time of making his will. The notice was in these terms : B

"I do hereby give you notice to quit and deliver up the possession of all my lands belonging to and called Trogues farm, situate in the parish of Darley, now in your possession, on or before Lady Day next."

This evidence was objected to by the counsel for the plaintiff, but was admitted by the learned judge, and thereupon the plaintiff was nonsuited. C

Serjeant Vaughan now moved to set aside the nonsuit, on the ground that this being a specific devise of Trogues farm in the occupation of Clay, and Trogues farm being proved in his occupation, there was a clear description of property for the devise to operate upon; and consequently it admitted of no extension to other lands, not in the occupation of Clay, although they might be parcel of Trogues farm : for such a construction would amount to a complete rejection of the words "in the occupation of Clay." As the devise would admit of no extension, the evidence which was received for the purpose of extending it was consequently improperly received. D

LORD ELLENBOROUGH, C.J.—Parcel or no parcel is always a question of evidence for a jury; and in the same manner it was competent to show here, if there was any doubt, that the two closes were parcel of Trogues farm, by which name the thing devised was sufficiently ascertained. The testator certainly contemplated these closes as parcel of Trogues farm, when he gave the notice to quit. That is clearly an exposition of the description which he used in his will. As to the argument that the words of the devise are satisfied by applying them to the farm in Clay's occupation, and, therefore, cannot be extended to the closes in question; it may be answered that if these closes were parcel of Trogues farm, the word "all" in the devise would not be satisfied without including them. The testator was mistaken as to the person in whose occupation the two closes were; but the devise is sufficiently comprehensive : it is clear that he meant to pass all which was called Trogues farm, which is a plain and certain description; and the defective description of the occupation will not alter the devise. E F G

LE BLANC, J.—The only question is on the admissibility of the evidence; and that question has been determined by the cases, some of which have been before the courts very recently : see *Roe d. Conolly* v. *Vernon* (1); *Marshall* v. *Hopkins* (2); and *Goodright d. Lamb* v. *Pears* (3). This was clearly a latent ambiguity, which may be explained by evidence. H

BAYLEY, J.—The testator devises " all his farm called Trogues farm;" and it was competent to show by evidence of what parcels that farm consisted.

GROSE, J., concurred.

Rule refused.

A

RANDALL *v.* LYNCH

[Court of King's Bench (Lord Ellenborough, C.J.), January 22, 1809]

[Reported 2 Camp. 352; 170 E.R. 1181]

Shipping—Detention of ship by charterers—"Detention"—Failure to restore ship
B *to owner at time stipulated in charterparty—Responsibility of charterer for all causes of detention.*

By a charterparty the charterer covenanted to deliver and discharge his homeward cargo at the London Docks, forty days being allowed for unloading his outward cargo and loading and unloading his homeward cargo, with an option for the charterer to keep the vessel for ten days above the stipulated
C forty days upon payment of £5 per day for each and every of the said ten over lay days or days of demurrage. Due to the crowded state of the London Docks the charterer was unable to unload part of his cargo until thirty-five days after the expiration of the several periods of forty and ten days. In an action by the shipowner for damages for detention of the ship,

Held: a person who hired a vessel detained her if at the end of the stipulated
D time he did not restore her to the owner and he was responsible for all the various vicissitudes which might prevent him from so doing, whether arising from want of berth, as in this case, tempestuous weather, or any other cause; from the leave given to the charterer to keep the ship for so long there was to be implied a covenant that he would keep her no longer; and, therefore, he was liable to the owner for the detention of the ship.

E *Deed—Covenant—Breach—Payment into court—Need to prove deed.*

In an action of covenant if money be paid into court on a breach it is unnecessary to prove the deed, for the payment in is a sufficient admission of the execution of the deed.

Notes. Distinguished: *Rodgers* v. *Forresters* (1810), 2 Camp. 483; *Norden*
F *Steam Co.* v. *Dempsey* (1876), 1 C.P.D. 654. Considered: *Davies* v. *McVeagh* (1879), 4 Ex. D. 265; *Nelson* v. *Dahl* (1879), 12 Ch.D. 568; *Postlethwaite* v. *Freeland* (1880), 5 App. Cas. 599. Distinguished: *Gullischen* v. *Stewart* (1883), 11 Q.B.D. 186. Applied: *Budgett* v. *Binnington*, [1891] 1 Q.B.D. 35. Distinguished: *Neptune Steam Navigation Co.* v. *Sclater and Proctor, The Delano* (1894), 71 L.T. 544. Approved: *William Alexander & Sons* v. *Aktieselskabet Dampskibet Hansa*,
G [1918–19] All E.R. Rep. 986. Referred to: *Parker* v. *Winlo* (1857), 27 L.J.Q.B. 49; *Thiis* v. *Byers* (1876), 1 Q.B.D. 244; *Porteus* v. *Watney* (1878), 3 Q.B.D. 534; *Dahl* v. *Nelson, Donkin & Co.*, [1881–5] All E.R. Rep. 572.

As to damages for detention of ship, see 35 Halsbury's Laws (3rd Edn.) 311, 312; and for cases see 41 Digest (Repl.) 489 et seq. As to exceptions to strict proof of instruments, see 15 Halsbury's Laws (3rd Edn.) 452; and for cases see 22
H Digest (Repl.) 498, 499.

Action on a charterparty of affreightment, dated April 1, 1809, for a voyage to Lanceretto and back to London, whereby it was covenanted that,

"being fully laden and dispatched, the master should and would with the then first favourable opportunity, set sail and depart from the port or place at which
I he might have completed his homeward cargo, and proceed direct to the said port of London, and upon arrival there (that is to say) at the London docks, after regular report being first made at the Custom House, make discharge and faithful delivery of the said homeward cargo and every part thereof unto the said affreighter or his order, or according to bill or bills of lading, or otherwise, and there end and complete both out and homeward voyages."

It was further covenanted,

"that forty days should be allowed for unloading, loading, and again unloading

the said cargoes, to commence and be computed at Lanceretto, from, and including, the day after the said master should be ready to make discharge of such part of his cargo as was intended to be landed there, and notice given thereof to the said affreighter's agent at that place, and to continue in London from the day of reporting at the Custom House: and likewise it was agreed between the parties, that it should be lawful for and at the option of the said affreighter or his agents to keep and detain the said vessel for the space of ten working days over and above the hereinbefore stipulated forty days, upon paying him the said master or his representative £5 sterling per day for each and every of the said ten over lying days or days of demurrage."

In the declaration, the breach assigned was that the defendant did not nor would unload, load, and unload again the said respective cargoes of the said vessel within the said forty days in the said charterparty mentioned, and stipulated and allowed for those purposes, computed as therein mentioned, and the said space of ten working days over and above the said stipulated forty days, but kept and detained and caused to be kept and detained the said ship or vessel with a part of the said homeward cargo on board her in the London docks aforesaid, for another long space of time, to wit, the space of thirty-five days after the expiration of such periods of forty days and ten days; whereby the plaintiff, during all the time last aforesaid, lost and was deprived of the use and profit of his said ship or vessel. The defendant pleaded non est factum; and to the last breach, that he did not keep and detain and cause to be kept and detained the said ship or vessel with a part of the said homeward cargo on board her in the London docks aforesaid, after the expiration of such several periods of forty days and ten days modo et forma, etc.

The ship arrived from Lanceretto in the London Docks on Aug. 10, and was reported next day at the Custom House. The forty days stipulated in the charterparty for unloading the outward cargo, and loading and unloading the homeward cargo, expired on Aug. 22; but on account of the crowded state of the docks, her discharge could not then be begun, and it was not finally completed till Oct. 6, being about thirty-one days after the expiration of the ten days during which time she might be kept on demurrage of £5 a day. The question was whether the defendant, as freighter, was, under these circumstances, liable for the detention of the ship.

Park, Topping and Marryat for the plaintiff.
Sir Vicary Gibbs, Garrow and *Barrow* for the defendant.

LORD ELLENBOROUGH, C.J.—The question is whether the detention of the ship arising from the inability of the London Dock Co. to discharge her is, in point of law, imputable to the freighter; and I am of opinion that the person who hires a vessel detains her, if at the end of the stipulated time he does not restore her to the owner. He is responsible for all the various vicissitudes which may prevent him from doing so. While the goods remained on board the vessel in the London docks, it was impossible for the plaintiff to make any use of her, and to all intents and purposes she was there detained by the defendant. When she was brought into the docks, all had been done which depended upon the plaintiff, and the Dock company were the defendant's agents for her delivery. The defendant is as much responsible for a delay arising from the want of a berth, as if it had arisen from tempestuous weather or any other cause. This issue must, therefore, be found for the plaintiff, and the jury will consider to what compensation he is entitled for the detention after the ten days during which the ship was allowed to be detained at £5 a day.

The jury awarded thirty-one days more at the same rate.

In the ensuing term *Sir Vicary Gibbs* (without objecting to the Chief Justices's direction upon this point, or the manner in which the issue joined on the record had been found) moved in arrest of judgment, on the ground that the breach for detaining the ship beyond the forty lay days, and the ten demurrage days, was not

warranted by the charterparty, there being no covenant on the part of the freighter to deliver up the ship at the end of that time. A rule to show cause was granted, but it was afterwards discharged, the court clearly thinking that, from the leave given to the defendant to keep the ship so long, there was an implied covenant that he would keep her no longer, upon which the breach was well assigned.

The defendant had paid money into court on the breach for non-payment of freight. A question arose at the trial whether this dispensed with the necessity of proving the execution of the charterparty. *Sir Vicary Gibbs* insisted that the plaintiff was still bound to produce the attesting witness, that he might be cross-examined as to the circumstances under which the deed was executed.

LORD ELLENBOROUGH, C.J.—The rule to pay money into court is a sufficient admission of the execution of the deed to dispense with the production of the attesting witness [see s. 3 of the Evidence Act, 1938 : 9 HALSBURY'S STATUTES (2nd Edn.) 628].

DENEW *v.* DAVERELL

[COURT OF KING'S BENCH (Lord Ellenborough, C.J.), November 30, 1813]

[Reported 3 Camp. 451]

Auction—Auctioneer—Sale of Land—Negligence by auctioneer whereby sale nugatory—Right to recover compensation for services.

If an auctioneer employed to sell an estate is guilty of negligence whereby the sale becomes nugatory, he is not entitled to recover any compensation for his services from the vendor.

Notes. By s. 44 (2) of the Law of Property Act, 1925 (20 HALSBURY'S LAWS (3rd Edn.) 520), under a contract to grant or assign a term of years, whether derived or to be derived out of freehold or leasehold land, the intended lessee or assign is not entitled to call for the title to the freehold.

Considered : *Souter* v. *Drake* (1834), 3 L.J.K.B. 31.

As to auctioneer's right to remuneration, see 2 HALSBURY'S LAWS (3rd Edn.) 84, 85; and for cases see 3 DIGEST (Repl.) 34 et seq.

Action for work and labour, money paid, etc.

The plaintiff, who was an auctioneer, was employed by the defendant, a gentleman of fortune, to sell for him a leasehold house in Grosvenor Street. The plaintiff advertised the house, and made out a particular of the conditions of sale, which was submitted to the defendant, and which he approved of. This did not contain any proviso that the vendor was not to be called upon to show the title of the lessor. The lease of the house was bought upon this particular by Lord Bolton, who immediately called upon the defendant to show that Lord Grosvenor, the lessor, had power to grant the lease. A bill being filed for a specific performance, the Lord Chancellor held that the vendor, without an express stipulation to the contrary, was bound to show the title of the lessor, and the plaintiff was not in a situation to do so. Lord Bolton accordingly brought an action against the auctioneer, and recovered back his deposit. The amount of the damages and costs in that action was now paid into court. The plaintiff sought to recover further 2½ per cent. commission upon the sum for which the lease was sold to Lord Bolton.

The defence was the plaintiff's negligence in conducting the sale; and several witnesses were called who stated that it has been the constant usage of auctioneers

for a number of years, when employed to sell leasehold property, to insert a proviso in the particular that the vendor shall not be called upon to show the title of the landlord. For the plaintiff it was insisted this was no defence to the action, more especially as the defendant himself had seen and approved of the particular under which the house was sold. A

Garrow and *Comyn* for the plaintiff.
Topping and *Bowen* for the defendant. B

LORD ELLENBOROUGH, C.J.—Where there is a special contract for a stipulated sum to be paid for the business done by the plaintiff, it has been usual to leave the defendant to his cross-action for any negligence he complains of. But where the plaintiff proceeds, as here, upon a quantum meruit, I have no doubt that the just value of his services may be appreciated, and that if they are found to have been wholly abortive, he is entitled to recover no compensation. In the present case, the plaintiff appears to have been guilty of gross negligence, and the defendant has suffered an injury instead of deriving any benefit from employing him. A practice has very properly sprung up among auctioneers in selling leasehold property, to insert a clause in the particulars of sale, that the vendor shall not be called upon to show the title of the lessor. The plaintiff was bound to take notice of that practice, and to insert such a clause in the particulars of sale of the defendant's house. Had this been done, the defendant would have been secure, and Lord Bolton must have completed the purchase. By the omission, the defendant has the house thrown back upon his hands with expensive litigation. It is no answer that the particulars were shown to him, and that he made no objection to them. I pay an auctioneer, as I do any other professional man, for the exercise of skill on my behalf which I do not myself possess; and I have a right to the exercise of such skill as is ordinarily possessed by men of that profession or business. If from his ignorance or carelessness he leads me into mischief, he cannot ask for a recompense, although from a misplaced confidence I followed his advice without remonstrance or suspicion. C D E

The jury found a verdict for the defendant.

BERKELEY PEERAGE CASE

[COMMITTEE OF PRIVILEGES (Lord Eldon, L.C., Lord Ellenborough, C.J., and Lord Redesdale, advised by Sir James Mansfield, C.J., and other judges), May 13, 1811]

[Reported 4 Camp. 401]

Legitimation—Evidence—Declarations by deceased persons—Need for declaration to be made before existence of any dispute—Admission as evidence received with jealousy.

Declarations by deceased persons to prove matters of pedigree are admissible in evidence if made not only ante litem motam (in its strict sense of before the commencement of legal proceedings), but also before the existence of any actual controversy or dispute concerning the matters referred to in the declaration. The admission in evidence of declarations has ever been received with a degree of jealousy because (per WOOD, B.) the opposite party has had no opportunity of cross-examining the persons by whom the declarations were made, and because (per LAWRENCE, J.) a declaration is an answer to particular questions put with an interested view by one party behind the back of the other. To exclude a declaration as having been made post litem motam it is not necessary to show that the existence of the lis mota was known to the declarant.

Legitimation—Evidence—Entry in family Bible—Entry in other book or paper—Declaration that entry made to establish legitimacy.

An entry in a family Bible or any other book, or on any piece of paper, made by a father with regard to the legitimacy of his son is admissible in evidence as a declaration of the father. The fact that the father is proved to have declared that he had made the entry for the express purpose of establishing the legitimacy of his son and the date of his birth in case these matters should be called in question after the father's death, **held**, not to render the entry inadmissible.

Per LORD ELLENBOROUGH, C.J.: I agree that an entry made in a Bible does not, therefore, become evidence, but I cannot say it is not greatly strengthened by being found there, that being the ordinary register in families.

Per LORD REDESDALE: The circumstance of an entry being in a family Bible, to which all the family have access, gives it that solidity which it would not have if made in a book which remained in the exclusive possession of the father.

Notes. Considered: *Belfast* v. *Chichester and A.-G.* (1820), 2 Jac. & W. 439; *Gee* v. *Ward* (1857), 7 E. & B. 509; *Shedden* v. *Patrick* (1860), 2 Sw. & Tr. 170; *Davy* v. *A.-G.*, [1934] All E.R. Rep. 176. Referred to: *Gordon* v. *Gordon* (1821), 3 Swan. 400; *Moseley* v. *Davies* (1822), 11 Price, 162; *Roscommon's Case* (1828), 6 Cl. & Fin. 97; *Davies* v. *Morgan* (1831), 1 Cr. & J. 587; *Monkton* v. *A.-G.* (1831), 2 Russ. & M. 147; *Walker* v. *Beauchamp* (1834), 6 C. & P. 552; *Davies* v. *Lowndes* (1843), 6 Man. & G. 471; *Sussex Peerage Case*, [1843–60] All E.R. Rep. 55; *Shrewsbury (Peerage) Case* (1858), 7 H.L. Cas. 1.

As to declarations as to pedigree and admissibility of family papers, see 15 HALSBURY'S LAWS (3rd Edn.) 310–312, 409, 410. For cases see 22 DIGEST (Repl.) 111 et seq., 358–360.

Cases referred to:

(1) *Whitelocke* v. *Baker* (1807), 13 Ves. 510; 33 E.R. 385, L.C.; 22 Digest (Repl.) 113, *960*.

(2) *Goodright d. Stevens* v. *Moss* (1777), 2 Cowp. 591; 98 E.R. 1257; 3 Digest (Repl.) 407, *78*.

(3) *Spadwell* v. —— (1730), unreported.

(4) *Hayward* v. *Firmin* (1766), unreported.

(5) *Douglas Case*, cited in 13 Ves. at p. 145, H.L.

(6) *Anglesea (Earldom) Case* (1771), Cruise on Dignities, 276; cited in 4 Camp. at p. 411; cited in 13 Ves. at p. 145, H.L.; 37 Digest (Repl.) 49, *307*.

(7) *Smith* v. *A.-G.* (1777), Rom. 54; cited in 6 Ves. at p. 260, L.C.; 22 Digest (Repl.) 607, *6998*. A

(8) *Banbury Peerage Case* (1811), ante p. 171; 1 Sim. & St. 153; 57 E.R. 62; 3 Digest (Repl.) 398, *2*.

Objection to the admission in evidence of a declaration of the fifth Earl of Berkeley in a matter of pedigree. B

Frederick Augustus Berkeley, the fifth Earl of Berkeley, died on Aug. 8, 1810. On Oct. 27 in the same year the claimant presented a petition to His Majesty, praying that a writ might be issued to summon him to Parliament by the title of Earl of Berkeley, as eldest son of the late earl by Mary, Countess of Berkeley. This petition, on the recommendation of Sir Vicary Gibbs, then His Majesty's Attorney-General, was referred by the Prince Regent to the House of Lords. C

To explain the questions submitted in this case to the judges, it is only necessary to state that William Fitzhardinge Berkeley, the claimant, was born on Dec. 26, 1786, and that he alleged that his father and mother were married in the parish of Berkeley, in the county of Gloucester, on Mar. 30, 1785. They were likewise married in the parish of St. Mary Lambeth, on May 16, 1796, till which time Lady Berkeley did not appear as his lordship's wife, nor was the claimant till some time after treated as their legitimate son. They had several children after the second marriage. The only question before the Lords respected the legitimacy of the claimant, and that depended entirely upon the reality of the first marriage alleged to have taken place between his parents. D

In 1799, a bill was filed in the Court of Chancery by the present claimant and three of his brothers, born before the second marriage, to perpetuate the testimony of their legitimacy, on the ground that they were entitled, in remainder in tail after an estate for life, to certain lands then held by their father, the children born after the second marriage and others entitled in remainder after them being made the defendants. The Earl of Berkeley was one of the witnesses examined on interrogatories for the plaintiffs, and in his deposition he swore positively to the reality of the first marriage and the plaintiffs' legitimacy. The counsel for the claimant (*Serjeant Best*, with him *Romilly*), after a large body of other evidence adduced before the Committee of Privileges, now proposed to read this deposition as a declaration by the late Earl of Berkeley in matter of pedigree respecting the legitimacy of his son. The admissibility of the deposition was opposed by *Sir Vicary Gibbs*, the Attorney-General, on the part of the Crown, and *Sir Thomas Plumer*, Solicitor-General, appointed to watch the interests of the eldest son born after the marriage in the parish of Lambeth. Thereupon the judges were summoned, and the following questions were submitted by the House of Lords to their consideration : E F G

(i) Upon the trial of an ejectment respecting Black Acre, between A. and B., in which it was necessary for A. to prove that he was the legitimate son of J.S., A., after proving by other evidence that J.S. was his reputed father, offered to give in evidence a deposition made by J.S. in a cause in Chancery instituted by A. against C.D. in order to perpetuate testimony to the alleged fact disputed by C.D. that he was the legitimate son of J.S., in which character he claimed an estate in remainder in White Acre, which was also claimed in remainder by C.D.; B. the defendant in the ejectment did not claim Black Acre under either A. or C.D., the plaintiff and the defendant in the Chancery suit. According to law, could the deposition of J.S. be received upon the trial of such ejectment, against B. as evidence of declarations of J.S. the alleged father in matters of pedigree? H I

(ii) Upon the trial of an ejectment respecting Long Acre, between E. and F., in which it was necessary for E. to prove that he was the legitimate son of W., the said W. being at that time dead, E., after proving by other evidence that W. was his reputed father, offered to give in evidence an entry in a Bible, in which Bible W. had made such entry in his own handwriting that E. was his eldest son

born in lawful wedlock from G. the wife of W. on May 1, 1778, and signed by W. himself. Could such entry in such Bible be received to prove that E. is the legitimate son of W., as evidence of the declaration of W. in matter of pedigree?

(iii) Upon the trial of an ejectment respecting Little Acre, between N. and P., in which it was necessary for N. to prove that he was the legitimate son of T., the said T. being at that time dead, N. after proving by other evidence that T. was his reputed father, offered to give in evidence an entry in a Bible, in which Bible T. had made such entry in his own handwriting that N. was his eldest son born in lawful wedlock from J. the wife of T. on May 1, 1778, and signed by T. himself: And it was proved in evidence on the said trial that the said T. had declared "that he T. had made such entry for the express purpose of establishing the legitimacy and the time of the birth of his eldest son N., in case the same should be called in question in any case or in any cause whatsoever, by any person, after the death of him the said T." Could such entry in such Bible be received, to prove that N. is the legitimate son of T., as evidence of the declaration of T. in matter of pedigree?

Upon the first question, the judges not being unanimous, they delivered their opinions seriatim.

BAYLEY, J.—The opinion which I have formed is that the deposition is not admissible evidence. Your Lordships observe that the party against whom the evidence is offered was a stranger to the suit, and the deposition is offered in evidence, not in its character of deposition, but as a declaration. I lay out of consideration the circumstance stated in the question of its being the deposition of a reputed father, because I believe all the judges are agreed that no objection arises to its admissibility on that ground.

The grounds on which it appears to me that the deposition is not receivable in evidence as the declaration of the witness are these: because it was made post litem motam, after a controversy raised upon this very point; because J.S. the witness who made it was brought forward to speak to the point by a person who had a direct interest in establishing it; because the deposition is upon interrogatories formally put to J.S. by an interested party: and because B. against whom it is proposed that the deposition should be read had no opportunity of putting any questions on his own behalf. In general when evidence is given viva voce in courts of justice, the witnesses speak to what they know, and each party has in turn an opportunity of putting such questions as he may think fit for the purpose of drawing forth the whole truth and of throwing every light upon the subject which the witness is capable of giving. Whoever has attended to the examination, the cross-examination, and the re-examination of witnesses, and has observed what a very different shape their story appears to take in each of these stages, will at once see how extremely dangerous it is to act on the ex parte statement of any witness, and still more of a witness brought forward under the influence of a party interested. In this case A. whose legitimacy is supposed to be in issue has put to J.S. every question he thought fit, and has, therefore, obtained from him probably not the whole that J.S. knows upon the subject, but all that will benefit A., while B., against whom this deposition is to be read, has had no opportunity of proposing a single question to J.S. either to put his veracity to the test, or to bring out any other matter within the knowledge of J.S. which would make in his favour.

Where a man speaks upon a subject of his own accord, he naturally tells the whole of what he knows, but where he is examined on interrogatories formally administered to him, his answers are naturally confined to the particulars to which he is so interrogated, and, as the examining party generally knows beforehand the scope of the witness's evidence, he has an opportunity of so shaping his questions that they may elicit everything in his favour with which the witness is acquainted and keep back everything of a contrary tendency. It may be said that a question

of legitimacy is an exception to the general rule, and that, a father having once affirmed his son to be legitimate, no inquiries e contra can destroy the effect of his testimony. But the father may have views of his own, and a personal interest to serve by establishing the legitimacy of his eldest son. His eldest son may be of an age to cut off an entail, which cannot be done by means of the younger. There may be various other considerations in point of interest to influence the father, which if exhibited by cross-examination might in a great degree impeach, if not completely destroy, the effect of the evidence he has given. So it might turn out on cross-examination that he had made other contrary declarations, perhaps equally solemn as those to which he has been asked, and that his conduct towards his children and towards other persons had been such as to throw an entire discredit on his present asseverations. [The learned judge then made some observations on *Whitelocke* v. *Baker* (1), and *Goodright d. Stevens* v. *Moss* (2), and concluded by submitting to their Lordships as his opinion that the depositions of J.S. as evidence of declarations in matter of pedigree ought not to be received.]

WOOD, B.—The admission of hearsay evidence of the declarations of deceased persons in matters of pedigree is an exception to the general law of evidence, and it has ever been received with a degree of jealousy because the opposite party has had no opportunity of cross-examining the persons by whom the declarations are supposed to have been made. Declarations to be receivable in evidence, as I have always understood, and as was said in *Whitelocke* v. *Baker* (1), must have been the natural effusions of the mind of the party making them, and must have been made on an occasion when his mind stood in an even position, without any temptation to exceed or fall short of the truth. Upon this principle it has been the rule, as far back as my experience and knowledge go, to reject hearsay evidence of the declarations of deceased persons, not only relative to matters in actual suit, but in dispute and controversy prior to the commencement of judicial proceedings. Though such declarations may in some instances be founded in truth, I have always understood it to be a general rule to reject them, because of the possibility, nay probability, that they may have been made to serve one or other of the contending parties. A most arduous task would be imposed upon the judge who has to determine in the first instance upon the admissibility or non-admissibility of evidence, if he had no fixed rule to go by in such cases, and if he must in each case institute a previous inquiry into all the circumstances which might or might not influence the mind of the party making the declaration after the suit was commenced or the controversy had arisen. To preserve, therefore, the pure administration of justice, and for the sake of certainty and public convenience, the law has drawn the line which I have mentioned, and in practice the rule is well established that declarations made upon a subject then in suit, or in controversy or dispute preparatory to it, are not to be received in evidence. For these reasons it is my humble opinion that the deposition of J.S. could not be received on the trial of the ejectment.

GRAHAM, B.—I have the misfortune to differ upon this question not only with the two learned persons who have preceded, but I am afraid with the rest of my brethren who are to follow me, but the opinion I am about to offer is the conclusion to which my mind has come with perfect satisfaction.

Under the circumstances of the case, I think there is no legal objection to receiving this deposition in evidence—not as a deposition—that I am not prepared to say—but as a declaration of the deponent. One ground on which I am induced to doubt the soundness of that rule which has been laid down by my learned brothers is that I cannot find it stated in any book of law that ever fell within my reading. If there be a rule that the declaration of a deceased person upon a subject on which evidence of reputation may generally be received is inadmissible when made subsequent to suit commenced, it is a rule with which in my little

A experience I have not become acquainted, and which is confined to the breasts of a few peculiarly conversant with the business of nisi prius.

I must likewise observe that great uncertainty will arise in the application of the rule. We are told that it extends to all declarations after a suit is in contemplation. But how is it to be determined whether the parties did or did not contemplate a suit at any given moment of time? Then if it should be clearly B shown that the party making the declarations could not by possibility know that a suit was commenced or contemplated, surely the declarations are receivable; but if you exclude them when his knowledge of the lis mota is made to appear, what a field of inquiry is opened as often as evidence of reputation is tendered to a judge and jury. It seldom happens that an investigation of a pedigree takes place till an action is brought or resolved upon, and it will often be a great hardship C to reject what was then said by a member of the family who dies before the trial. Suppose a man is privately married before the English ambassador at Paris, where no register is kept, and has a son. On his return to this country he is re-married to satisfy the scruples of his wife and afterwards has another son. In the progress of twenty or thirty years, when all the witnesses to the marriage except the father are dead, an estate is left to the eldest legitimate son who enters into possession. D The younger son brings an ejectment to recover this. The father hears of such a proceeding with surprise and dismay, makes a solemn declaration of the legitimacy of the eldest son, and dies. I should require strong authority and clear principle for the rule which should exclude his dying declaration at the trial of the ejectment.

You may have the natural and voluntary effusions of the mind of an individual after a suit is commenced, although what he then says may be subject to more E suspicion. Let the objection, therefore, go to the credit, not to the competency of the evidence. Do not shut out what may be the truth, and what may be the only mode of arriving at justice. Receive the evidence, and let the jury, under the direction of the judge, determine to what weight it is entitled. Hearsay evidence is always to be received with caution, and particularly that which may have arisen when men's minds were heated and biased by an existing controversy F upon the subject, but instead of laying down a rigid rule which may exclude bona fide declarations entitled to implicit credit, confide in the discretion of the judge, whose duty it is to point out the circumstances which in each particular case ought to influence the conclusion of the jury.

Notwithstanding my profound respect for the noble and learned Lord who decided *Whitelocke* v. *Baker* (1), I certainly do not altogether approve of the accuracy G and precision and justice of the rule there laid down. But that noble Lord will allow me to say that if this particular question had been stated to him upon that occasion, he would have hesitated at least before he would have held that the deposition of the parent taken under these circumstances could not be received as a declaration. *Goodright d. Stevens* v. *Moss* (2) I must consider an authority the other way. Although this deposition is not the spontaneous effusion of a H man's mind, yet, perhaps, it is entitled to some degree of credit on the very ground that the deponent did not come forward as a volunteer, and that, being judicially interrogated, he declared what he knew upon the subject under the sanction of an oath. We must likewise remember that he stood quite indifferent between the parties.

As it strikes me, no one has a right to suppose that J.S. did not, in this deposition, I give the true history of his marriage and of his family. What ground have we to suppose that there was any bias on his mind, or that he was interested for one of his children more than for another. He was compelled to state what he knew upon the subject, and it seems what he then declared must be rejected because he spoke by compulsion under the sanction of an oath although his voluntary effusion upon the same subject would have been admitted without question. Your Lordships are about to establish a precedent of great importance, and if the rule which has been laid down be adopted, I fear considerable confusion

may be introduced into investigations respecting pedigree, and that evidence will often be excluded which would lead to the discovery of truth, and to the due distribution of justice between man and man. It is my humble opinion in this case that the deposition of J.S. ought to be received as a declaration, although made after the suit was commenced.

LAWRENCE, J.—I concur with the judges who have stated their opinions against the admissibility of the evidence. From the necessity of the thing, the declarations of members of the family, in matters of pedigree, are generally admitted, but the administration of justice would be perverted if such declarations could be admitted which have not a presumption in their favour that they are consistent with truth. Where the relator had no interest to serve, and there is no ground for supposing that his mind stood otherwise than even upon the subject (which may be fairly inferred before any dispute upon it has arisen) we may reasonably suppose that he neither stops short nor goes beyond the limits of truth in his spontaneous declarations respecting his relations and the state of his family.

The receiving of these declarations, therefore, though made without the sanction of an oath, and without any opportunity of cross-examination, may not be attended with such mischief as the rejection of such evidence which in matters of pedigree would often be the rejection of all the evidence that could be offered. But mischievous indeed would be the consequence of receiving an ex parte statement of a deceased witness, although upon oath, procured by the party who would take advantage of it, and delivered under that bias which may naturally operate on the mind in the course of a controversy upon the subject. Notwithstanding what is said in *Goodright d. Stevens* v. *Moss* (2), I cannot think that Lord Mansfield, C.J., would have held that declarations in matters of pedigree, made after the controversy had arisen, ought to be submitted to the jury. They stand precisely on the same footing as declarations on questions of rights of way, rights of common, and other matters depending upon usage; and although I cannot call to mind the ruling of any particular judge upon the subject, yet I know that according to my experience of the practice (an experience of nearly forty years) whenever a witness has admitted that what he was going to state he had heard after the beginning of a controversy, his testimony has been uniformly rejected. If the danger of fabrication and falsehood be a reason for rejecting such evidence in cases of prescription, that will equally apply in cases of pedigree, where the stake is generally of much greater value.

In looking for authorities upon the subject, I have found two cases at nisi prius, *Spadwell* v. —— (3), before Reynolds, C.B., at the Spring Assizes at Exeter in 1730, and *Hayward* v. *Firmin* (4), before Lord Camden at the sittings after Trinity Term, 1766. In the first of these, the declarations of an aunt as to which of three brothers came first into the world, made after the dispute had arisen, were rejected, but such as she had made prior to the dispute were received. Therefore, in that case the learned judge took the distinction of before and after litigation commenced. *Hayward* v. *Firman* (4) was an issue to try the legitimacy of a child, and the declarations of the mother as to that fact were received in evidence though made after the commencement of the suit. But it appears that the case determined by Reynolds, C.B., was not at that time brought under the consideration of Lord Camden. In *Goodright d. Stevens* v. *Moss* (2), the point whether declarations could be received which were made while the dispute was existing was not adverted to, and in considering the authority of that decision, it must not be forgotten that Eyre, B., who tried the cause, was of opinion that the answer was not admissible evidence. The authorities being thus balanced, I think the point must be considered as without any decision, and we must resort to principle and the uniform practice which has obtained in questions of prescription.

Hardships may arise in rejecting declarations made between the commencement of the suit and the time of the trial, but such hardships are not confined to the case

of pedigree. In other cases, if witnesses die before the trial of the cause, the party who relied upon their testimony must sustain the loss. For avoiding uncertainty in judicial proceedings, general rules must be laid down and adhered to, without regard to our feelings or our wishes on particular occasions. Besides, the hardship may generally be avoided by a bill to perpetuate testimony. In the supposed case of the marriage at Paris, no difficulty need have arisen, for under a bill to perpetuate testimony the father might have been examined on behalf of the eldest son and his deposition as to all the circumstances of the first marriage regularly read against the younger son on the trial of the ejectment. [As to perpetuation of testimony, see 14 HALSBURY'S LAWS (3rd Edn.) 506, 507.]

Although the exclusion of declarations made in the course of the controversy may prejudice some individuals, it is better to submit to this inconvenience than expose courts of justice to the frauds which would be practised upon them were a contrary rule to prevail. That this is not an imaginary apprehension, will occur from what happened at the bar of your Lordships' House in the *Douglas* (5) and *Anglesea* (6) causes—in the first of which, fabricated letters were given in evidence before Your Lordships, and in the second false declarations. Notwithstanding the danger of incurring the penalties of the crime of perjury, there is scarce an assize or sittings in which witnesses are not produced who swear in direct contradiction the one to the other, and it may be feared that persons who have as little regard to truth may be induced to make false declarations when they run no risk of punishment as no use can be made of their evidence till after their death. We know that passion, prejudice, party, and even goodwill, tempt many who preserve a fair character with the world to deviate from truth in the laxity of conversation. Can it be presumed that a man stands perfectly indifferent upon an existing dispute respecting his kindred? His declarations post litem motam, not merely after the commencement of the lawsuit, but after the dispute has arisen (that is the primary meaning of the word lis) are evidently more likely to mislead the jury than to direct them to a right conclusion, and, therefore, ought not to be received in evidence.

I am likewise of opinion that no deposition can be received in evidence as a declaration to prove a fact which it was the object of that deposition to establish. A deposition is the answer of the witness to such interrogatories as it is thought expedient to put to him to establish certain facts which the plaintiff alleges and on which his case depends. Consequently, a deposition is considered a partial representation of facts as to all persons who have no opportunity of bringing out the whole truth by cross-examination, and on that account all admit that against a stranger it cannot be received in evidence as a deposition. How then shall it be received as a declaration? In that case the circumstance of its being upon oath cannot be regarded. To consider it a declaration on oath, would be to receive it as a deposition. This would be blowing hot and cold. As a declaration it is still subject to the same vice and infirmity of being an answer to particular questions artfully put with an interested view by one party behind the back of the other. All the objections on which it is allowed that this document cannot be received as a deposition apply with at least equal strength to receiving it as a declaration, and I cannot but think that the law of England would be under a just reproach if a document which must be rejected in one character might be rendered admissible by the paltry juggle of changing its name.

HEATH, J.—I concur in opinion with the majority of the judges. Since the party against whom it is proposed to read this deposition had no opportunity of cross-examining J.S., who must be taken merely to have answered such questions as the plaintiff found it convenient to put to him, I think that as a declaration it is exposed to every objection to which it was liable as a deposition. Another objection equally strong is that it was made after the dispute had arisen. In the course of my long experience in all the circuits I have gone, I never heard till now

of such evidence being receivable. When the objection that the declaration was post litem motam has been taken, it has been constantly acquiesced in. It is true there is no mention made of this rule in the books of reports, because they note only the decision of doubtful points. They do not notice matter of mere practice, which was never questioned. When the contest has originated, people take part on one side or the other; their minds are in a ferment; and if they are disposed to speak the truth, facts are seen by them through a false medium. The authorities cited are conflicting. Therefore, Your Lordships will be governed by principle; and upon principle it seems clear to me that the evidence ought to be rejected. Courts of law have endeavoured to avoid any extension of the rule which admits declarations in matter of pedigree, and serious mischief might arise from such extension. Great estates have been litigated upon this species of evidence, and perjury with regard to declarations has been most abundant. But it would hold out an invitation to fabricated testimony, if declarations could be received in evidence which have been made when the contest was actually begun.

MACDONALD, C.B. I agree in the opinion entertained upon this subject by almost all the learned judges. The question is of infinite importance. If such evidence is to be adduced to establish legitimacy, it must equally be received to establish illegitimacy, and, in my humble judgment, it is of such a nature that it would shake the condition of every man in the kingdom. After a dispute upon the very point has arisen, a witness is brought forward by a party, who of course tries to find out those whose testimony will be most beneficial to him—who will say most in his favour and least against him.

In the case put by Your Lordships, there was no opportunity given to the party against whom this deposition is to be read to cross-examine the witness. And if he had been cross-examined by the defendant in the equity suit, what does it amount to? The difference is great between what is called a cross-examination in equity and a cross-examination at law. In equity the one party knows not the questions put by the other, nor the answers which have been given by the witness. In the course of a trial at law every witness comes forward in the presence of both parties and of those who are to decide upon his testimony. He is examined in chief by the party who produces him; he is cross-examined by the opposite party to the same or other topics; and then comes the re-examination to explain what may have been rendered ambiguous—with an opportunity to put any questions which may suggest themselves to the minds of the judge or the jury. Would you allow a deposition taken in the former mode to be read against a person who was an entire stranger to the proceeding? We know that when a solicitor, after the dispute has arisen, searches for evidence, if he finds any persons acquainted with facts unfavourable to his client, he abstains from producing them, and we know that witnesses who are produced are often influenced by bad motives. Experience has likewise taught us that a parent speaking of the legitimacy of a child is not to be heard with undoubting confidence. In one of the cases referred to, a mother was precluded from proving the illegitimacy of her child, having before sworn to his legitimacy, and in *Goodright* v. *Moss* (2), the mother swore that her son was illegitimate, the consequence of which was that she increased her share of the residue of her husband's estate.

The authorities upon the subject are balanced, LORD CAMDEN being for receiving the evidence, and REYNOLDS, C.B., and EYRE, B., for refusing it. But the practice has constantly been in affirmance of the decision of REYNOLDS, C.B., and the expediency of this rule has appeared for a great length of time. If it is departed from, I know not what evidence of declarations may not be offered or how they are to be dealt with. I cannot conceive the common sense of saying that the same instrument, if you style it a deposition, is to be rejected, but, if you style it a declaration, is to be received. Names cannot change things. Therefore, I think

A that for the attaining of justice in the particular case, and for the general security, the proposed evidence is inadmissible.

SIR JAMES MANSFIELD, C.J.—By the general rule of law nothing that is said by any person can be used as evidence between contending parties unless it is delivered upon oath in the presence of those parties. With two exceptions, this B rule is adhered to in all civil cases. Some inconvenience no doubt arises from such rigour. If material witnesses happen to die before the trial, the person whose case they would have established, may fail in the suit. But although all the bishops on the Bench should be ready to swear to what they heard these witnesses declare, and add their own implicit belief to the truth of the declarations, the evidence could not be received.

C Upon this subject, the laws of other countries are quite different; they admit evidence of hearsay without scruple. There is not an appeal from the neighbouring kingdom of Scotland in which you will not find a great deal of hearsay evidence upon every fact brought into dispute. This has struck many persons as a great absurdity and defect in the law of that country. But the different rules which prevail there and with us seem to me to have a reasonable foundation in the D different manner in which justice is administered in the two countries. In Scotland, and most of the continental States, the judges determine upon the facts in dispute as well as upon the law, and they think there is no danger in their listening to evidence of hearsay because when they come to consider their judgment on the merits of the case they can trust themselves entirely to disregard the hearsay evidence or to give it any little weight which it may seem to deserve. E But in England, where the jury are the sole judges of fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds.

To the general rule with us, there are two exceptions—first, on the trial of rights of common and other rights claimed by prescription, and, secondly, on questions of pedigree. With respect to all these, the declarations of deceased persons, who are F supposed to have had a personal knowledge of the facts and to have stood quite disinterested, are received in evidence. In cases of general rights which depend upon immemorial usage living witnesses can only speak of their own knowledge to what has passed in their own time, and to supply the deficiency the law receives the declarations of persons who are dead. There, however, the witness is only allowed to speak to what he has heard the dead man say respecting the reputation G of the right of way, or of common, or the like. A declaration with regard to a particular fact, which would support or negative the right is inadmissible. In matters of pedigree, it being impossible to prove by living witnesses the relationships of past generations, the declarations of deceased members of the family are admitted, but here, as the reputation must proceed on particular facts, such as marriages, births, and the like, from the necessity of the thing, the hearsay of the H family as to these particular facts is not excluded. General rights are naturally talked of in the neighbourhood, and family transactions among the relations of the parties. Therefore, what is thus dropped in conversation upon such subjects, may be presumed to be true. But after a dispute has arisen, the presumption in favour of declarations fails, and to admit them, would lead to the most dangerous consequences. Accordingly, I know no rule better established in practice than I that such declarations shall be excluded.

With respect to questions of prescription, I have known many instances in which the rule has been acted upon. I never heard the contrary contended either as counsel or judge. I think the rule is equally applicable to questions of pedigree, and the violation of it here would be still more alarming. There is no difference between the declarations of a father, and those of any other relative, and if the declarations of a father after the suit has begun be receivable, so must the declarations of all related to the parties, whatever their station in society, and whatever

their private character. I do not feel that much mischief is likely to arise from such declarations being rejected. This question supposes J.S. to be the reputed father, and evidence of reputation must previously be given aliunde to render the declaration admissible. If the father is proved to have brought up the party as his legitimate son, this is sufficient evidence of legitimacy till impeached, and indeed it amounts to a daily assertion that the son is legitimate. On principle I think the evidence inadmissible. The weight of authority I think inclines to the same side. In the famous *Douglas* cause (5) hearsay evidence of all sorts was received, but that cause was tried by the law of Scotland, according to which it was receivable. In the *Anglesea* cause [*Anglesea (Earldom) Case* (6)] many declarations of deceased persons were given in evidence, but after an attentive examination I cannot find that any of these had been made after the dispute had occurred. I myself took a note at the time of the case before LORD CAMDEN [i.e., *Hayward* v. *Firmin* (4)], which states that on a question of the legitimacy of the son, the declarations of the mother as to her marriage, made after the commencement of the suit, were received after objection taken and debate had, but not a word appears to have been said of the prior decision of REYNOLDS, C.B., in *Spadwell* v. —— (3). Had it been cited, I make no doubt that I should have enriched my store of notes with some account of it. In *Goodright d. Stevens* v. *Moss* (2), the objection to the answer that it was post litem motam does not seem to have been taken, and upon examination it will be found that the new trial was granted on the ground that the general declarations of the father and mother had been rejected. I am not aware of any other authority upon the subject in our law, but the distinction of declarations ante litem motam, and post litem motam is clearly taken in a foreign treatise of great learning, entitled DE PROBATIONABUS.

I have now only to notice the observation that to exclude declarations you must show that the lis mota was known to the person who made them. There is no such rule. The line of distinction is the origin of the controversy, and not the commencement of the suit. After the controversy has originated, all declarations are to be excluded, whether it was or was not known to the witness. If an inquiry were to be instituted in each instance, whether the existence of the controversy was or was not known at the time of the declaration, much time would be wasted, and great confusion would be produced.

For these reasons I conceive that the deposition now offered in evidence is not admissible. I should inform your Lordships that **CHAMBRE, J.,** who attended this case hitherto, is prevented by illness from attending the House today, but he authorises me to say that he perfectly concurs in the opinion now delivered by the majority of the judges.

SIR JAMES MANSFIELD, C.J., then delivered the unanimous opinion of the judges on the second and third questions submitted to them.

Referring to the second question, he said: I cannot answer this question without adding something to the answer beyond what is in the question, because it supposes that an entry written by a father in a Bible would be of more weight than the same written in any other book. I know no difference between a father writing anything respecting his son in a Bible, and his writing it in any other book or on any other piece of paper, and, therefore, the answer I would give is that such a writing by a father in a Bible, or in any other book, or upon any other piece of paper, would be a declaration of that father in the understanding of the law, and like other declarations of the father might be admitted in evidence. Were it to appear in your Lordships' JOURNALS that the answer was given in the very words of the question, some persons might suppose that the admissibility of the entry depended upon its being written in a Bible, and, therefore, I submit that the answer should be "that such a writing in a Bible, or any other book, or on any other piece of paper, would be admissible in evidence as a declaration of the father in matter of a pedigree."

The third question is the same in effect, with the addition that the father is proved to have declared that he had made such entry for the express purpose of establishing the legitimacy of his son and the time of birth, in case the same should be called in question after the father's death. The opinion of the judges is that the entry would be receivable in evidence, notwithstanding the professed view with which it was made. Its particularity would be a strong circumstance of suspicion, but still it would be receivable, whatever the credit might be to which it would be entitled. I should wish the same addition to be made to this as to the former answer "a Bible or any other book, or any other piece of paper."

LORD ELDON, L.C.—Before proposing anything to the Committee arising out of the opinion of the judges, I will make one or two observations upon the subjects which they have so learnedly and ably discussed. There does seem a hardship in rejecting the declarations of the late Lord Berkeley after the dispute had arisen, for there was no way in which the claimant as heir apparent to his titles could have availed himself of his testimony. The bill filed in 1799 applied only to landed estates in which he had a vested interest. He had no such interest in the titles. Where [in *Smith* v. *A.-G.* (7)] a bill was filed by the next of kin of a lunatic, a demurrer was put in on the ground that the plaintiffs might not be next of kin at the time of the lunatic's death. Had the claimant made the Attorney-General a defendant, I apprehend he might have said that the titles might never be the claimant's, whether he is legitimate of not, and, having no present interest in them, a bill to perpetuate testimony for the purpose of establishing his claim to them cannot be supported. But your Lordships must look hardships in the face rather than break down the rules of law. The next of kin of the lunatic might have lost hundreds of thousands of pounds, but the general principle was adhered to, and the demurrer was allowed.

Upon the admissibility of this evidence, judges have held different opinions, and it might appear remarkable that a declaration under no sanction was receivable and a declaration upon oath was not. I, therefore, thought it material to ascertain from the highest authority what the law is upon the subject. Accordingly, in the *Banbury Peerage Case* (8), as the depositions under the bill to perpetuate testimony contained many statements with regard to pedigree, a question was put to the judges whether, if they could not be received as depositions, they could be received as declarations. The judges thought that at all events the depositions could not be received as declarations unless the individuals whose declarations were supposed to be incorporated in the depositions were aliunde proved to be relations, and that there was no such evidence. I, therefore, thought it right that the question should be again put to the judges in the present case, it being of great importance to the claimant, and to the public.

Your Lordships have heard the opinion which the learned judges have delivered, and I have no difficulty in saying that I agree with that of the majority. In the case alluded to, decided in the Court of Chancery by myself [*Whitelocke* v. *Baker* (1)] (on which I ought to place less reliance than any other noble Lord), conscious of my liability to err and prone to doubt (an infirmity which I cannot help), I delivered the sentiments which I believed to be according to law. I have heard nothing since which has convinced me I was wrong. I have attended most anxiously to the distinctions taken by Graham, B., but, on revolving the subject in my mind, I am forced to concur with the opinion so forcibly expressed by Lawrence, J., that, if the writing was not evidence as to deposition, it was not evidence at all. The suit in equity is commenced on the ground that unless the testimony be so perpetuated that it may be used as a deposition it must be entirely lost. Being embodied in deposition, are you to say that this same testimony is to be received as declaration, and read in evidence from the deposition? The previous existence of the dispute would be a sufficient ground to proceed upon. I have known no instance in which declarations post litem motam have been

received. When it was proposed to read this deposition as a declaration, the Attorney-General flatly objected to it. He spoke quite rightly, as a Western Circuiteer, of what he had often heard laid down in the west, and never heard doubted. LORD THURLOW was most studious to contradict *Goodright d. Stevens* v. *Moss* (2), and he had learned his doctrine in the same school. So had the Chief Justice of the Common Pleas, and I believe HEATH, J., the result of whose experience your Lordships have just heard. Therefore, although the authorities are at variance, principle and practice unite in rejecting the evidence.

I introduced the Bible into the second and third questions as the book in which such entries are usually made. If the entry be the ordinary act of a man in the ordinary course of life, without interest or particular motive, this, as the spontaneous effusion of his own mind, may be looked at without suspicion, and received without objection. Such is the contemporaneous entry in a family Bible, by a father, of the birth of a child. But a doubt had been entertained upon this point, and it was fit that it would be solemnly decided. I agree to the admissibility of similar entries in other books. There is a great difference between the competency of evidence, and the credit to which it is entitled. [HIS LORDSHIP concluded by moving that counsel be informed that the deposition of Lord Berkeley could not in any shape be received.]

LORD ELLENBOROUGH, C.J.—I had conceived some doubts whether this deposition could not be received as a declaration, but the arguments of the learned judges have convinced me that it is inadmissible. It is only the answer to particular interrogatories, and may be very different from the genuine reputation upon the subject. I agree with the judges that an entry made in a Bible does not, therefore, become evidence, but I cannot say it is not greatly strengthened by being found there, that being the ordinary register in families, and I think there are some exceptions to the generality of the statement of the learned judges that every declaration of a parent, howsoever made, before any dispute appears to have subsisted is admissible.

LORD REDESDALE.—The circumstance of an entry being in a family Bible, to which all the family have access, gives it that solidity which it would not have if made in a book which remained in the exclusive possession of the father. Entries in family Bibles have, therefore, become common evidence of pedigree in this country, and in America, where there is no register of births or baptisms, hardly any other is known. With regard to the main question of the admissibility of the deposition as a declaration, one circumstance is, in my mind, decisive. In cases of reputation, the attorney takes down what old witnesses will prove, and it often happens that some of them afterwards die before the trial. But what was taken down from their mouth is never offered in evidence. Why? Because declarations post litem motam are not receivable. That I can take upon myself to say was the practice of the Western circuit, which I happened to go for some years, and we apprehended that we were more correct on subjects of evidence than any other.

After some observations from **LORD GRANTLEY** and **LORD STANHOPE,** the question was put that the deposition of the Earl of Berkeley, offered in evidence as a declaration, ought not to be received, which passed in the affirmative. On June 28, 1811, the Committee of Privileges resolved, nemine dissentiente, that the claimant had not made good his claim to the titles of Earl of Berkeley, Viscount Dursley, and Baron Berkeley.

Order accordingly.

HODGSON *v.* FIELD

[Court of King's Bench (Lord Ellenborough, C.J., and other judges), June 25, 1806]

[Reported 7 East, 613; 3 Smith, K.B. 538; 103 E.R. 238]

Easement—Water—Repair of watercourse—Grant of right to make drain—Implied right to enter to inspect and repair.

By a deed dated July 30, 1747, A., the owner of certain woodlands, granted to B., his heirs and assigns, the right to make a sough or drain from A.'s land into adjoining land of B., and to make two little sough-pits in A.'s land "for the more easy and safe carrying up the tail of the sough." One of the sough-pits was to be covered in as soon as conveniently possible after making the sough and the other kept open for examining the sough "so long as was necessary for that purpose, and no longer." On the question whether the grant extended to authorise the making of further sough-pits from time to time as necessary after the original ones had been filled in,

Held: under the terms of the grant the grantee had a right to do that which from time to time might be wanted to repair the sough so long as the original purpose for which it was made required it to be continued.

Notes. Referred to: *Earl of Cardigan* v. *Armitage*, [1814–23] All E.R. Rep. 33. As to repair of watercourses by grantee of easement, see 12 Halsbury's Laws (3rd Edn.) 603; and for cases see 19 Digest (Repl.) 174–176.

Demurrer by the defendant in an action of trespass by breaking and entering the close of the plaintiff at Heaton, Yorkshire, digging a pit or hole there, and opening and uncovering a sough or drain there and continuing the pit and trough opened and uncovered for a long time, thereby disturbing the plaintiff in his possession and occupation of the said close.

The plaintiff and the defendant were the owners of two adjoining areas of woodland at Heaton in Yorkshire, the defendant also owning another piece of adjacent land 35 acres in extent. Under the defendant's land a coal-mine had been opened by his predecessor in title, Jeremy Marshall, who for the purpose of draining it had obtained a grant from the plaintiff's predecessor, Robert Stansfield of the right to make a sough or drain and sough-pits in the plaintiff's land. By a deed dated July 30, 1747 (in the defence referred to as of July 13, 1747, the defendant's part of the indenture having been lost), Stansfield granted to Marshall, his heirs and assigns, in consideration of £2 2s. 0d. and the covenants therein contained, full liberty for him (Marshall), his heirs and assigns, to carry up a sough from the bottom or edge of a hill near a brook in the plaintiff's woodland into the defendant's adjoining woodland, described as being in the possession of Jasper Pickard; and also full liberty for Marshall, his heirs and assigns to make two little sough-pits near the edge of the said hill or brook "for the more easy and safe carrying up the tail of the said sough," one of the sough-pits to be covered from the top of the intended sough to ground level "as soon as conveniently might be done after the making thereof," and the other to be kept open for examining the sough "so long as was necessary for that purpose and no longer"; and also full liberty for Marshall, his heirs and assigns to bring the rubbish which might arise in another sough-pit made or intended to be made in Marshall's woodland and throw it into a hollow in Stansfield's woodland "for the rendering more safe and commodious the cart-way which is intended to be made by Jeremy Marshall for the inhabitants of Shipley and others through his own ground there to and from the intended colliery"; and also full liberty for Marshall, his heirs and assigns to take stones from Stansfield's woodland for making the intended sough and for making and repairing such part of the fence or walls of Stansfield's woodland as should be injured by Marshall, his heirs and assigns; with covenants that Marshall,

his heirs and assigns, should not damage the trees in Stansfield's woodland nor take any of the coal thereunder except that which might lie in the course of the intended sough; and with the right for Stansfield, his heirs and assigns, from time to time and at all times thereafter to enter any pit or pits of Marshall, his heirs or assigns, to ascertain whether any such coal had been taken except as aforesaid; and a covenant that Marshall, his heirs and assigns should at all times repair the part of the fence or walling near the banks of the said brook where the rubbish aforesaid was to be laid.

The plaintiff sued the defendant in trespass for digging a pit and opening or uncovering a sough or drain in his said woodland and keeping the pit and sough opened and uncovered for a long time. The defendant set up the grant to Marshall and pleaded that the coal seams under his woodland and the thirty-five acres were still unexhausted, that the sough had continued to be used for the purpose of the original grant and that the sough being from time to time ruinous and obstructed for want of repairing, opening and cleansing the defendant was entitled to enter the plaintiff's land and make a pit or hole and open and uncover the sough "for the purpose of the needful and necessary repairing opening and cleansing the sough for the uses and purposes in that behalf aforesaid." The plaintiff replied that both sough-pits mentioned in the deed had been filled in up to ground level, with the consent of the defendant's predecessor in title, before the matters complained of in the action, namely on January 1, 1776, by which time it had ceased to be necessary to keep either of them open for the purpose of examining the sough, and neither of the pits had been kept open after that date. The defendant demurred.

Holroyd for the defendant.
Wood for the plaintiff.

Cur. adv. vult.

LORD ELLENBOROUGH C.J., stated the pleadings, and continued: On the part of the defendant it has been contended, under the grant from R. Stansfield to J. Marshall, that he, the defendant, as Marshall's assignee, has a right to do everything necessary to keep the sough in repair, as being incident to the grant of the sough; and if necessary to open sough-pits and uncover the sough in the plaintiff's ground from time to time, as often as repairs of the sough shall be required. For the plaintiff it has been insisted that the liberty of opening sough-pits was granted but for once, and not as often as the sough should require repairs. In addition to this question another has been argued, viz., whether the defendant has, under the grant from R. Stansfield, any right to drain any land but that which was J. Marshall's woody ground.

The deed granting to Jeremy Marshall the liberty of making the sough does not in any part of it distinctly point out what particular purpose the sough which was to be made was intended to answer. But it appears from the deed that Stansfield was to have liberty to go down into J. Marshall's pits to see that neither he nor any claiming under him got any coal under the plaintiff's close, except in the drift of the sough, as there are coals under Marshall's woody ground and the adjoining land, and as the deed speaks of an intended colliery, it seems that the object of the grant was to drain the water from such intended colliery, the local extent and limits of which intended colliery we have no means of defining, but, judging from the nature of such works, there seems no reason to give them any other or narrower limit than the boundaries of the continued property of the grantee, under which the intended colliery might be prosecuted by him, without regard to the closes and pieces of ground under which it might be carried, and who might of course be expected to follow the coal through all the contiguous and connected veins and seams of coal which belonged to him.

The question, therefore, is singly whether under the terms of the grant the grantee had a right to do that which from time to time might be wanted to repair the sough, so long as the original purpose for which it was made required it to be

continued, or whether, the sough having been once made, it was the intention of the parties that the grantee should use it no longer than it should happen to continue unimpaired by length of time or accidents, although in consequence of accidents the grantee might have actually lost the beneficial use of it very soon after it was made. Such latter construction, it is obvious, would ill accord with the views of one who was about to open a colliery intended to be worked as long as the coal might last. As to the liberty of making two little sough-pits, which were to be kept open during a certain time and then to be filled up (and which has been observed upon in order to show that the defendant could not open pits for the purpose of repairing the sough), this does not furnish any substantial inference against the defendant. The purpose for which that liberty was granted was "the more easy and safe carrying up the tail of the sough and examining it." The purpose of carrying up the tail of the sough has long since been answered, and from the words, "the more easy and safe carrying up the tail of the sough," it may be reasonably concluded that the sough might have been carried up, though not easily and safely, without such pits. If that be so, Marshall, under the words granting him the liberty to make the sough, would not have been entitled to make pits of that description: and, therefore, no inference arises from the mention of them that other pits should not be made, if the same should be, and to the extent only in which they should be, absolutely necessary for the purpose of repair.

Nor do the covenants in the deed with respect to the repairs of the fences and other matters mentioned in them, furnish any argument to show that Marshall and his assigns had not, as incident to his grant, a right to do what might properly be necessary to repair the sough, for they are covenants by which he bound himself to do, for the benefit of the grantor, certain things which had no connection with the continuance of the sough, and to do which he would have been under no obligation without such covenants. It would be very illogical to deduce a conclusion from the terms of a deed comprehending covenants, without which one of the parties could not have certain rights, and from their not expressly granting matters, which would pass as incidents without being mentioned at all, that such matters in the nature of incidents were intended not to be granted. It is, therefore, to be seen, as there is nothing to narrow the grant, whether the right to repair the sough, and of doing all necessary things for that purpose, do not pass as an incident to the grant of the liberty of making it. As to which, the authorities quoted by counsel for the defendant are very strong, and that cited from 2 Rolle's Abridgment, 567, is very like the present case. It appears from the Year Book, 9 Edw. 4, 35, thus—Choke, in the course of an argument at the Bar, put this case:

> "If a man grant to me to dig in his land and make a trench from such a fountain or spring to my place, so that I may put a pipe to carry the water to my place; if the pipe be afterwards stopped or broken, so that the water cannot issue out, I cannot dig the land to amend the pipe; for that was not granted to me: but if he had granted that I might dig and amend the pipe toties quoties, etc., then I should do it. And the law is the same if I prescribe to have such a conduit; it behoveth me to prescribe to scour and amend it, toties quoties, etc., or otherwise I cannot dig the land to empty it, etc. Quod fuit negatum in both the cases; for it was said by the court, that it is incident to such a grant to scour and amend."

The authority of this and the other cases was not disputed; but the case found in Rolle's Abridgment and the Year Book was said to be distinguishable from that now before us, as that was a continuing grant to convey water at all times. Yet it was conceded in argument, if the sough had been to drain the water from all the grantee's coals, that he would have had a right to manitain the sough while there were any coals: and if that be so, as it is admitted by the pleadings, that all the coals are not gotten from within and under Marshall's woody grounds and

the adjoining lands, which may be deemed the intended colliery, upon the grounds already considered the right to maintain the sough will of course continue. For these reasons we are of opinion that judgment should be for the defendant.

Judgment for defendant.

SCOTT *v.* NESBITT

[Lord Chancellor's Court (Lord Eldon, L.C.), January 29, 1808]

[Reported 14 Ves. 438; 33 E.R. 589]

Lien—Equitable lien—Expenditure on property of another—Consignees in London of plantation in West Indies making advances for necessaries for benefit of plantation—Senior partner personally liable for profits received by him in capacity of executor of part owner.

A firm of London merchants, acting as consignees of the produce of a Jamaican plantation, without any regular appointment, but with the acquiescence of the owners of all the shares, advanced money for necessary purposes of the business which from time to time resulted in considerable balances owing to the firm. The senior partner was an executor of the will of the late owner of a share in the plantation and in that capactiy accountable to his estate for profits received by him personally, and he became liable to the estate in the sum of £9,741 3s. 11d. The firm became bankrupt at a time when the balance in its favour amounted to some £10,000, shortly afterwards reduced to £6,497 10s. 0d., and because of the difficulty of finding other merchants to take over this balance and the consigneeship, the owner of the remaining shares himself discharged it, and between 1802 and 1805 paid £3,352 19s. 2d. to the firm's assignees in bankruptcy. In the course of taking accounts, on a motion to appoint a consignee, this payment was challenged by those interested in the testator's estate since at the material time the senior partner was liable to the estate for the previous profits of £9,741 3s. 11d.

Held: apart from any question of the law or custom of the colony, the firm was entitled to a lien for the balances due to it because of the nature of the subject-matter requiring expenditure, as in the case of money spent in managing mines, alum works, etc., in England and distinct from the ordinary case of an estate in English land.

Notes. Considered: *Sayers* v. *Whitfield* (1829), 1 Knapp, 133. Distinguished: *Farquharson* v. *Balfour* (1836), 8 Sim. 210. Considered: *Morrison* v. *Morrison* (1855), 2 Sim. & G. 564; *Fraser* v. *Burgess* (1860), 13 Moo. P.C. 314; *Twynam* v. *Hudson* (1862), 31 L.J.Ch. 577. Applied: *Bertrand* v. *Davies* (1862), 31 Beav. 429. Referred to: *Re Courtney, Ex parte Pollard*, [1835–42] All E.R. Rep. 415; *Shaw* v. *Simpson* (1842), 1 Y. & C. Ch. Cas. 732; *Re Harriott, Ex parte Pengelley* (1863), 8 L.T. 854; *Re Leith's Estate, Chambers* v. *Davidson* (1866), L.R. 1 P.C. 296; *Securities and Properties Corpn.* v. *Brighton Alhambra* (1893), 62 L.J.Ch. 566; *Duder* v. *Amsterdamsh Trustees Kantoor*, [1902] 2 Ch. 132.

As to lien for expenditure on property of another, see 24 Halsbury's Laws (3rd Edn.) 163; and for cases see 32 Digest (Repl.) 299 et seq.

Case referred to:

(1) *Marryatt* v. *Hooke* (circa 1804), cited in 14 Ves. at p. 442; 33 E.R. 590, L.C.; 32 Digest (Repl.) 302, *452*.

A Also referred to in argument:

Buxton v. *Snee* (1748), 1 Ves. Sen. 154; 27 E.R. 952; sub nom. *Buxton* v. *Sidebotham*, 2 Ves. 520, n., L.C.; 42 Digest (Repl.) 669, *4220.*

Petition to discharge an order made by the Lord Chancellor.

Arnold Nesbitt, the owner in fee simple subject to a mortgage of a one-third B share in a Jamaican plantation known as Duckenfield Hall Estate with its stock, by his will dated March 14, 1779, directed payment of his debts and funeral expenses and devised his share to trustees for his sons successively in strict settlement with remainder to his nephew the defendant John Nesbitt and his sons successively in like manner and ultimate remainder to the testator's right heirs and appointed the trustees and John Nesbitt executors.

C After the testator's death John Nesbitt appointed attorneys to ship consignments from the plantation, first to himself and then to the London firm of Nesbitt, Steward (or Stewart) and Nesbitt, in which he was principal partner. The testator's personal estate being insufficient to pay his debts, two bills for administration were filed by creditors and on the Master's report under a decree made in 1783 for the usual accounts the court ordered a sale of a sufficient part of the real estate and D an account of the rents and profits against John Nesbitt, who admitted having received them. In 1795 Jacob Franks, the second defendant and owner of the other two-thirds share in Duckenfield Hall Estate joined John Nesbitt in appointing attorneys to make such shipments as aforesaid to the same firm, who in the course of acting as consignees paid and advanced money for the benefit and on behalf of the plantation beyond what was received for the produce, and delivered annual E accounts in the usual manner of such merchants which were not objected to by the representatives of Arnold Nesbitt or the persons interested in his third share in the plantation.

John Nesbitt and his partners, Edward Stewart and John Nesbitt junior, became bankrupt under a commission dated April 13, 1802, and from two examinations put in by John Nesbitt and his assignees under the commission it appeared that John F Nesbitt was liable to the testator's estate for £9,741 3s. 11d. At the time of the bankruptcy there was a balance due to the firm on account of money paid and advanced in excess of receipts as aforesaid of over £10,000, subsequently reduced by further receipts to £6,497 10s. 0d. Because of the bankruptcy it became necessary to find other consignees, and Jacob Franks, being unable to find any other merchants who would pay off this balance and assume the consigneeship, G paid it himself, and the assignees thereupon relinquished the consigneeship to him.

On May 16, 1805, on a motion to appoint a consignee of the plantation, Jacob Franks, who since John Nesbitt's bankruptcy had been in receipt of the whole consignments of the plantation as aforesaid, was directed to continue to receive the consignments representing the testator's third share and to account for the proceeds thereof. He put in an account from May 4, 1802, to Mar. 1, 1805, showing H payments to John Nesbitt's assignees on Mar. 1, 1803, of sums amounting to £3,352 19s. 2d., which the Master disallowed because John Nesbitt was not entitled to them but on the contrary a balance was due from him to the testator's estate.

Jacob Franks presented a petition showing the course of dealing between the firm and the testator's representatives and those interested in his share in the plantation and the circumstances in which he paid off the balance due to the firm. I By an order dated April 21, 1807, Lord Eldon, L.C., directed the Master to allow the payments mentioned in his account.

One of the testator's creditors petitioned for the discharge of the order on the ground that the payments made to the bankrupt firm represented debts due to the firm from John Nesbitt and not from the testator, John Nesbitt being liable to the testator's estate in respect of the proceeds of the plantation on account of which the payment was made; that the attorneys not having been given any directions for consigning or remitting the produce, their possession was unauthorised and

could not give rise to a lien on the consignments; that Franks was not entitled, particularly while an action was pending, to take it upon himself to settle the account and make payments; that admitting the advances to be for necessaries they could not give rise to a lien any more than by a mason building a house; and that as John Nesbitt had taken possession without title and consigned to his own firm and being credited for profits as they arose, could not make the testator's estate liable to bear the losses without accounting for such profits.

An inquiry being directed on the petition, the Master's report stated that no evidence was produced of any law or custom in Jamaica for a lien by a consignee in respect of supplies furnished to the plantation or by a tenant in common, having made advances for that purpose, and, accordingly, he did not find that any such lien existed.

Alexander and *Leach* for the petitioning creditor.
Sir Arthur Piggott and *Daniell* for the mortgagee.
Sir Samuel Romilly and *Hart* for the defendant Franks.
Trower for the assignees in bankruptcy.

LORD ELDON, L.C.—The Master's report in this case that he does not find that consignees or tenants in common have any such lien as is claimed, no evidence of any such law or usuage having been laid before him, and that consequently this defendant has not such lien in either of those characters, has disappointed me extremely, as I had understood for many years that in respect of certain articles of supply furnished to a West Indian estate, the person providing them had a species of claim against the estate itself. So in the case of tenant for life, with regard to the remainder, and, when I determined *Marryatt* v. *Hooke* (1), I understood that a tenant in common would on similar principles be entitled in the account as against the other tenants in common and the estate itself to various claims which he could not claim in this country, considering the nature of a West Indian estate and how far it differs from a mere estate of land in this country. This case, however, taking it now, as I must, according to the report, without reference to any such lien, is to be determined upon a due application of such principles of equity as are applied to estates in this country, always having regard to the different nature of landed property in the West Indies.

This is represented as a case of hardship on both sides, and with reference to that it must be recollected that this is a West Indian estate, which as such must be taken by those to whom it is given subject to the expenses of management; for let possession be taken by either tenant for life, remainderman or the executor who has no interest in the estate, the concerns of the estate could not be carried on without consignees, and all moral justice requires that for what in the fair discharge of their duty they became liable to in respect of the management of the estate they should be indemnified; with priority to the claim of those who have interests in the estate to be so managed before any person can have any benefit from it. If any probable cause had been laid before the court when the decree was made in 1783, a received or consignee and manager would have been granted whose fair expenses would have been paid in the first instance, before this court would have permitted anything to be taken by the parties entitled; and it may be represented rather as the effect of accident that this question arises now, than that a consignee might not have been appointed, who would have been immediately entitled to the benefit which is now claimed. I cannot feel the weight of the argument which attempts to confound the house of Nesbitt & Co. with the individual John Nesbitt. The decision must be precisely upon the same principle as if distinct persons were consignees of the estate, rendering accounts between themselves as such, and John Nesbitt, representing the owners of one-third of the estate, and Franks as representing the other two-thirds, without reference to the circumstance that John Nesbitt the debtor happens to be a partner in the house to which the consignments were made.

A I must lay the doctrine of lien out of the question, except with reference to the distinction between an estate in Jamaica and one in this country, not upon principles of colonial law, but as they necessarily must from the different nature of the property be distinguished upon principles of natural justice. I have, however, still the opinion I held in *Marryatt* v. *Hooke* (1), with regard to a tenant in common of a Jamaican estate, that he must, in respect of the different nature and the expendi-
B ture belonging to the management of that property, be allowed the benefit of that principle of English law that would in this country be given in equity to a person having a species of landed estate, which, however, could not be represented as mere landed property, as a tenant in common of soil containing mines or alum works, in the management of which there must be expenditure incurred as between the tenants, I have no conception that the court would in such cases give the
C account between them without making allowances, that would not be given in the case of an estate to be managed in the ordinary course of husbandry. Those who could claim under the will could not derive any advantage from the property without employing some individual in the character of consignee. This court, therefore, will as far as principles of equity permit allow to consignees against the estate claims incurred for the benefit of those who are to take it: but that, I admit, cannot
D be unless, upon the circumstances of the title and the dealing permitted by the parties with the estate, the principles of this court will entitle it to allow those claims.

The title to this estate comes before the court upon the claims of creditors under a mere charge, no estate created for that purpose, and of the persons taking the estate subject to that charge. The personal estate appears from the record to have
E been greatly insufficient for the demands of the creditors: from the death of the testator, therefore, a necessity existed of resorting to that charge to make good those demands according to the will; and if the actual state of things had been laid before the court at an early period, the court would have appointed a consignee, and in that case would not have taken the possession from him unless his demand
F was paid. Another way of putting this is that the creditors, the tenant for life, all interested in the estate, stand by and permit the consignment from time to time, whether under due authority or not, to be sent to the house of Nesbitt & Co.; and it is clear, that the house, if John Nesbitt had remained solvent, would have been entitled to a personal remedy against him and Franks, the dealing with the estate creating a personal contract in respect of which the estate is liable.

G Then adverting to the charge upon the estate and the fact that the owners permitted this management, the question is whether there is an equity for those who are called upon in respect of their personal liability, to insist that the court ought to reimburse them the expenses which would have been allowed if the court had put the estate in the hands of a consignee and manager. It is not necessary to claim through John Nesbitt, the parties having permitted the consignees all along
H to deal with him as being entitled as owner of the third. I think further that Franks's payment of this demand of the consignees, if that demand was incurred in the due management of the estate, would entitle him as tenant in common, independent of the doctrine of lien and any local law or usage of Jamaica, a right arising out of the nature of the estate and that would equally attach upon estates in this country. He would have a right to an allowance of one-third of what he paid
I the assignees before he could be called upon to pay over the balance. The order to make the allowances in respect of this third is, therefore, right.

CURTIS *v.* PRICE

[Rolls Court (Sir William Grant, M.R.), November 18, December 19, 1806]

[Reported 12 Ves. 89; 33 E.R. 35]

Settlement—Fraudulent settlement—Avoidance as against creditors—Validity for all other purposes—Sale of estate to satisfy creditors—Surplus bound by settlement.

A voluntary settlement, void as against creditors under the Fraudulent Conveyances Act, 1571 (13 Eliz. 1, c. 5) [now s. 172 (1) of Law of Property Act, 1925], is void only as against creditors, and once they have been satisfied the settlement is good for all other purposes. The court, however, is sometimes obliged to see the whole estate covered by the settlement although the whole proceeds of a sale to satisfy creditors are not applicable. In such a case, the surplus remains bound by the settlement.

Notes. Referred to: *Lewis* v. *Rees* (1856), 3 K. & J. 132.

As to avoidance of settlements in fraud of creditors, see 17 Halsbury's Laws (3rd Edn.) 650–653, 659–664; and for cases see 25 Digest (Repl.) 228 et seq.

Cases referred to:

(1) *Shelley's Case*, *Wolfe* v. *Shelley* (1581), 1 Co. Rep. 93; Moore, K.B. 136; 3 Dyer, 373 b; 1 And. 69; Jenk. 249; 76 E.R. 199; 38 Digest (Repl.) 838, *506.*

(2) *Doe d. Compere* v. *Hicks* (1797), 7 Term Rep. 433; 101 E.R. 1061; 47 Digest (Repl.) 204, *1704.*

(3) *Venables* v. *Morris* (1797), 7 Term Rep. 342, 438; 101 E.R. 1009, 1064; 47 Digest (Repl.) 205, *1717.*

(4) *Lloyd* v. *Johnes* (1804), 9 Ves. 37; 32 E.R. 514; 38 Digest (Repl.) 845, *587.*

Bill to obtain the specific performance of an agreement by the defendant to purchase an estate from the plaintiff which was resisted upon objections to the title.

By indentures of lease and release, dated Sept. 3 and 4, 1725, in consideration of a marriage had between Martin and Eleanor Barry, for making a provision for their children and for settling a jointure upon Eleanor in case she should survive Martin in lieu of dower, the manor and lands of Tregett, and the advowson to Llanrothall, the premises contracted for by the defendant, were conveyed to Richard Powell and John James, their heirs and assigns, to the use and behoof of Martin Barry, without impeachment of waste, for and during the term of his natural life, and from and after his decease to the use and behoof of Eleanor his wife for and during the term of her natural life, if she continued sole and unmarried. If she should happen to marry, then to the use and behoof of Powell and James, and their heirs upon trust that they, or some, or one of them, should with, by, or out of the rents, issues, and profits of the said premises, pay unto Eleanor the sum of £50 yearly for and during her life by half yearly payments to commence from the time of the marriage, and with all the rest of the said rents, issues, and profits, to maintain and provide for as well the eldest as all other the children of Martin Barry and Eleanor and for educating his eldest son, and preferment of the younger children, as they should see most convenient. After the deaths of Martin and Eleanor, to the use and behoof of Powell and James, their executors, etc., for the term of 100 years subject to the proviso aftermentioned, and after the end, expiration, or determination of the said term to the use and behoof of the heirs of the body of Eleanor by Martin lawfully begotten or to be begotten, and for want of such issue, to the right heirs of Martin for ever. It was further agreed that in case the second or any other of the younger children of Martin Barry should be bred a clergyman, the said advowson should be to the use of such child, and he should hold and enjoy some land, described as under the Parsonage-House, and should have the next presentation to the parsonage. On his being instituted and inducted therein, or any person in trust for him, he should hold the said land as long as the said parsonage. The trust of the term of 100 years

A was declared to be that the trustees should by and out of the yearly rents and profits, or by leasing, demising, or mortgaging, raise the sum of £500, to and for all and every younger child or children of Martin Barry by Eleanor begotten or to be begotten, to be paid, subject to the appointment of Martin Barry, at their respective ages of twenty-one with interest and survivorship, and it was declared that then the aforesaid term of 100 years should cease.

B The testator died soon after the execution of the settlement, leaving Eleanor, William Barry, his eldest son, and several younger children surviving. By a decree pronounced on July 8, 1740, upon the bill of a bond-creditor of Martin Barry (on behalf of himself and other creditors) against Eleanor Walter (the widow of the testator), her second husband, William Barry, the younger children of Martin Barry, and Thomas Shurmer, under whom the plaintiff claimed, and other persons, C it was declared that the settlement, being voluntary, ought to be considered as void against the plaintiff, and the other specialty creditors, and that articles of agreement for the sale of the estates comprised in the settlement, except the next presentation to the church of Llanrothall, should be carried into execution. An account was directed of the mortgages, and payment out of the purchase-money and the re-conveyance to Shurmer, and that out of the remainder of the purchase-money D the plaintiff and the other specialty creditors of Martin Barry should be paid. By the consent of William Barry it was directed that the sum to be raised under the settlement for the younger children after the death of Eleanor, should be retained by the purchaser, to be paid to them at the age of twenty-one, and that the residue of the purchase-money should be paid to William Barry, with the usual direction that two of the children, who were infants, should join in the conveyance, E unless after coming of age they should show cause against the decree.

By indenture of lease and release, dated Oct. 31 and Nov. 1, 1740, for the considerations therein mentioned and in obedience to the said decree, Christopher Walter and Eleanor, his wife, the widow of the testator, William Barry, his eldest son, and Alice, his wife, and Martin, Walter, and John, Barry, three of the younger children, granted, released, and confirmed, to Shurmer the settled premises, to hold F to the use of him, his heirs and assigns, and in Hilary Term, 1741, a fine was levied in which all the above parties joined. William Barry died during the life of Eleanor Walter, his mother.

The principal objection taken by the defendant to the title was that it was necessary to furnish the defendant with evidence that there was a total failure of issue of William Barry as there was strong ground to contend that the limitation in G the settlement to the heirs of the body of Eleanor Barry operated as a contingent remainder in favour of the persons answering that description at the time of her decease, and, as William Barry died in her life and never answered that description, there was reason to suppose the estate might be still subject to the title of a descendant of William Barry. Further, that the parties had not acted under the decree of the Court of Chancery, which could, therefore, be of no use and was H defective and irregular (i) in not directing an account of the personal estate which ought to have been applied in the first instance in ease of the real estate; (ii), in directing the execution of the contract without an inquiry whether it would be for the benefit of the parties interested; (iii) in directing the surplus of the purchase-money, after satisfaction of all the debts and encumbrances, the annuity to the widow, and the charge of £500 for the younger children, to be paid to the eldest son.

I In answer to the first objection it was urged on the part of the plaintiff that Eleanor Barry under the limitations of the settlement of 1795, on the death of her husband Martin Barry took an estate tail; that it was not affected by her subsequent marriage with Walter; and, therefore, the fine levied by Mr. and Mrs. Walter on Shurmer's purchase barred such estate tail, and enabled them, even without the concurrence of any of her sons, to make a good title. The evidence required was, therefore, unnecessary; the decree, though the account was not taken, which was waived by the eldest son, would protect the purchaser, who paid the

encumbrances and specialty debts, and parties claiming under the settlement as volunteers against the effect of that decree and what was done under it could not disturb a purchaser for valuable consideration who had against the settlement all the equity of the mortgages, encumbrances, and debts, paid; after sixty-four years since the purchase from the family of Barry under that decree, and nearly thirty years since the death of Eleanor Barry, there was little to be apprehended from the possibility of a claim.

Piggott, *Romilly* and *Leach* for the plaintiff.
Richards and *Bell* for the defendant.

SIR WILLIAM GRANT, M.R.—In this cause I understand that both parties wish to have my judgment without a reference to the Master, or stating a Case which I should upon one point have been disposed to direct. It is admitted that, if Shurmer acquired a good title in 1740, the plaintiff can make a good title now, and it is admitted that Shurmer did acquire a good title provided there was an estate tail in Eleanor Barry, afterwards Walter, for it is not contended that the statute 11 Hen. 7, c. 20 [repealed by Fines and Recoveries Act, 1833] has any operation. That statute, being made for the protection of the interests of the issue, cannot apply, when the heir in tail himself has joined with his mother either in the fine or in the conveyance, declaring the uses it is intended to effectuate. But, supposing her not to have had an estate tail, and consequently that Shurmer did not by the mere force of the conveyance to him acquire a title, yet it is contended for the plaintiff that he had a secure and unimpeachable title by the decree under which he purchased.

The first consideration, therefore, is whether Mrs. Barry, afterwards Walter, had an estate tail, depending upon the question whether upon the construction of the settlement of 1725 the remainder, limited to the heirs of her body, be legal or equitable. If legal, it is said, it will unite with the freehold interest given to her before and will vest in her an estate tail; if equitable, it cannot so unite with the preceding legal freehold; and the consequence is that it must be a contingent remainder to such person as should answer the description of heir of the body of Eleanor Barry at the time of her death. The use to Martin Barry was executed in him; not a trust: so was the use to his wife during her widowhood a use executed. Then upon the event of her marriage follows the limitation upon which the question arises giving the trustees the absolute fee, and the use is executed in them.

It is contended for the plaintiff that, though this limitation does in words give the absolute fee to the trustees, yet in sound construction, both with reference to the purposes for which it is limited to them and to other parts of the settlement, it must be construed as if the words "during her life" were added to the limitation to the trustees. It is said the purposes for which the limitation is raised are purposes that terminate with her life, the first trust being to pay her £50 a year during her life, and the other trust to employ the residue of the rents and profits in the maintenance of the children. I keep out of view for the present the clause as to the advowson, and, passing that by, shall consider afterwards whether that will make a difference in the construction. It is said the settler must have intended to limit the estate of the trustees to the life of the wife, for at the moment of her death the term is given to those very trustees which, upon the supposition that they had the fee already by the use executed, could not arise. It is, therefore, necessary to adopt a construction, that will give effect to the whole settlement, and, if the proposed construction be adopted, then the remainder to the heirs of the body of Eleanor Barry will be, not contingent, but vested, and will unite with the estate for life. I am taking for granted that it will unite, though it was in some degree argued, but not pressed, that, as her estate is to terminate in case of her second marriage, the two estates could not unite so as to vest a complete estate tail. That point is quite at rest, for all that is required by the rule in *Shelly's Case* (1) [abolished by s. 131 of Law of Property Act, 1925], is that the ancestor shall take

an estate of freehold and afterwards in the same conveyance an estate shall be given to his heirs. The estate during widowhood is an estate of freehold, and the possibility that it may terminate in the life of the widow and before there can be an heir is no objection.

Against this construction it is alleged that it is necessary that the fee should remain in the trustees beyond the life of Mrs. Barry on account of the clause, which immediately succeeds the declaration of the trust upon which the trustees were to hold the estate before limited to them. It is clear that, if the estate of the trustees can upon other grounds be confined, as the plaintiff contends, it is not necessary that it should remain unlimited by anything contained in that clause, for it is no declaration of any trust which the trustees have to perform. It is not a declaration that they shall present to the living or do any act, but a declaration of the intention of all the parties that, if there shall be a second or any other younger son capable of taking the next presentation, he shall have it, as he might, let the presentation be vested in whom it may. The only question then is whether the court is authorised upon the other ground to read this settlement as if the words "during the life of Eleanor Barry" were inserted. *Doe d. Compere* v. *Hicks* (2) is very much in point. There, though the limitation to the trustees was not expressed to be confined, yet it was construed to operate only for the lives of the several tenants for life upon two grounds: (i) that the object for which the estate was given to the trustees did not require it to endure any longer, the object being to preserve contingent remainders; (ii) that the intention must have been to limit, at least the party must have understood himself to be limiting, only during the lives of the several tenants for life, as he repeated the limitation each time that he limited estates for life.

That, I admit, was the case of a will. A case, however, a short time before upon a deed is there cited which gave Lord Kenyon occasion to state the ground upon which the former case was decided, more particularly than upon the argument of that case. The other case is *Venables* v. *Morris* (3) in which the court held that they could not read the deed as if the words "during the life of Hannah Morris" were inserted. But Lord Kenyon stated the ground of the difference to be, not that the one case was upon a will and the other upon a deed, but, that in the one case the construction was necessary to give effect to the apparent intention, and in the other it was not necessary. In my opinion, it was not only not necessary, but it was not consistent with that which the settlement meant to provide for, that is, not with all the cases it meant to provide for. An estate for life was limited to the husband with remainder to trustees to preserve contingent remainders, remainder to the wife for life, and a limitation to the trustees, and their heirs, generally, not during the life of the wife, to preserve contingent remainders, but a power of appointment was given to the wife. In the execution of that power she might have occasion to make contingent limitations, and, therefore, the estate was very properly left absolute in the trustees, to support those possible contingent limitations.

In this case there is, first, what existed in *Doe d. Compere* v. *Hicks* (2)—a purpose to be answered for which an estate in the trustees during the wife's life would be sufficient, laying the advowson out of the case; next, a limitation for a term of years which could not arise consistently with the estate in fee to the same trustees. Therefore, not only is this case similar to that of *Doe d. Compere* v. *Hicks* (2) in the particular upon which the court proceeded, but this is stronger, as the intention not only would not be answered, but would be contradicted unless the plaintiff's construction is put upon the general words of the limitation to the trustees. As this, however, would have been a very fit question to be submitted to a court of law, viz., what interest the trustees took during the life of the wife, I should feel considerable reluctance in deciding it by my opinion if the judgment I have formed upon the other branch of the case did not render it of very little consequence whether that opinion is well founded or not.

The second question is whether the purchaser Shurmer in 1740 was not perfectly secure by the decree under which he purchased, whatever might be the direct effect

and operation of the conveyance made to him under that decree as considered separately. The settlement was executed after the settlor's marriage, a voluntary settlement. A creditor filed his bill in 1740 impeaching that settlement as voluntary and, consequently, fraudulent against creditors by specialty, stating likewise a contract by the several parties, the mother and sons and Shurmer, for the purchase, and that Shurmer declined to perform the contract without a decree, and praying execution of the contract. The bill stated that the personal estate of Martin Barry was very inconsiderable, which was also stated by the answer. Upon this case a decree was made declaring the settlement voluntary and void against specialty creditors, directing an execution of the contract, and that upon the payment of the money all necessary parties should join in the conveyance of the estate to the purchaser. It is said that, though Shurmer's purchase was thus sanctioned by the decree, yet there are many irregularities in that decree, and, therefore, his title does not derive from it that protection which it would have from a decree regular in all respects.

The ground upon which the decree proceeds is that the settlement is voluntary, so that the point now to be examined is whether there was sufficient ground for so declaring it. The bonds were executed before the settlement. Upon the face of the proceeding, therefore, the party was indebted at the date of the settlement, and upon the answer he must be taken to have been indebted to a very considerable amount at the date of the settlement. His death happened soon afterwards. It is impossible at this time to raise a doubt whether the decree had any foundation or not. It must have been proved that this settlement was under circumstances that made it voluntary according to the Fraudulent Conveyances Act, 1571 [see now s. 172 (1) of Law of Property Act, 1925] and the construction given to the statute by this court. This is not a case, therefore, in which there is any question upon the title of the estate to be sold, for no doubt is started that this was the estate of Martin Barry. It was right, therefore, to sell it for his creditors. This is not a case where there is a doubt whether the person had any title to the estate, and, consequently, whether the purchaser could acquire any title.

Then, if this case is to be considered as if it was clear that the remainder to the heirs of the body of Eleanor Barry was contingent, the question is whether that makes any difference with regard to the security of the title which the purchaser gets under the decree. It would make great difference with regard to the conveyance from the party. A settlement of this kind is void only as against creditors, but only to the extent to which it may be necessary to deal with the estate for their satisfaction, it is as if had never been made. For every other purpose it is good. Satisfy the creditors, and the settlement stands. The court frequently is obliged to sell the whole estate, though the whole proceeds are not necessarily applicable. But the purchaser is not answerable for the mode in which it has been sold by the court nor for the disposition which the court makes of the money. The objections taken to this decree are that the court has not done what it ought for the security of those who after the creditors had an interest in the estate upon the defendant's construction. What is that to the purchaser? Is it for him to inquire whether the court has dealt properly with the fund which it obliged him to pay in?

It is said there are two omissions and an improper direction in this decree upon the supposition that the ultimate interest in this estate is in contingency. The first omission is that there is no account of the personal estate which ought to have been applied in the first instance in case of the real estate. But that is a direct act of the court—not that the account is waived by the agreement of the parties, but it is waived in the presence of the court by the express assent of the eldest son. Another act of the court was the direction for execution of the contract without any inquiry whether it would be for the benefit of the parties interested. That is a precaution that, if it was in the view of the court and for unascertained parties who might be interested, it might be fit to adopt. But that also is the act of the court. Is it to be expected, that the purchaser should insist upon that inquiry?

The improper direction, as it undoubtedly would be if the deed is to be construed as the defendant contends, is that the surplus of the money after payment of all the debts and encumbrances, the sum which the widow agreed to take for her annuity and the £500 to the younger children should be paid to the eldest son. If it was not yet ascertained who the heir of the body would be, as it could not be if the limitation was a contingent remainder, that was an improper direction. The money ought to have been brought into court. But that is not an application of the money for which the purchaser can be accountable. The only way in which the party is really interested, if he should turn out to be a different person from any of those parties to that proceeding, to affect the purchase is that no account of the personal estate was directed, for upon any other supposition than that the personal estate was fully sufficient the real estate must have been sold. But that is so improbable a supposition after such a length of time, sixty-five years, that it cannot be looked at as a point the party should be let in to establish, viz., that the personal estate was sufficient for all the debts, and I do not know that it would do him good, for frequently upon the Master's report the court decrees a sale provisionally. Probably the parties were satisfied that the personal estate was very inconsiderable, and the account would have answered no purpose, but would have created expense. William Barry could have no interest in waiving it, for he was to get the balance. Therefore, his interest required the previous application of the personal estate.

The only injury could be by not procuring a sufficient price, and not securing the money for the person entitled. In *Lloyd* v. *Johnes* (4) irregularities the most substantial had taken place. In that case an account of the personal estate had been actually decreed, yet it was never taken. So it might be argued that the decree had made it a condition precedent to the application of the real estate that the personal estate should be first applied. Then the cause was brought on for further directions upon a separate report, and one that was never filed. The decree upon further directions for a sale was to pay, not only the testator's debts, but also those of Pugh which were no charges upon the estate. Yet the Lord Chancellor's opinion was that, if the purchaser could not be affected upon some other ground, he could not be affected by the irregularity of the proceedings, though he had notice, all the proceedings being stated in the agreement for his purchase; and, though the Lord Chancellor was willing to direct the account, if desired, I do not understand that his Lordship intended that to affect the purchaser, but only to show the claims of the parties interested in the result of that account as against each other.

Supposing, therefore, this decree liable to objection in all these points, the purchaser is not in any degree responsible, and is perfectly safe in the title which he takes under the decree. I have reasoned this upon the supposition that the decree is irregular. But for that I must suppose that the court construed the settlement, as the defendant contends it ought and as I think it ought not, to be construed, for, as I construe this settlement, the decree is not liable to objection throughout, for upon that supposition the parties had among them the whole interest in the estate. William Barry, having agreed to purchase his mother's interest, might properly waive the account of the personal estate and any reference as to the contract, and it is scarcely possible that the court could proceed upon any other ground, the settlement being distinctly before the court at length upon the pleadings. I have stated that, when a settlement is declared void as to creditors, it is only as to them. The court was, therefore, necessarily called upon to look into the settlement in order to see what to do with the residue of the purchase-money, and, directing that to be paid to William Barry, they could not possibly construe the limitation to be a contingent remainder which would have left the right to the money perfectly unascertained. The court must, therefore, have proceeded upon the same ground that is, I think, now to be adopted. Upon both grounds, therefore, this agreement ought to be performed.

NEWSOM AND ANOTHER *v.* THORNTON AND ANOTHER

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), January 24, 1805]

[Reported 6 East, 17; 2 Smith, K.B. 207; 102 E.R. 1189]

Sale of Goods—Passing of property—Delivery of bill of lading—Intention of parties to pass property—Mercantile agent—Goods consigned by owner for sale—Right of agent to pledge bill of lading.

A bill of lading passes the property in the goods to which it relates upon a bona fide endorsement and delivery by the owner of the goods or his authorised agent to a buyer where it is so intended to operate, in the same manner as a direct delivery of the goods themselves. Where a bill of lading is transferred to a factor to enable him to sell the goods on behalf of the owner only such property in the goods passes as is intended by the owner to pass, and the factor has no authority to pledge the bill of lading.

Shipping—Carriage of goods—Stoppage in transitu—Bill of lading pledged by consignee—Failure of consignee to pay for goods.

Where goods were consigned on the joint account of the consignors and consignee, and a bill of lading was sent to deliver the goods to the consignee or his assigns, who afterwards endorsed and delivered it to the defendants upon condition of their making an advance to him on it, which they failed to do, but claimed to return it as a security for prior advances,

Held: the endorsement and delivery of the bill of lading did not divest the consignors' right to stop the goods in transitu upon the insolvency of the consignee who had not paid for them.

Notes. Applied: *Martini* v. *Coles* (1813), 1 M. & S. 140. Approved: *Sewell* v. *Burdick*, [1881–5] All E.R. Rep. 223. Referred to: *Rodger* v. *Comptoir d' Escompte de Paris* (1869), L.R. 2 P.C. 393.

As to transfer of a bill of lading, see 35 Halsbury's Laws (3rd Edn.) 344–352, and as to the authority of a factor, see ibid., vol. 1, pp. 167, 168. For cases see 41 Digest (Repl.) 257 et seq.; 1 Digest (Repl.) 396–401. As to dispositions under the Factors Act, see 1 Halsbury's Laws (3rd Edn.) 214; 1 Digest (Repl.) 383; and the Factors Act, 1889, 1 Halsbury's Statutes (2nd Edn.) 29.

Cases referred to:

(1) *Lickbarrow* v. *Mason* (1787), 2 Term Rep. 63; 6 East, 20, n.; 100 E.R. 35; reversed sub nom. *Mason* v. *Lickbarrow* (1790), 1 Hy. Bl. 357, Ex. Ch.; reversed and venire de novo awarded sub nom. *Lickbarrow* v. *Mason* (1793), 4 Bro. Parl. Cas. 57; subsequent proceedings (1794), 5 Term Rep. 683; 6 Term Rep. 131; 6 Digest (Repl.) 428, *3007*.

(2) *Paterson* v. *Tash* (1743), 2 Stra, 1178; 93 E.R. 1110; 1 Digest (Repl.) 397, *578*.

(3) *Daubigny* v. *Duval* (1794), 5 Term Rep. 604; 101 E.R. 338; 1 Digest (Repl.) 397, *578*.

(4) *Salomons* v. *Nissen* (1788), 2 Term Rep. 674; 100 E.R. 363; 39 Digest (Repl.) 770, *2467*.

(5) *Wright* v. *Campbell* (1767), 4 Burr. 2046; 1 Wm. Bl. 628; 98 E.R. 66; 41 Digest (Repl.) 259, *754*.

(6) *Hunter* v. *Baring* (circa 1793), unreported.

Rule Nisi obtained by the defendants to set aside the verdict in an action of trover for certain barrels of beef and pork.

The plaintiffs were Irish merchants residing at Cork, and were used to consign provisions to Mathew Church, a merchant of London. The beef in question was shipped on board the *Nancy* by the plaintiffs in December, 1802, consigned on their

own account to Church as their factor for sale, and the bill of lading, signed by the captain and dated "Cork, Dec. 17, 1802," was to deliver "to order or assigns," and was endorsed by Newsom and transmitted to Church. The pork was shipped on board the *Russell* in May, 1803, and consigned by the plaintiffs on the joint account of themselves and Church, and the bill of lading, signed by the captain, and dated "Cork, May 20, 1803," was to deliver "to Mathew Church or his assigns." The plaintiffs at the same time drew a bill on Church for half the amount of the latter shipment, but it was never paid nor even presented in consequence of the subsequent bankruptcy of Church. Soon after the arrival of the bill of lading for the beef in December, Church being in embarrassed circumstances obtained from the defendants a loan of £200, which they agreed to advance him on having the bill of lading for the beef deposited with them, and, accordingly, the bill of lading was endorsed by Church to the defendants and deposited with them as a security for that advance, but it did not appear that the defendants knew that the beef had been consigned to him only as factor. Church still continuing to be embarrassed, previous to his departure for Ireland, about May 12, 1803, having before sent an order for the pork, agreed with the defendants in consideration of a further advance, to leave with them an order upon one Cole, who was his clerk, to endorse and deliver to them the bill of lading for the pork when it arrived. In consequence, upon his departure he left word with Cole that in case money was wanted during his absence he should apply to the defendants for it, and was to endorse and deliver to them the bill of lading when it arrived. After Church's departure, Cole, who had received the bill of lading, applied to the defendants for an advance of £500 and upwards for Church, which they refused, but nevertheless contrived to obtain from him the bill of lading with his endorsement, he not being fully apprised of the agreement between them and his master, and understanding from them that immediately previous to Church's departure for Ireland they had made another advance to him upon the promise of this assignment. Church stopped payment the latter end of June, and was soon after declared a bankrupt, not having paid for either the beef or pork. In the meantime, before he was declared a bankrupt, the pork arrived, and the plaintiffs, having been apprised of the insolvency of Church, gave notice to the captain of the *Russell* to stop the delivery of it to Church or to the defendants, and tendered him the freight and charges. The captain, however, delivered the pork to the defendants upon the production of the bill of lading, and taking their indemnity. By means of the other bill of lading they had previously obtained the possession of the beef, of which, as well as of the pork, the freight and other charges were tendered to them, which they refused to accept or to return the goods. It was also proved, that the usual credit for provisions of this description sent from Ireland was three months, and, therefore, that a bill of lading, within that date, conveyed to persons conversant in the trade, as the defendants were, intimation that the goods were probably not paid for by the consignee.

At the trial at Guildhall in 1804 Lord Ellenborough, C.J., in his direction to the jury, distinguished between the beef and the pork. He said that the first, having been consigned to Church as a factor, gave him no authority to pledge the goods, but only to sell them for his principal, and that by the same rule he had no authority to pledge the bill of lading, which was the mere emblem of the goods themselves. As to the pork which was consigned to Church on the joint account of himself and the plaintiffs, though he had a right to pledge it as a joint owner, yet, having agreed to pledge it to the defendants only on condition of a further advance from them and they having obtained possession of the bill of lading from his clerk with his endorsement, in the absence of Church, without complying with that condition, they had no right to retain the goods against the plaintiffs who had applied in time to stop the delivery of them while in transitu, and were, therefore, entitled to recover the value of the pork as well as of the beef.

The jury found a verdict for the plaintiffs for the whole value of both parcels.

It was moved to set aside the verdict on the ground that the endorsement and delivery of a bill of lading of goods in transitu transferred the legal property in them to the endorsee, the bill of lading being a negotiable instrument by the custom of merchants, according to the authority of *Lickbarrow* v. *Mason* (1), where LORD KENYON left it to the jury to find what was the effect of such an instrument by the custom of merchants, and it was found by the jury to be the custom to pass the property by the endorsement and delivery of it. Though it were admitted that a factor had no general authority to pledge the goods of his principal, yet, if the principal endorsed the bill of lading to his factor generally, he thereby enabled him to hold himself out to the world as the ostensible owner of the goods, and thereby to impose on persons like the defendants who were not cognisant of his real character as factor, but dealt with him on the supposition that the goods were consigned to him on his own account, which it appeared was the fact in respect of the pork, which, therefore, it must be admitted that he had authority to pledge.

Gibbs, *Park* and *Marryat* for the plaintiffs, showing cause against the rule: With respect to the pork, admitting that Church might, as joint owner with the plaintiffs and not merely as their factor, have the same authority to pledge as well as sell the bill of lading as he would have over the goods themselves when they arrived, yet he did neither the one nor the other, for the agreement was that that bill of lading should be deposited with the defendants upon condition of a future advance, and in fact no future advance was made by them on it. The interest, therefore, in the goods remained as it did before, that is, in Church, the consignee of a moiety as factor for the plaintiffs, and the vendee of the other moiety, subject to the plaintiff's right of stopping in transitu which could not be less, because Church had only a moiety, than if he had had the whole. The plaintiffs having exercised that right, in consequence of the insolvency of Church, as far as they could in fact by demanding the goods of the captain of the *Russell* before their delivery to Church or any other person authorised by him to receive them, the defendants obtained possession of them afterwards by the wrongful act of the captain. The plaintiffs, therefore, are entitled to recover not only a moiety, but the whole value of the pork, because by the stoppage in transitu, Church's interest in the moiety as vendee never attached.

As to the beef, which Church received merely as factor, it being clear that as such he had no authority to pledge: *Paterson* v. *Tash* (2); *Daubigny* v. *Duval* (3), but could only sell the goods, however he might have appeared to the world as the visible owner, it follows a fortiori that the bill of lading, which is the mere symbol of possession, could not give him a greater authority than the actual possession of the goods themselves. For it is no more than an authority from the owner to the captain to deliver the goods to the person named therein, and such as every factor must necessarily have before he can acquire possession of them. So far is the bill of lading from tending to mislead the purchaser or pawnee into a belief that the factor with whom he is dealing is the absolute owner of the goods mentioned in it, that it gives him a better opportunity of knowing the truth, by asking for the letter of advice which conveyed, or the invoice which accompanied it, than the mere view of the goods themselves would suggest to him. *Lickbarrow* v. *Mason* (1) does not apply to a factor, for there the question arose upon the right of estopping in transitu, which can only exist as between vendor and vendee. Where there is no stoppage in transitu, or where that right is restrained, as was held in that case, by the previous endorsement of the bill of lading to a third person for a valuable consideration and without notice, the right of property remains in the vendee. But here Church never had any property as factor in the beef as against the plaintiffs. He had only an authority to sell, and not to pledge. Considering, therefore, the bill of lading the same as the goods, by pledging it, he clearly acted beyond the scope of his authority, and cannot bind his principals.

Salomons v. *Nissen* (4) was also between vendor and vendee; and it appearing that the endorsee of the bill of lading had reason to think that the goods had not been paid for, the right of the vendor to stop them in transitu was affirmed. On the same ground there was evidence here to show from the known course of trade between England and Ireland in salt provisions that the defendants must have known when they received both the bills of lading that the goods had not been paid for. *Wright* v. *Campbell* (5), which was the case of an endorsement and delivery of a bill of lading by a factor to one as a security for his becoming bail for him, seems to come nearest to the present case, but there the parties evidently meditated a sale of the goods, and ultimately the verdict which had been found in favour of the assignees of Scott, to whom the bill of lading had been endorsed, was set aside upon the ground of there being evidence of collusion between him and the factor to cheat the principal, and so that case was explained by BULLER, J., in *Salomons* v. *Nissen* (4).

Erskine and *Garrow* for the defendants in support of the rule: Admitting that the bill of lading of the beef was deposited with the defendants as a pledge for their advance and not by way of sale of the goods, yet, the possession of the bill without any special endorsement designating that Church held it in his character of factor for another person, gave him the absolute control over the property, so as to pass it by endorsement and delivery to a third person for a valuable consideration without notice. The grounds on which *Lickbarrow* v. *Mason* (1) was decided apply as well to the possession of a factor as of any other person, and the decision in *Salomons* v. *Nissen* (4) went wholly beside that question, upon the grounds as well of a failure of consideration in the first instance, as of notice of the defect of the title in the vendee on account of non-payment of the goods: and the endorsee was even considered as a partner with the vendee, standing in the same condition. It is true that *Lickbarrow* v. *Mason* (1) was a case between vendor and vendee, but this court decided it on the broad ground that the endorsement of a bill of lading for a valuable consideration and without notice conveys per se the legal property in the goods to the endorsee. Nor can the judgment be maintained on any other footing, for, considering it as the assignment of a bare authority to the captain to deliver the goods to the holder, there could be no pretence for saying that the second purchaser ought to stand in a better situation than the first as against the vendor. After the venire de novo was awarded in that case and the cause went to trial a second time, the jury found specially the custom of merchants to pass the property of the goods named in a bill of lading by endorsement. The cause which stood immediately preceding that in the paper for trial at Guildhall was *Hunter* v. *Baring* (6), which turned upon the endorsement of a bill of lading by a factor to a third person for a valuable consideration without notice, and that was held by LORD KENYON to conclude the principal's right to stop in transitu. *Wright* v. *Campbell* (5), however, was the case of a bill of lading pledged by a factor as a security to another who had become bail for him. The very ground of collusion on which the new trial was ultimately granted, and the language used by LORD MANSFIELD show that, if the transaction had been considered as a fair one, the transfer of property by the endorsement to the extent of the pledge would have been sustained. No sale could have been there intended, for the value of the goods was much beyond the sum for which the bill of lading was pledged as a security. But if such a pledge by a factor were at all events void, it was nugatory to consider the question of collusion.

[LORD ELLENBOROUGH, C.J.: The endorsement in that case was absolute as for a sale, and not as a pledge, that is, the security meant to be given by the endorsement of the bill of lading was through the medium of a sale and not of a pledge. Here there is no ground for saying that the parties meditated an immediate sale of the goods by depositing the bill of lading. It was deposited as a pledge for the repayment of the loan.]. *Wright* v. *Campbell* (5) was not put on that ground,

nor was it so considered by any of the court in commenting on it in *Lickbarrow* v. *Mason* (1). But the true principle is, that if one man put it in the power of another to cheat a third person, he must abide the consequences, and it is the less necessary to make an exception to the general rule in the case of a factor because the principal may always prevent the mischief by making a special endorsement to his correspondent by the name of his factor, which will give notice of the transaction to every person into whose hands the bill of lading comes.

LORD ELLENBOROUGH, C.J.—There are two subjects of consideration, the bill of lading for the pork and that for the beef. First, as to the pork. As there was no consideration paid for that bill of lading by the defendants, they not having in fact made any advance upon it as they had engaged to do and upon the faith of which it was agreed to be deposited with them, there was nothing to divest the original right subsisting in the consignors to stop the goods in transitu, upon the insolvency of the consignee who remained debtor for them. As to the beef, I should be very sorry if anything fell from the court which weakened the authority of *Lickbarrow* v. *Mason* (1), as to the right of a vendee to pass the property of goods in transitu by endorsement of the bill of lading to a bona fide holder, for a valuable consideration and without notice. As to *Wright* v. *Campbell* (5), though that was the case of an endorsement of a factor, it was an outright assignment of the property for value. Scott the endorsee was to sell the goods and indemnify himself out of the produce the amount of the debt for which he had made himself answerable. The factor at least purported to make a sale of the goods transferred by the bill of lading, and not a pledge. This was a direct pledge of the bill of lading, and not intended by the parties as a sale. A bill of lading, indeed, shall pass the property upon a bona fide endorsement and delivery, where it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do, if so intended. But it cannot operate further. If the factor had been in possession of the goods themselves, and had purported to sell them to the defendants bona fide, the property would have passed by the delivery, but not if he had only meant to pledge them, because it is beyond the scope of a factor's authority to pledge the goods of his principal. The symbol then shall not have a greater operation to enable him to defraud his principal than the actual possession of that which it represents. The principal who trusts his factor with the power to sell absolutely shall so far be bound by his act, but the defendants shall not extend the factor's act beyond what was intended at the time, and here only a pledge was intended, which he had no authority to make. I consider the endorsement of a bill of lading, apart from all fraud, as giving the endorsee an irrevocable, uncountermandable right to receive the goods, that is, where it is meant to be dealt with as an assignment of the property in the goods, but not where it is only meant as a deposit by one who had no authority to do so. Having been dealt with in this case only as a deposit, it cannot be made into a sale in order to give it effect.

GROSE, J.—I agree entirely with what my Lord has said respecting the two bills of lading of the pork and beef. With respect to the latter, it would be very extraordinary that a bill of lading sent to a factor should be able to confer upon him more power over the property than the possession of the thing itself. It is admitted that a factor cannot pledge the goods of his principal by delivery of the goods themselves. Then is it not inconsistent to say that he may do so by delivery of the bill of lading? If his delivery of the goods themselves as a pledge will not pass the property, much less shall his delivery of the bill of lading operate in that manner.

LAWRENCE, J.—The question is whether, if a factor have no property in the goods of his principal so as to dispose of them otherwise than according to the authority delegated to him, namely, by sale, he can have a greater disposing power over them by means of his possession of the instrument which gives him authority

A to receive them than the possession of the goods themselves, when received, would give him? In *Wright* v. *Campbell* (5) the court only said that, if it were a bona fide sale, it should bind the principal. They did not go the length of saying that a factor could pawn the bill of lading received from his principal. In *Lickbarrow* v. *Mason* (1), some of the judges did indeed liken a bill of lading to a bill of exchange and consider that the endorsement of the one did convey the property B in the goods in the same manner as the endorsement of the other conveyed the sum for which it was drawn. But when the case was before the Exchequer Chamber there was much argument to show that in itself the endorsement of a bill of lading was no transfer of the property, though it might operate as such in the same manner as other instruments may be evidence of the transfer of property. As if goods be sold by a merchant abroad to his correspondent here, and the bill C of lading be sent to him endorsed to deliver the goods to the vendee or his order. There the transfer of the goods may be evidenced by such endorsement. And if the vendee part with the property in the goods while they are yet in transitu and before his property in them is divested by the vendor's stopping them in transitu, which assignment of the vendee's property may be evidenced in like manner by his endorsement to another, then, according to *Lickbarrow* v. *Mason* (1), D the original vendor's right to stop them in transitu would be divested. Therefore, all that that case seems to have decided is that where the property in the goods passed to a vendee, subject only to be divested by the vendor's right to stop them while in transitu, such right must be exercised, if at all, before the vendee has parted with the property to another for a valuable consideration and bona fide, and by endorsement of the bill of lading given him a right to recover them. In E this case there is no ground to complain of the defendants' having been deceived by means of the bill of lading, for it would have been very easy for them to have inquired for the letter of advice that brought it, which would have shown that Church held it as a factor and not as vendee of the goods. If persons will neglect all precaution and advance money on goods without inquiring whether the party F had any right to dispose of them or not, they must bear the loss if it turn out that he had no authority so to do.

LE BLANC, J.—I do not know that the trade of the country will suffer much risk by our holding that in a case where if the goods themselves had come into the factor's hands he could not pledge them, he shall not be able to pledge them by means of the instrument which gives him authority to receive the goods. Some G of the cases, indeed, state the opinion of the judges generally that an endorsement of a bill of lading will pass the property, but that must be taken with reference to the circumstances of the case, and is not to be applied to the case of a factor pledging the goods of his principal, but to that of a vendor selling goods in which he has a property. The cases show, indeed, that where either vendee or factor intend to sell the goods, the endorsement of the bill of lading for that purpose H will bind the vendor or principal. *Wright* v. *Campbell* (5) appears, I think, to be that of a sale, for it was agreed that Scott, the endorsee of the bill, should sell the goods. But at least we may say of it that it is not an authority for holding that a factor may pledge the bill of lading though he could not pledge the goods themselves. Our now determining that a factor cannot make such a pledge will not break in at all upon the doctrine of *Lickbarrow* v. *Mason* (1) that the endorsement I of a bill of lading upon the sale of the goods will pass the property to a bona fide endorsee, the property being intended to pass by such endorsement.

Rule discharged.

A

MORSE *v.* ROYAL AND OTHERS

[LORD CHANCELLOR'S COURT (Lord Erskine, L.C.), February 28, March 1, 3, 4, 6, 8, 1806]

[Reported 12 Ves. 355; 33 E.R. 134]

B

Undue Influence — Voidable transactions — Presumption — Gift by client to solicitor—Purchase of trust property by trustee—Purchase of bankrupt's property by trustee in bankruptcy—Purchase of reversions from expectant heirs—Purchase by guardian of property from ward.

Per LORD ERSKINE, L.C.: A gift obtained by an attorney while engaged in the business of the author of that gift, a deed by an heir to his guardian, C purchases of reversions from young heirs, are void and can be set aside without any consideration of fraud or looking beyond the relation of the parties. To that class of case I shall add the case of a trustee selling to himself. In the case of [a trustee in bankruptcy or solicitor employed by him] also there is no necessity for evidence. The contract is interdicted by the policy of the law. Finding that there is so much difficulty in supporting a purchase by a trustee D from the cestui que trust that the transaction ought to be guarded with that necessary degree of jealousy, running so near the verge, it might be better embraced under the policy of the law. To maintain a contract between trustee and cestui que trust the relation must be dissolved or the parties must agree to take the characters of purchaser and vendor. If some advantage has been taken [by the trustee] some information acquired which the [cestui que trust] E did not possess, inadequacy of consideration, without going to the length of being such as shocks the conscience will go to a vast way to constitute fraud. Confirmation of a contract so obtained must be watched with the utmost strictness and is to stand only on the clearest evidence as an act done with all the deliberation that ought to attend a transaction the effect of which is to ratify that which in justice ought never to have taken place. F

Notes. Considered: *Tomson* v. *Judge* (1855), 3 Drew. 306; *Plowright* v. *Lambert* (1885), 52 L.T. 646. Referred to: *Trevelyan* v. *Charter* (1835), 4 L.J.Ch. 209; *Bartram* v. *Floyd* (1904), 90 L.T. 357; *Lowther* v. *Lowther*, post p. 385.

As to undue influence and unconscionable bargains, see 17 HALSBURY'S LAWS (3rd Edn.) 672 et seq.; and for cases see 25 DIGEST (Repl.) 277 et seq. G

Cases referred to:

(1) *Beaumont* v. *Boultee* (1800), 5 Ves. 485; affirmed (1802), 7 Ves. 599; 32 E.R. 241, L.C.; 20 Digest (Repl.) 291, *334*.

(2) *Purcell* v. *McNamara* (1806), 14 Ves. 91; 33 E.R. 455, L.C.; 25 Digest (Repl.) 277, *848*.

(3) *Barnardiston* v. *Lingood* (1740), 2 Atk. 133; Barn. Ch. 337; 26 E.R. 484, H L.C.; 25 Digest (Repl.) 290, *957*.

(4) *Gwynne* v. *Heaton* (1778), 1 Bro. C.C. 1; 28 E.R. 949, L.C.; 25 Digest (Repl.) 292, *975*.

(5) *Pierce* v. *Waring* (1745), cited 1 Ves. Sen. 379; 2 Ves. Sen. 548; 1 P. Wms. 6th ed. 121, n.; 27 E.R. 1093, L.C.; 12 Digest (Repl.) 119, *703*.

(6) *Gibson* v. *Jeyes* (1801), 6 Ves. 266; 31 E.R. 1044, L.C.; 47 Digest (Repl.) I 259, *2277*.

(7) *Ex parte Lacey* (1802), 6 Ves. 625; 31 E.R. 1228, L.C.; 47 Digest (Repl.) 259, *2278*.

(8) *Coles* v. *Trecothick* (1804), ante p. 14; 9 Ves. 234; 1 Smith, K.B. 233; 32 E.R. 592, L.C.; 47 Digest (Repl.) 259, *2272*.

(9) *Earl of Chesterfield* v. *Janssen* (1751), 2 Ves. Sen. 125; 1 Atk. 301; 1 Wils. 286; 28 E.R. 82, L.C.; 25 Digest (Repl.) 273, 823.

(10) *Cole* v. *Gibbons*, *Martin* v. *Cole* (1734), 3 P. Wms. 290; 24 E.R. 1070, L.C.; 25 Digest (Repl.) 301, *1085.*

(11) *Cole* v. *Gibson* (1750), 1 Ves. Sen. 503; 27 E.R. 1169, L.C.; 12 Digest (Repl.) 279, *2141.*

(12) *Taylour* v. *Rochford* (1751), 2 Ves. Sen. 281; 28 E.R. 182; 8 Digest (Repl.) 562, *150.*

(13) *Crowe* v. *Ballard* (1790), 2 Cox, Eq. Cas. 253; 3 Bro. C.C. 117; 1 Ves. 215; 30 E.R. 118; 1 Digest (Repl.) 536, *1654.*

(14) *Cocking* v. *Pratt* (1750), 1 Ves. Sen. 400; 27 E.R. 1105; 12 Digest (Repl.) 113, *664.*

(15) *Griffith* v. *Frapwel* (1732), cited in 1 Ves. Sen. at p. 401; 27 E.R. 1106.

(16) *Wiseman* v. *Beake* (1690), 2 Vern. 121; Freem. Ch. 111; 23 E.R. 688; 25 Digest (Repl.) 296, *1019.*

(17) *Woodman* v. *Skuse* (1708), Gilb. Ch. 9; Prec. Ch. 266; 25 E.R. 7; sub nom. *Godman* v. *Scuse*, 2 Eq. Cas. Abr. 183; sub nom. *Anon.*, 3 P. Wms. 294, n.; 12 Digest (Repl.) 108, *636.*

(18) *Welles* v. *Middleton* (1784), 1 Cox, Eq. Cas. 112, L.C.; affirmed sub nom. *Middleton* v. *Welles* (1785), 4 Bro. Parl. Cas. 245; 2 E.R. 166, H.L.; 43 Digest (Repl.) 81, *693.*

(19) *Walmesley* v. *Booth* (1741), 2 Atk. 25; Barn. Ch. 475; 26 E.R. 412, L.C.; 43 Digest (Repl.) 91, *785.*

(20) *Saunderson* v. *Glass* (1742), 2 Atk. 296; 26 E.R. 581, L.C.; 43 Digest (Repl.) 141, *1272.*

(21) *Hillary* v. *Waller* (1806), 12 Ves. 239; 33 E.R. 92, L.C.; 22 Digest (Repl.) 172, *1584.*

(22) *Symmons* v. *Mortimer* (circa 1776–96), Hunt's Annuity Cases, 75.

Bill to set aside a purchase, by a trustee.

John Morse died in 1781, seised and possessed of considerable real and personal estates in the West Indies, which by his will he gave to his sons-in-law Vanheylin and Green and Mitchell, whom he appointed executors, upon trust for the payment of debts, and subject thereto principally for his natural son. Green was also one of the residuary legatees, and had been the partner of the testator and his consignee. Soon after the testator's death, Vanheylin, who had been his agent in the West Indies, came to England, and the original contract took place at the end of the year 1784, and the beginning of 1785, the deeds bearing date in December, 1784, and Jan. 7, following in consideration of £7,500, which sum was paid. The testator's son at the time he entered into this contract was about the age of twenty-five, a lieutenant in the Horse Guards. Some time afterwards, upon the representation of Morse that the purchase was at an undervalue, another treaty commenced for a further consideration to be paid to Morse, to which Vanheylin at length agreed, and another deed was executed bearing date Feb. 17, 1790, by which Morse was to receive the further sum of £7,500 payable by instalments, the answer representing that the amount was fixed by the arbitration of Green to whom Vanheylin proposed to refer it and who awarded the sum of £15,000 as the value. Of that sum part only was received by Morse, Vanheylin becoming insolvent and Morse taking a dividend with his other creditors for what remained due to him on that account, having previously brought an action and resisted an injunction.

The bill was filed after the death of Vanheylin against Green and Mitchell, his executors, and against his daughter Mrs. Smith as heir-at-law and residuary legatee, suggesting inadequacy of consideration, fraudulent advantage taken by Vanheylin of his situation as trustee, etc., and that the recitals in the deed of 1790 as to the circumstances of the arbitration by Green were false, and praying that the purchase by Vanheylin might be set aside, that the trusts of Morse's will be executed, that accounts be directed and the property applied accordingly,

and that the residue, after payment of the debts and legacies, might be divided between the plaintiff and Green, etc., according to their respective interests. The defendants Smith and his wife relied principally upon the circumstances that the purchase was proposed and pressed upon Vanheylin by Morse who said he was determined to sell and would put the property up at Garraway's and had attempted to sell to other persons; that there was no evidence of distress: that the title of Morse was not clear, and was actually in litigation upon an appeal to the Privy Council from a judgment in the West Indies in his favour upon a bill filed in 1788, the objection arising under a colonial Act of Assembly restraining devises in favour of the children of negroes or mulattoes; that the value was fixed by the arbitration of Green and the suit was not instituted until after the death of Vanheylin. Green also died before the cause was heard, and the suit was revived against his representatives.

Perceval, *Hart* and *Bell* for the plaintiff: Under the circumstances of this case this purchase cannot stand—a purchase by a trustee from the cestui que trust acting upon the representation of the trustee who took advantage of the ignorance of the cestui que trust and the pressure of his circumstances, which by the management of the trustee could be made more pressing, followed by what is called a deed of confirmation containing false recitals; the party who sold not in possession, and under circumstances, that made him not sui juris, the party purchasing in possession of the whole estate. Under the relation between the parties, attended with such circumstances, a court of equity will not permit this purchase to stand. A trustee cannot purchase from his cestui que trust without perfectly informing him of the nature and value of the subject, opening his eyes, discharging himself from the situation of trustee, and placing himself in an adverse situation. The circumstance that the money is not paid at the execution of the contract is a material badge of fraud in these cases. As to the objection of delay, in many cases delay for a much longer period has been insisted upon in vain, as in *Beaumont* v. *Boultbee* (1). So, in *Purcell* v. *McNamara* (2) all the deeds were swept away, though many acts of acquiescence were insisted on.

The peculiar protection, given by the court to young heirs, is extended beyond the strict interpretation of that word, comprehending persons entitled to reversionary property from any quarter, persons treating with guardians, or those who are in the nature of guardians, for it is not necessary that they should be so strictly if they possess property in the nature of guardians: *Barnardiston* v. *Lingood* (3); *Gwynne* v. *Heaton* (4); *Pierce* v. *Waring* (5). The principle of the relief is not merely youth and inexperience, for any transaction while the account remains unsettled shall be set aside as long as one party is in the power of the other. Another class of agreements at which the court looks with great jealousy is that between trustees and cestui que trust, a subject, upon which Lord Eldon states his opinion with great precision in *Gibson* v. *Jeyes* (6), *Ex parte Lacey* (7), and *Coles* v. *Trecothick* (8); that a trustee, before he can treat with his cestui que trust, must discharge himself from the office of trustee and communicate all the knowledge he has acquired. What Lord Hardwicke says in *Earl of Chesterfield* v. *Janssen* (9) is rational and sensible with reference to the principle stated by Lord Eldon, that it is incumbent upon parties in such a situation to show that all is fair and proper.

As to the doctrine of confirmation, the party must not remain in the situation in which he was when the imposition was originally practised upon him; whether that was a state of ignorance or distress. In *Cole* v. *Gibbons* (10), *Cole* v. *Gibson* (11), and *Taylour* v. *Rochford* (12), the ground upon which transactions of this description may be confirmed appears. In *Earl of Chesterfield* v. *Janssen* (9) the Lord Chancellor and the judges held that the party confirming should know all the circumstances, and should stand so unconnected with the preceding transaction as to have the complete power of determining, as upon an original act, whether he would

A do it or not. In *Crowe* v. *Ballard* (13) Lord Thurlow held clearly that the confirmation could not be by an act done under the influence of the former transaction. *Cocking* v. *Pratt* (14), and *Griffith* v. *Frapwel* (15) there cited, where, though the agreement had been confirmed by decree, it was upon a bill of review set aside. *Wiseman* v. *Beake* (16) is a strong authority. The relief is administered, not only for the sake of the individual, but upon grounds of public policy.

B *Sir Samuel Romilly*, *Alexander* and *Leach* for the defendants, Smith and his wife: The law of this court is not that a trustee may not purchase from his cestui que trust. It was never determined that a contract should be set aside merely upon that point. *Coles* v. *Trecothick* (8) is an express decision to the contrary. That case was not decided in any peculiar circumstances except that Trecothick knew C that Coles, to whom he sold, was constituted a trustee for the sale of the estate and consented to sell to him, yet it was held that the contract should stand. It is true the court looks with great jealousy upon a contract between such parties, and it is incumbent upon the trustee, if a suit is instituted during his life, to prove that the cestui que trust knew, not only that he was selling to his trustee, but also what he was selling, and that he had all the information the trustee could give him. That, D however, is the law of the court only where the transaction is impeached during the life of the trustee, imposing upon him the necessity of showing the purity of the transaction only where it is possible for him to do so, and a person who by his delay has made that impossible, as in this instance, cannot expect the interference of the court. The trustee, who alone knew whether the information was given, and all the other circumstances, died before the transaction was impeached. In such a E case everything is to be presumed against the plaintiff: viz., that the trustee could have shown to the satisfaction of the court all the circumstances relating to the property as well as the exact amount of it.

The circumstances of the subject of this trust must be taken into consideration. A sale immediately after the death of the testator would in the instance of a West India estate have been most destructive. A considerable part of the property con- F sisted of debts which could not be immediately paid. As to the objection that the consideration was not immediately paid, the contract was to pay, not in ready money, but by instalments. A contract cannot be set aside merely upon the inadequacy of the consideration. The test, represented as Lord Thurlow's (*Gwynne* v. *Heaton* (4), 1 Bro. C.C. at p. 9), that the inequality must be so gross as to produce an exclamation depending upon the particular disposition and temper of the judge, G cannot be just. This must also be considered with reference to the large premium upon remittances by bills payable in London so that £100 paid in the island will not be more than £75 here; the casualties and fluctuation to which property of this nature is liable, and the doubts as to Morse's title subject to which Vanheylin purchased. All these circumstances must have great weight upon the question as to the adequacy of the consideration.

H Then the transaction of 1790 is a complete confirmation. Contracts that are considered as against public policy are to be laid out of view, not admitting confirmation as marriage brokage bonds, etc. But that doctrine is never applied to the case of a person taking advantage of another in a bargain, and the case of trustee and cestui que trust fall within that class. The court has said, not that contracts between trustee and cestui que trust, but that a sale by a trustee to himself shall I be set aside on principles of public policy, without regard to the fairness of the transaction. *Cole* v. *Gibbons* (10), an extremely material case, determined by one of the greatest of your Lordship's predecessors, Lord Talbot, has established the law upon this subject. In this case, as in that, the proposition came from Morse, not from Vanheylin, and Morse had attempted to sell to other persons. That is an instance of a most extravagant bargain, advantage taken of extreme misery, circumstances to which the original transaction in this case cannot be compared. *Anon.* (17), before Lord Cowper, is another instance of confirmation where the first

transaction was the effect of distress. MR. COX in his NOTE (3 P.Wms. 294, note E) states the accurate result that the party must be fully apprised of his right to be relieved. *Taylour* v. *Rochford* (12) has no application. The act supposed to be a confirmation being as much tainted by fraud as the original transaction.

In *Crowe* v. *Ballard* (13) LORD THURLOW did not mean that there can be no confirmation unless the original transaction is quite undone and annihilated. If that is the effect, there would be inconsistency in describing the second transaction as a confirmation. It would be a new transaction. *Beaumont* v. *Boultbee* (1) turned upon such particular circumstances that it cannot be an authority, and it was a case, not of confirmation, but of long acquiescence merely. *Purcell* v. *McNamara* (2) also depends upon a great variety of circumstances. If the party, aware that he was deceived and had a right to set aside the transaction, as he had not a knowledge of the accounts, upon mature deliberation chooses, in consideration of a further sum, to say he will not then look into the accounts, but will confirm that transaction which he knows he may set aside, it will be impossible to impeach that confirmation, yet his eyes are not more open in the second transaction. He knows nothing of the accounts then, and does not look into them. Suppose this suit compromised upon the same ground, the plaintiff may come at a future time, alleging that still he knows nothing of the accounts, and, therefore, is entitled to set aside the compromise. Is it possible to set aside this second transaction five years afterwards, upon which £7,500 more is paid, the party is five years older, and is a man of the world guarded against transacting with trustees, and with this trustee particularly? If that can be done, there can be no confirmation. The consequences of the delay must be considered, families acting upon their supposed rights, putting the property in settlement, and applying it to other occasions. The mischief extends far beyond the mere loss of evidence. Admitting the rule requiring the trustee to give all information to the cestui que trust and to show that in a court of equity the laches creates an exception. Upon that the presumption is the other way, and the cestui que trust must show clearly by evidence that a fraud has been committed. Upon Green's answer it must be presumed, either that Morse had examined the accounts, or that Vanheylen supposed he had.

LORD ERSKINE, L.C.—The authorities, connected with this case are not many, and the principles are perfectly clear. One class of cases is that of contracts that may be avoided as being contrary to the policy of the law, which are interdicted for the wisest lessons. Of that kind are a deed of gift obtained by an attorney while engaged in the business of the author of that gift, a deed by an heir, when of age, to his guardian, and purchases of reversions from young heirs, when of age. The most remarkable case is *Welles* v. *Middleton* (18) in which LORD THURLOW said that Middleton deserved to be, and under other circumstances might have been, an object of that party's bounty, but the deed, taken by an attorney while he was the attorney of the party, could not be supported without striking at the root of property. He referred to *Walmesley* v. *Booth* (19), and *Saunderson* v. *Glass* (20), both cases of an attorney. To that class of cases I shall add the case of a trustee selling to himself. Without any consideration of fraud or looking beyond the relation of the parties that contract is void. In the case of the assignee or solicitor under a commission of bankruptcy purchasing the property, in all these instances, there is no necessity for evidence—the contract is interdicted by the policy of the law. I have no difficulty in saying, I should not have regretted to have found that the rule extended even to such a case as this. Finding that there is so much difficulty in supporting a purchase by a trustee from the cestui que trust that the transaction ought to be guarded with that necessary degree of jealousy, running so near the verge, it might be better embraced under the policy of the law.

In *Gibson* v. *Jeyes* (6), and *Ex parte Lacey* (7), LORD ELDON appears to have stated that, to maintain a contract between trustee and cestui que trust the relation must be dissolved, or the parties must agree to take the characters of purchaser

and vendor, the rule does not preclude a new contract, dismissing the trustee from that character. If the relation is dissolved altogether, they cease to be trustee and cestui que trust. But the language in which Lord Eldon expresses himself in *Coles* v. *Trecothick* (8) sufficiently explains all that was intended by those former passages. His Lordship in that case says (ante pp. 18, 19):

> "A trustee may buy from the cestui que trust, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, that the cestui que trust intended that the trustee should buy; and there is no fraud, no concealment, no advantage taken, by the trustee of information acquired by him in the character of trustee."

As to the effect of inadequacy of consideration, the principle is there put full as strong as I should be disposed to put it. If the court can discover that some advantage has been taken, some information acquired, which the other did not possess, though it is not to be precisely discovered, inadequacy, without going to the length of requiring it to be such as shocks the conscience, will go a vast way to constitute fraud.

As to the doctrine of confirmation, it stands upon several authorities, where a man, having been defrauded, with complete knowledge chooses to come again in contact with the person who defrauded him, abandons his right to abrogate the contract, and enters into a plain, distinct, transaction of confirmation. But when the original fraud is clearly established by circumstances, not liable to doubt, a confirmation of such a transaction is so inconsistent with justice, so unnatural, so likely to be connected with fraud that it ought to be watched with the utmost strictness and to stand only upon the clearest evidence as an act done with all the deliberation that ought to attend a transaction the effect of which is to ratify that which in justice ought never to have taken place.

As to the effect of length of time where there is no bar by the Statute of Limitations, a court of equity will never lay down as a general proposition that, though the fact that imposition has been practised is established, the party is too late, and by the accident of the death of the person who might have contradicted him shall be deprived of his right to relief. The true operation of length of time is by way of evidence, and, acknowledging the rule as to dealings between a trustee and the cestui que trust, and that the transaction should be more narrowly watched than in the case of strangers, yet it is to be examined according to the rules of evidence, standing upon the eternal principles of justice, and recognised by the whole theory and practice of the law of England. Considered in that way, length of time may have some operation, in what degree depends upon the circumstances of this case which are peculiar. Particular attention is due to the joint trust, in Vanheylin, Mitchell and Green, owing, therefore, a joint duty, Green a partner with Morse, and consignee. At the date of the original contract in 1785, Morse was an officer, and it does not appear, that he was in any particular distress. Green, with all the knowledge he must have had of the value of the real and personal estate, and who had married the sister of this young man, was made a co-trustee, in which respect this is much stronger than the case of a single trustee and cestui que trust. The fair presumption from such circumstances is that imposition would be avoided. The objection in the case that has been cited of an attorney having the party in his power is obviated in a great degree where there is another trustee consenting, a person of this description who derives no benefit from the contract. This is a peculiar feature in the cause. If Green were now living, and proved that this transaction was a fraud committed by Vanheylin, his testimony would not be entitled to any respect, the fraud, if any, being committed as much by him as by Vanheylin.

Another circumstance deserving attention is who first made the proposition. This is not a trustee looking round him, and fixing his eye upon this property as increasing in value. It is in evidence that Morse was determined to sell it, and, if he could not get what he wanted, that he would put it up at Garraway's, that he frequently

teased Vanheylin to purchase it, who was reluctant, but at last said he would go the length of giving £5,000. The debts due to the estate at that time were above £113,000; in 1790 they were £118,000: debts from all sorts of people, at a great distance, liable to accident, from the situation in the West Indies where debts and estates were frequently sold upon terms that at first have the appearance of fraud. There is nothing like pretium affectionis here. Yet I do not join in any panegyric upon Vanheylin's conduct though I may dismiss this bill, and I repeat that I should not have been sorry to have found that the rule reached this case. But this is a contract that cannot be dissolved except upon legal principles.

The effect of the transaction in 1790 is this. This gentleman, not a minor, not a lunatic, with his brother-in-law and other assistance near him, finding that this was a better thing than he imagined at the date of the contract in 1785, goes to Vanheylin, not charging him as having committed a fraud, but applying as cestui que trust to a person who had gained an advantage which a relation at least ought not to take, desiring that, as the property had improved, either the contract should be dissolved or Vanheylin should give him what it was then worth. An application was made to Green, as a common friend, each party standing upon his right, the plaintiff insisting that he should have more, but not on the ground of fraud, the other referring to the plaintiff's own brother-in-law standing in the same character as Vanheylin, a man who cannot be supposed to have an interest to join in a breach of his trust for the purpose of defrauding his brother-in-law and throwing money into the hands of another person with whom he does not appear to have been connected. There is no evidence of collusion with Vanheylin for that purpose. The second transaction, in 1790, is in its circumstances nothing like another fraud growing out of the former—the act of a man of full age, and all these circumstances within his reach and knowledge.

It does not rest there. At the time the plaintiff had by no means a title to the estate, and it is plain that he was perfectly aware that the infirmity of his title constituted one of the considerations of the contract. That infirmity, resting upon the local law, stood upon a claim by no means contemptible which was finally determined at the cockpit with great consideration upon an appeal from the judgment obtained in Jamaica. The plaintiff, so far from attempting to rescind what had passed, brought an action standing upon his contract for the remainder of the consideration. The defendant did not, as in *Wiseman* v. *Beake* (16), endeavour to draw him into a ratification, but came to this court to do what was dishonest certainly, saying he had a right to the money, but there was a warranty in the contract of his title to the estate, and insisting that, until it was seen what became of Edward Morse's claim, the action should be enjoined. The plaintiff, with complete knowledge of all the circumstances (and he could not then be under the age of thirty), in his answer to that bill insists that the court should dissolve the injunction against him, and would have obtained the advantage of his suit if not prevented by the insolvency of Vanheylin's estate from which he took a dividend, founded upon the contract the existence of which he now denies. Upon *Wiseman* v. *Beake* (16), if that case is to be considered as an authority, I do not view this in the light of confirmation, but as repelling the evidence.

The point upon the length of time is put thus—that I must shift the proof from the one to the other. I do not know that I am to go that length. I am to see that the transaction was fair, that no advantage was taken, that there was no concealment. Length of time operates only as it does in the instance of rights of way and other incorporeal hereditaments, upon the infirmity attending all human testimony, where witnesses are suffered to die before the claim is made, much is to be presumed against it. Charters, and even an Act of Parliament, as Lord Mansfield says, have been presumed: see *Hillary* v. *Waller* (21). In the instance of an annuity open to objection under the Act of Parliament 17 Geo. 3, c. 26 [relating to grants of life annuities, repealed by Statute Law Revision Act, 1861], the Act being imperative, Lord Rosslyn considered the court bound, notwithstanding the party had lain by.

A But LORD KENYON'S opinion upon that was so different, that, where I pressed a case upon him, the party not having lain by, but the witness being dead, insisting that the Act imperatively bound the court, the answer of LORD KENYON was that there was nothing in the Act binding the court to believe an affidavit, that could not receive contradiction. In *Symmons* v. *Mortimer* (22) also LORD KENYON says the length of time which had elapsed since the granting of the annuity and the defen-
B dant's having lain by till the death of the agent, by whom the business was negotiated, and till all the evidence of the transaction, except what he himself had disclosed, was lost, might perhaps have been a sufficient answer to this application. If Vaheylin was living, he might say the plaintiff had an account, and there were witnesses who could prove the integrity of the transaction. How is it possible that length of time shall not operate in this way—not to induce the court to refuse to
C hear the plaintiff, but that unfortunately without design he has put it out of the power of the court to see the wrong with the distinctness that is necessary in order to act.

As to granting an issue, the case could not be made out at law. The evidence, the acquiescence, and the length of time are strong against the claim. Green is dead; and, if living, he could not upon any principle be admitted to say, a co-trustee
D and relation had been engaged in a scandalous collusion to defraud the plaintiff.

Bill dismissed.

E

GARTHSHORE *v.* CHALIE AND OTHERS

F [LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), June 15, 19, July 4, 5, 9, 1804]

[Reported 10 Ves. 1; 32 E.R. 743]

Settlement—Marriage settlement—Covenant by husband to pay widow part of estate after death—Intestacy of husband—Effect of covenant on widow's statutory right to share of estate—Equitable doctrine of performance.

By a covenant in a marriage settlement the husband undertook that, if the
G wife should survive him, his representatives would, within six months of his death, convey and pay to her a share of his estate. He died intestate.

Held: applying the equitable doctrine of performance, the widow was not entitled in addition to the payment to her under the covenant to a widow's statutory share of her husband's net personal estate.

Notes. Considered: *Goldsmid* v. *Goldsmid* (1818), 1 Swan. 211; *Adams* v.
H *Lavender* (1824), M'Cle. & Yo. 41; *Glengal* v. *Barnard* (1836), 1 Keen, 769; *Re Hall, Hope* v. *Hall*, [1918] 1 Ch. 562. Referred to: *Wathen* v. *Smith* (1819), 4 Madd. 325; *Lang* v. *Lang* (1837), 1 Jur. 472; *Salisbury* v. *Salisbury* (1848), 6 Hare, 526; *Lett* v. *Randall, Lett* v. *Dormer* (1855), 3 Sm. & G. 83; *Patch* v. *Shore* (1862), 2 Drew. & Sm. 589; *Willis* v. *Willis* (1865), 34 Beav. 340; *James* v. *Castle* (1875), 33 L.T. 665.

I As to rights of intestates' widows, see 16 HALSBURY'S LAWS (3rd Edn.) 396–402, 414–416; and for cases see 24 DIGEST (Repl.) 940–945, 963–965. As to equitable doctrine of performance, see 14 HALSBURY'S LAWS (3rd Edn.) 609–611; and for cases see 30 DIGEST (Repl.) 521 et seq.

Cases referred to:

(1) *Randall* v. *Willis* (1800), 5 Ves. 262; 31 E.R. 577; 40 Digest (Repl.) 524, *344*.

(2) *Jones* v. *Martin* (1798), 5 Ves. 266, n.; 6 Bro. Parl. Cas. 437; 8 Bro. Parl. Cas. App. I 242; 31 E.R. 582, H.L.; 40 Digest (Repl.) 528, *382*.

(3) *Lewis* v. *Madocks* (1803), 8 Ves. 150; 32 E.R. 310, L.C.; 44 Digest (Repl.) 115, *947*.

(4) *Blandy* v. *Widmore* (1715), 1 P. Wms. 324; 2 Eq. Cas. Abr. 352, pl. 11; 2 Vern. 709; 24 E.R. 408, L.C.; 20 Digest (Repl.) 525, *2372*.

(5) *Lee* v. *Cox and D'Aranda* (1747), 3 Atk. 419; 1 Ves. Sen. 1; 26 E.R. 1042, L.C.; 20 Digest (Repl.) 525, *2374*.

(6) *Barret* v. *Beckford* (1750), 1 Ves. Sen. 519; 27 E.R. 1179, L.C.; 20 Digest (Repl.) 513, *2218*.

(7) *Lechmere* v. *Lady Lechmere* (1735), Cas. temp. Talb. 80; 2 Eq. Cas. Abr. 31, 501; 25 E.R. 673; sub nom. *Lechmere* v. *Earl of Carlisle*, 3 P. Wms. 211, L.C.; 20 Digest (Repl.) 369, *916*.

(8) *Sowden* v. *Sowden* (1785), 1 Cox, Eq. Cas. 165; 1 Bro. C.C. 582; 29 E.R. 1111; 20 Digest (Repl.) 522, *2330*.

(9) *Kirkman* v. *Kirkman* (1786), 2 Bro. C.C. 95; 29 E.R. 55, L.C.; 20 Digest (Repl.) 519, *2285*.

(10) *Rickman* v. *Morgan* (1788), 2 Bro. C.C. 394; 29 E.R. 220; 20 Digest (Repl.) 498, *2070*.

(11) *Devese* v. *Pontet* (1785), 1 Cox, Eq. Cas. 188; Prec. Ch. 240, n.; 29 E.R. 1122; 20 Digest (Repl.) 513, *2219*.

(12) *Tinney* v. *Tinney* (1743), 3 Atk. 8; 26 E.R. 807, L.C.; 17 Digest (Repl.) 309, *1158*.

(13) *Walker* v. *Walker* (1747), 1 Ves. Sen. 54.

(14) *Vizard* v. *Longdale* (1718–19), cited 3 Atk. at p. 8; 4 Ves. at pp. 392, 395.

(15) *Couch* v. *Stratton* (1799), 4 Ves. 391; 31 E.R. 199, L.C.; 20 Digest (Repl.) 525, *2383*.

(16) *Villareal* v. *Lord Galway* (1769), Amb. 682.

(17) *Haynes* v. *Mico* (1781), 1 Bro. C.C. 129; Rom. 41; 28 E.R. 1031, L.C.; 20 Digest (Repl.) 506, *2126*.

(18) *Richardson* v. *Elphinstone* (1794), 2 Ves. 463; 30 E.R. 726; 20 Digest (Repl.) 514, *2230*.

(19) *Pickering* v. *Earl of Stamford* (1793), 4 Bro. C.C. 214; 2 Ves. 272; 29 E.R. 858; 20 Digest (Repl.) 555, *2602*.

(20) *Wilcocks* v. *Wilcocks* (1706), 2 Vern. 558; 23 E.R. 961; 20 Digest (Repl.) 522, *2337*.

(21) *Oliver* v. *Brickland* (1732), cited in 3 Atk. at pp. 420, 422; 26 E.R. 1043; 20 Digest (Repl.) 526, *2386*.

(22) *Clark* v. *Sewell* (1744), 3 Atk. 96; 26 E.R. 858, L.C.; 20 Digest (Repl.) 510, *2176*.

(23) *Davila* v. *Davila* (1716), 2 Vern. 724; 23 E.R. 1075, L.C.; 24 Digest (Repl.) 942, *9531*.

Bill for an order in the administration of an intestate's estate, and for an account.

By indentures previous to the marriage of John Chalie and Susanna Clarmont, dated May 11, 1763, John Chalie covenanted, in consideration of the marriage and a portion of £5,000, for making provision for his wife in case she should survive him, and for the issue of the marriage, that, if he should happen to die before Susanna without leaving any child or children of the marriage living at the time of his decease and without leaving her enceinte of any child or children which should be afterwards born alive, then, and in such case, his heirs, executors, etc., should within six months after his decease, convey, pay, assign, transfer, or deliver over, unto and for the proper use and benefit of Susanna, her heirs, executors, etc., full five-eighth parts of such real and personal estate as he or any other person in trust for him should be seised, possessed of, or entitled to, at his decease, and, if it should happen that he should die before Susanna, leaving any child or children of the marriage living at his decease, or leaving her enceinte

of one or more child or children which should afterwards be born alive, then and in such case the heirs, executors, etc., of Chalie would within six months next after his decease, convey, pay, assign, etc., unto and for the proper use and benefit of Susanna, her heirs, executors, etc., one full and clear moiety, or half part of all such real and personal estate as he or any person in trust for him should be seised, possessed of, or entitled to, at such the time of his decease. The mother of Chalie also covenanted, in consideration of natural love and affection for her son, by will or deeds, to give, bequeath, or secure, £2,500 at least to him, his executors, etc.

The marriage took place. Chalie died in August, 1803, intestate, leaving his widow Susanna, his daughter Jane Garthshore, and his grandson Henry Skrene, the son of another daughter, deceased, his only next of kin, surviving him. His widow obtained administration. Jane Garthshore died soon after her father, and her husband, having taken administration to her, filed the bill against Mrs. Chalie and Henry Skrene, the infant, charging that the former was entitled only to one moiety of the personal estate and not to one third of the remainder thereof under the Statute of Distribution, 1670 [see now Administration of Estates Act, 1925, ss. 46 to 49, as amended by Intestates' Estates Act, 1952, s. 4, Sched 1], and praying an account. The defendant, the widow, insisted upon her claims under the settlement, and also to one-third of the residue under the statute.

Romilly and *Bell* for the plaintiff; *Lloyd* and *Wilshaw* for defendants in the same interest: The object of Mr. Chalie by the covenant in his marriage settlement clearly was, not to constitute a debt to his wife in the first place, but to make a complete provision for her, thereby purchasing for his children a clear moiety of his real and personal estates at the time of his death. This is not a specific lien, but a general engagement affecting all his property at his death, intended only to secure her against any disposition by will, according to *Randall* v. *Willis* (1) and *Jones* v. *Martin* (2). In *Lewis* v. *Madocks* (3) those cases were very much considered by your Lordship. The conclusion is that any fair application is good, and nothing passes but the residue after all the engagements of the property which is the subject of the covenant are satisfied. The court leans strongly against a double performance of a duty, and, accordingly, it has been decided that where a man, having covenanted to leave a certain sum to his wife, has died intestate and she has taken under the Statute of Distribution, 1670, a sum equal or greater, that is a satisfaction or performance: *Blandy* v. *Widmore* (4); *Lee* v. *Cox and D'Aranda* (5); *Barret* v. *Beckford* (6), where Lord Hardwicke considers it an actual performance, distinguishing between performance and satisfaction. The same principle appears in *Lechmere* v. *Earl of Carlisle* (7), and *Sowden* v. *Sowden* (8), where land, permitted to descend, was held a performance of a covenant to purchase. The former of those cases establishes that there may be a part performance. The result of the authorities establishes a distinction between the cases of satisfaction and performance. The former have gone very much upon minute and subtle reasoning with reference to the intention, but upon the question of performance, a mere question of fact, the rules of equity are similar to those of law, and are not extended further. As to that, it is sufficient if the thing covenanted to be done is done, without reference to the intention, though the covenantor does nothing, and the effect is obtained by the mere operation of law. In this case the share of the widow under the statute, being only a third, would not satisfy her claim under the covenant, in the event, to a moiety of the personal estate, but it is a part performance, and, therefore, she is entitled only to so much more as will make up the deficiency. It is true that Lord Thurlow in *Kirkman* v. *Kirkman* (9) expresses a doubt whether, if the question was new, the distributive share under the statute ought to be held a performance, but he considered the point as bound by the authorities. His Lordship also in *Rickman* v. *Morgan* (10) considers the case of performance as depending ultimately upon the intention,

and upon the same principle as satisfaction. That, however, is questionable, and the distinction is clearly recognised by LORD KENYON in *Devese* v. *Pontet* (11). There can be no doubt, that this provision is a bar of dower: *Tinney* v. *Tinney* (12); *Walker* v. *Walker* (13); *Vizard* v. *Longdale* (14).

Spencer Perceval, *Richards* and *W. Agar* for the defendant, Mrs. Chalie: As to the last point, *Vizard* v. *Longdale* (14) is shaken by LORD ROSSLYN in *Couch* v. *Stratton* (15). The question whether dower is barred or not goes upon the intention. That was LORD HARDWICKE'S idea in *Tinney* v. *Tinney* (12), and LORD CAMDEN'S in *Villareal* v. *Lord Galway* (16). Upon the principal question, whether the distributive share of the residue is to be taken as a part performance or satisfaction of the claim under this covenant, there is no indication of that intention, and the intention must be looked to, as LORD THURLOW says in *Rickman* v. *Morgan* (10), both as to performance and satisfaction. The provision by this covenant was not intended to be a complete provision. The expression is, "for making some provision." There is no case near this in circumstances. Certainly *Blandy* v. *Widmore* (4) and *Lee* v. *Cox and D'Aranda* (5) are not. The authority of those cases is much shaken by *Haynes* v. *Mico* (17), *Devese* v. *Pontet* (11), and LORD THURLOW'S observation in *Kirkman* v. *Kirkman* (9), who says also that they can only apply to cases where the whole is satisfied. In those cases the effect of the intestacy, being a complete performance and satisfaction, was held a leaving, within the covenant. They are certainly not to be extended. In this instance the whole is not satisfied. The time also limited by the covenant, is six months after his decease, but the widow must wait till the end of a year for her share of the residue. The time of commencement, therefore, as in *Richardson* v. *Elphinstone* (18), is not the same. This is not a question with creditors, but between the widow and mere volunteers, claiming under the statute. *Pickering* v. *Earl of Stamford* (19) establishes the right.

July 9, 1804. **LORD ELDON, L.C.**—Feeling as LORD THURLOW did upon this point, that authorities clash with authorities and it is extremely difficult to reconcile them, and, therefore, to be certain that I am right in the principle drawn from them, I think it better to give the judgment I have formed, not without considerable doubt, than to delay it. The question arises upon the construction of a contract between parties, to stand in the relation of husband and wife, who might, therefore, either expressly stipulate with each other, or, if they thought proper, act upon the implied stipulations the law would make for them. But it is material that it is a contract which may have reference to what the wife and children might be entitled to claim of the husband's property, and upon such a contract, as LORD HARDWICKE says, it is not unnatural to consider it with reference to the rights they would have upon his property at his death if no such stipulations had been entered into. Though the professed object of the husband's covenant is for making some provision for his intended wife and for the issue, there is no provision expressly for the issue, and clearly it was competent to the father by act in his life, or at his death, to disappoint every expectation of what the issue were to derive immediately from him, and the hope that the wife, taking an interest from her husband, might be enabled to provide for them is of a nature that cannot be called a provision. But it is a circumstance that shows the parties were contemplating the case that issue, if there should be any, might be the next of kin. The period of time, specified in the covenant, six months, has been in cases of satisfaction considered material, and in cases of performance little regard has been paid to it by the court.

This settlement is not like most, if not all, in the cases referred to, viz., by an engagement to provide for the wife by leaving, paying or securing, a sum of money. The scheme of this settlement is to increase that proportion of her share of his personal property at his death beyond what she would take if he should die intestate, her title also being a mixed title to an interest in his real as well as his

A personal estate. The cases that have been referred to commence with *Blandy* v. *Widmore* (4). Formerly that case, and *Lee* v. *Cox and D'Aranda* (5), were respected as unquestionably good authorities, and I do not recollect anything passing in this court that went the length of disputing whether those decisions were right. It is material to observe what are the avowed principles, as founded in analogy, upon which those cases are supposed to be determined.

B In *Blandy* v. *Widmore* (4) the next of kin were not children. LORD KENYON in *Devese* v. *Pontet* (11), according to a note, published by MR. FINCH in his edition of PRECEDENTS IN CHANCERY, 240, which was supposed to have been corrected by his Lordship, uses the expression that in *Blandy* v. *Widmore* (4) there was a legal performance of the covenant. In that case the court must have understood the intention to be that, if the wife took a share of the personal estate, that share C would satisfy her in the construction of the covenant as between husband and wife, the rather, as the analogy referred to is to be collected from *Wilcocks* v. *Wilcocks* (20). It is now settled, whatever may have been LORD THURLOW'S difficulty, that, if there is a covenant to purchase and settle lands upon the first and other sons in tail mail and the party purchases lands of less, equal, or greater value than the sum he covenanted to lay out, taking a conveyance to him and his D heirs and dies, leaving a son who would be tenant in tail under the settlement and a granddaughter by an elder son, deceased, upon whom, no settlement being made, the lands descend, that purchase would be, not in all senses a performance, but a sort of mixed case between performance and satisfaction that would bar any demand against the assets of the grandfather. *Sowden* v. *Sowden* (8) proves that beyond all controversy. The father there under the covenant to lay out £2,000, E had no intercourse with the trustees upon the purchase he made for £2,150. He advanced nothing to them. They, therefore, laid out nothing. But taking to himself that purchase so made with more money than he had covenanted to lay out, he permitted it to descend, and LORD KENYON said it was much too late to argue it, and was clearly of opinion that the purchase must be taken to be in performance of the covenant, or, as he expresses it, an act done towards per- F formance of it. It would have been satisfactory of LORD KENYON had considered LORD THURLOW'S difficulty. Upon the principle of LORD KENYON'S decision it is very difficult to say that, when once you have marked that act as done towards performance of the covenant, you could permit the effect to be done away by any subsequent accidents. It would, therefore, impose upon the granddaughter the necessity of parting with the estate descended upon her, unless presumptio juris G et de jure could be raised, or it could be made out by evidence that it was not an act done towards performance.

In *Lechmere* v. *Earl of Carlisle* (7), intermediate between *Wilcocks* v. *Wilcocks* (20) and *Sowden* v. *Sowden* (8), it is said truly a man cannot buy all the land covenanted to be bought at once; also, that he cannot find land precisely of that H value. Those circumstances, therefore, do not tell much. But in the expressions of the judges we cannot find to what extent they felt that they must press the consequences of their opinion in all the circumstances that might occur between different branches of the family. With respect to *Blandy* v. *Widmore* (4), if the case were quite new, it would be difficult to answer HOOPER'S argument which embraces every topic that has been urged in subsequent cases. The observation is I that the covenant constitutes nothing more than an ordinary debt, and performing that by payment you do not advance to the consideration of the undisposed residue which the law gives and not the party. He also observes the distinction, relied on in *Lee* v. *Cox and D'Aranda* (5), that, if it is said the party left, it cannot be said, he paid. The Lord Chancellor says the intestate has left his widow £620, and upwards "which she, as administratrix, may take presently upon her husband's death." These are the words LORD THURLOW adverts to, as having been much relied on. But what is their wonderful efficacy? Can it be said that, if the widow gets the administration, she shall have the £620 satisfied out of her share of the

residue, but, if she does not choose to take it and some other person administers, it shall not be so satisfied? A

Next, what is meant by her being able to retain it? As to her distributive share, she could retain it only by paying it to another person, for in her own hands it would remain liable to all debts unsatisfied in the course of a year. If she could only have it in the character of administratrix, she could not have it as a wife. According to LORD THURLOW, as represented in *Kirkman* v. *Kirkman* (9), it seems B to turn upon the fact of administration, and not upon the ground, on which the court seems to have decided, that the wife and issue taking by the law some interest in the personal estate of the covenantor, if he died intestate, the construction of the covenant upon the whole intention between such parties should be that the property the wife would take in consequence of that circumstance should be applied in performance of the covenant—that a man required to do something C actively should be considered as performing his covenant by a passive permission of the descent of an estate which prima facie and without the presumption of this court cannot be considered an act according to his covenant.

In *Lee* v. *Cox and D'Aranda* (5), it is clear that LORD HARDWICKE thought the circumstance that the wife was administratrix was by no means the leading or only circumstance upon which the case was to be decided, though he noticed it, as D relied on by LORD COWPER [in *Blandy* v. *Widmore* (4)]. According to MR. JODDREL'S note of that case the Lord Chancellor concludes that the distributive share was a performance. He said it was exactly similar to *Blandy* v. *Widmore* (4). There was no breach in his lifetime, which distinguishes it from *Oliver* v. *Brickland* (21), which is right. The covenant having been broken in his life. That the distinction that the covenant in the case before him was to pay and in *Blandy* v. E *Widmore* (4) was to leave was much too slight for this court to form any difference upon it in its judgment.

So LORD HARDWICKE approves *Blandy* v. *Widmore* (4), and I am satisfied of that by his own note, for during the Attorney-General's argument, pressing the topics that have been urged in this case, LORD HARDWICKE repeatedly makes this short note: "*Blandy* v. *Widmore* (4) is an answer to this." Both the printed and F manuscript authorities, therefore, sanction that case as good law in this court upon the construction of a covenant between husband and wife as to what one party is to have at the death of the other, that it is to be construed with reference to the circumstance that there is a claim upon the property independent of the covenant, and does not go upon the accident whether the wife takes administration or not, and I should have regretted to find that it depended upon the circumstance G that in the one case, not taking administration, she is to have both, but if on behalf of her children she takes administration, she is not to have both.

Those cases are distinct authorities that where a husband covenants to leave, or to pay at his death, a sum of money to a person who, independent of that engagement by the relation between them and the provision of the law attaching upon it, will take a provision, the covenant is to be construed with reference to H that, and the court will not look upon the slight difference between leaving and paying or whether payment is to be within three months or six months. In that respect there is always a difference upon what is to be taken, in a sense, at the end of twelve months, but which, I agree, in another sense is to be taken from the death of the testator, for the other period is only for convenience, and, there is no doubt the property is vested at the death of the party. If a case was produced, I in which it was quite clear that there were no debts, the court would give the fund to the party notwithstanding there had not been a lapse of twelve months.

Blandy v. *Widmore* (4) and *Lee* v. *Cox and D'Aranda* (5) stood without imputation until *Haynes* v. *Mico* (17), which came on very soon after LORD THURLOW became Chancellor. In *Barret* v. *Beckford* (6) both the argument and the decision admit the authority of *Blandy* v. *Widmore* (4) and *Lee* v. *Cox and D'Aranda* (5), but under the particular circumstances it was held that the disposition of a moiety

of the residue could not be called a performance, and there was not similarity enough between the provisions to make it a satisfaction, and it was observed that they did not come out of the same fund. In *Haynes* v. *Mico* (17), where the testator had bound himself to leave to his wife £300 to be paid in one month after his decease, and by his will gave her £500 payable within six months after his decease, Lord Thurlow at first found it very difficult to say the £500 should not be a performance, or a satisfaction if not a performance, and to distinguish it from *Blandy* v. *Widmore* (4) and *Lee* v. *Cox and D'Aranda* (5), but after a strong inclination to hold it a satisfaction he found himself obliged to consider whether it was a performance, being of opinion that, if not a satisfaction, it was not a performance, and that, according to *Clark* v. *Sewell* (22) and other cases, if the party was a mere stranger, the difference of the time of payment was not enough to show that the one was debt and the other bounty. It is impossible to state a slighter difference, but Lord Thurlow thought it sufficient to determine that the latter provision was not a satisfaction. I believe also it is accurately stated upon Lord Thurlow's authority (notwithstanding what his Lordship is represented to have said in *Kirkman* v. *Kirkman* (9)), that if in *Blandy* v. *Widmore* (4) and *Lee* v. *Cox and D'Aranda* (5) what is taken in the second instance was properly held a performance, because it was more, it must, if it had been less, have been taken to be a part performance. Upon that case and *Devese* v. *Pontet* (11) I think myself entitled to say, as Lord Alvanley held in a subsequent case, that it was not the intention of Lord Thurlow and Lord Kenyon to shake *Blandy* v. *Widmore* (4) and *Lee* v. *Cox and D'Aranda* (5), and they are unshaken.

It is very difficult to answer the objection that the wife in *Devese* v. *Pontet* (11) might have been enceinte at the testator's death, and the question put by Lord Kenyon how the residue, given to her absolutely, was to be a satisfaction of that which, in one event that might have happened at the testator's death, was given to her but partially, viz., for life only. I cannot go along with the language which puts great stress, as applying to residue, upon those particular circumstances, whether it was given within six months or ten months, etc. There is not much weight in those expressions, for he must be considered as applying those limited periods to residue as he could apply them to residue. *Couch* v. *Stratton* (15) seems to fall under the same consideration. The judgment is extremely short, but I take it to mean that the covenant was entire, and, therefore, if the £4,500, not given absolutely, could not be considered satisfied out of the distributive share, neither could the £1,500. The former stands upon the same principle as *Devese* v. *Pontet* (11). The judgment, which resorts to the entirety of the covenant against satisfaction, seems to admit that it is questionable whether, if that circumstance had not occurred, the judgment ought not to be otherwise. It does not contradict the former cases, or mean to shake them.

If *Blandy* v. *Widmore* (4) and *Lee* v. *Cox and D'Aranda* (5) are to be considered as authorities, do the circumstances of this case distinguish it from them? First, it is said to be distinguished in the respect that the widow's share under the statute being one-third, is less than the share she was to take under the settlement, and that brings it to the question whether, if upon the ground of performance the distributive share may be applied in satisfaction, a part performance may not be applied in part satisfaction. Lord Hardwicke's principle means that what the wife could get of the distributive share she would take in performance. Why is it put upon this ground? The reason is that the party has recovered what she could recover by the obligation. In an action she would have recovered the whole, and the covenant would be performed. But it must follow that if she had received a part, she could recover nothing as covenantee but what would satisfy her as much as in the other case she would have been satisfied by receiving the whole. In *Barret* v. *Beckford* (6), which occurred soon after *Lee* v. *Cox and D'Aranda* (5), those cases are considered as establishing in principle not only what performance, but what part performance, would do. If the principle is that the husband, looking to the

event of his death, in which event she will have an interest in his property by operation of law, therefore, declines to give her any interest in his life, this court adverting to the circumstance that she will take part of his property at his death (and the court must advert to that), it is very difficult to say that, if she receives £1,000 in discharge of £1,000, that sum being her residuary share, she takes it in full satisfaction of £1,000 covenanted to be paid to her as it is the full amount, but if her share in the residue amounts only to £999, she shall have, not merely the additional pound, but the sum of £1,999 (for that must be the consequence) where the residue may be only £2,000, and she may be contending with others than her children. That is not the natural or the legal meaning of such a covenant.

It is said that there is a difference, as subsequent cases have determined, that where a testator by will gives a sum of money payable under different circumstances from those attaching upon the sum under the covenant, *Blandy* v. *Widmore* (4) and *Lee* v. *Cox and D'Aranda* (5) do not apply. First, in those cases the testator by his covenant was bound to pay, or to leave a particular sum of money; next, the question does not arise whether he meant that the intestate's residue should be applied to that particular sum of money so given, but when the testator sets about an act, expressly and actively giving to his wife, the question must always be both upon his meaning when executing his covenant, and, whether the meaning of both is satisfaction by the latter. Those cases upon this principle have been universally stated as cases that are not to disturb the law, if the question is what is to be done with reference to the intention of the covenantor as to the intestate's estate if he should happen to die intestate.

But this case goes further, for whatever may be the right decision upon all the cases together, considering *Blandy* v. *Widmore* (4) and *Lee* v. *Cox and D'Aranda* (5) as cases of covenant for a stipulated sum and an intestacy, and the latter cases as cases of covenant for a stipulated sum and a legacy, which prima facie imports a bounty and an intention of kindness absent in the case of intestacy, this is a case in which the covenantor, regarding the connection he was about to form, that it might produce children, and that the rights of both his wife and children in his property upon an intestacy would be fixed by the law, does not covenant to leave, or order his executors to pay to her a particular sum, but says that he will alter the proportion in which his widow, and his children, or, if none, his next of kin, shall take his property, providing, therefore, for the circumstances in what proportions those shall take his property who, if he died intestate, would take in given proportions the property with reference to which he was making a provision. There is no positive provision for the issue, I admit. But they had in contemplation, that there would be issue, and, therefore, means were to be used to provide for them or to enable others to do so. You must, therefore, consider what would naturally be the meaning of persons having that in contemplation. Whatever is the doctrine upon a will, which is very well stated in *Pickering* v. *Earl of Stamford* (19), and agreeing with that case, which is an authority that the widow is not barred in such a case, because the intention was to bar her from her thirds for the sake of persons under that instrument to take the residue, I do not know that it will apply to a marriage agreement, for soon after *Blandy* v. *Widmore* (4), upon a marriage agreement the direct contrary of that was held in *Davila* v. *Davila* (23)—that the true meaning of such an agreement between husband and wife was that the wife, receiving that sum of money, should consider herself as if she had not survived her husband.

Upon these cases, then, the question is whether, where a sum of money or a proportion of the testator's property is to be given, I am authorised to say that the intention was that the wife, receiving such a provision, in the one case by the payment of a sum of money, in the other by a proportion of the estate and effects, is to accept that in lieu of her third of the personal estate. Suppose this were a covenant for a third, if there should be children, and for half, if none. The question would be whether upon the whole instrument that is more or less than

A that as to her, if he does not make a will giving her so much, he should be considered as intestate, and, that, notwithstanding any disposition, she might claim, as if he had died intestate. It is very difficult upon that to say there ought to be a difference, because the terms are more in her favour than they would be in that case. It is also very difficult, and it is not natural, upon a marriage agreement, contemplating the rights upon the marriage and the dissolution, to suppose
B an intention, that she should have both. These arguments that it is natural or unnatural, are not very conclusive, but in aid of others assist the reasoning. If it is considered material for whom he is to be supposed a purchaser, the answer is for those for whom he may happen to be so. He contemplates no other relation than issue, for no other is mentioned. He might have defeated them, but his means of providing for them might be supplied either by testament or intestacy.
C Contemplating upon the face of the instrument that there might be children, it is not natural, that he should intend to give to his widow one moiety as against the children and that the effect of the Statute of Distribution should also give her as against those children, from whom under the express stipulation she had already taken more than she would under an intestacy, one third more than would have been supplied to the children passively under an intestacy.

D Another circumstance is that there is a material difference between a sum of money secured by a covenant and given by a will, and a proportion of effects given by a covenant and accruing by intestacy, especially if the proportion under the covenant is a proportion of effects constituting residue, for it is more easy to suppose, the covenantor, agreeing that his wife should take a proportion of his residue, meant that she should take it when the residue was formed than that a
E man, who has secured an ascertained sum by a covenant, meant that to be satisfied as a sum of money constituting a debt, as such, out of such a thing, composed in such a way, as a residue is. If I am not to take the husband to be a purchaser for his issue, still it is a circumstance to be regarded that in *Blandy* v. *Widmore* (4), *Lee* v. *Cox and D'Aranda* (5), and *Davila* v. *Davila* (23), the satisfaction was out of a residue, which did not go to children.

F Next, is this a covenant that the widow shall take this proportion of the residue or of the specific personal estate? As to that I was too hasty in expressing during the argument a strong inclination that this covenant had gone much further than I now think it goes, for, unless the court is bound by express terms, it must be taken to mean clear personal estate whatever it means as to real estate. The
G covenantor was left at full liberty to sell, alien, mortgage, dispose, and encumber, during his whole life, and, if so, those who contend that the specific personal property of the testator at his death is the subject upon which this covenant was to attach must say that, though he was at liberty during his whole life to contract debts, yet at his death this proportion of his specific personal property could be abstracted from the obligation to pay his debts. Where is that to stop? Suppose that he had covenanted that his trustees should deliver the whole personal estate.
H The true meaning of such a covenant must be that what is the testator's personal estate at his death is the subject to be divided, and that only is his personal estate at his death which is his in the ordinary sense, i.e., after his debts paid. This is embarrassed by being a mixed case of real and personal estate, but if it cannot be said that the real estate also is to be taken after the debts paid, it will not follow
I that the personal estate is not liable to them. I think the mere circumstance of mixing it with real estate would not alter it from what would be the effect if there was personal estate only. It is enough to say that without going into the consideration whether he did not mean a clear fund both of real and personal estate to be divided.

Another question is whether this is a provision in bar of dower. If it were necessary to decide that, it must be decided as if a bill had been filed immediately upon the death calling upon the heir to convey in fee one moiety of the real estate and also to assign by metes and bounds one-third of the other moiety, and the true

question is, not upon *Vizard* v. *Longdale* (14), but upon the whole, whether that was not intended to be the provision which in every view she was intended to have as between him, her, and his heirs, executors, and administrators, and I do not think if that was now before me that this case might not be so taken.

I am bound to consider, in construing this settlement, what would have been the case if Mrs. Chalie had died intestate and her son had received £2,500, as the distributive share of her property. It would have been impossible to have got his case out of *Blandy* v. *Widmore* (4) and *Lee* v. *Cox and D'Aranda* (5), and if so, that circumstance, though not decisive, is to have weight in considering the whole effect of this instrument together. Upon the whole it was not the intention that this lady should have more than one-half under the circumstances, that have happened. Accordingly, she must be declared to be entitled to a moiety of the residue of the personal estate.

Order accordingly.

ROE d. EARL OF BERKELEY *v.* ARCHBISHOP OF YORK

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), January 28, 1805]

[Reported 6 East, 86; 2 Smith, K.B. 166; 102 E.R. 1219]

Landlord and Tenant—Lease—Surrender—"Deed or note in writing"—Recital in second lease that granted in consideration of surrender of prior lease—Acceptance of new lease for part of term—New lease voidable.

A recital in a second lease stating that it was granted in part consideration of the surrender of a prior lease of the same premises was not a surrender by "deed or note in writing" of such prior lease within s. 3 of the Statute of Frauds, 1677 [see now Law of Property Act, 1925, s. 53], it not purporting in the terms of it to be of itself a surrender or yielding up of the interest, though in some instances the acceptance of a second lease for part of the same term before demised may be a surrender of such prior term by operation of law, and this even though the second lease be voidable, if it be not void.

Where a tenant for life, with a special power of leasing reserving the best rent, in consideration of the surrender of a prior term of ninety-nine years (of which above fifty were unexpired) and certain charges to be incurred by the tenant for repairs and improvements, etc., granted to him a new lease of the premises for ninety-nine years by virtue of the power reserved to her, or any other power vested in, or in anywise belonging to her, which new lease was void by the power for want of reserving the best rent,

Held: the second lease, which was intended and expressly declared to be granted by virtue of and under the power and being apparently not intended by the parties to be carved out of the estate for life of the lessor, being void under the power, should not operate in law as a surrender of the prior term, as passing an interest out of the life estate of the grantor, contrary to the manifest intent of the parties and, consequently, the prior term, though the indenture of lease were in fact cancelled and delivered up when the new lease was granted, might be set up by the tenant of the premises in bar to an ejectment by the remainderman after the death of tenant for life, however such second lease might have operated by way of estoppel as against the lessor during her life.

Notes. Distinguished: *Doe d. Courtail* v. *Thomas* (1829), 9 B. & C. 288. Considered: *Lovell* v. *Smith* (1857), 3 C.B.N.S. 120. Referred to: *Doe d. Lewis* v.

A *Bingham*, [1814–23] All E.R. Rep. 540; *Doe d. Wilmot* v. *Pickering* (1823), 3 Dow. & Ry. K.B. 497; *Hamerton* v. *Stead* (1824), 3 B. & C. 478; *R.* v. *Hughes* (1826), 5 B. & C. 886; *Golding* v. *Fenn* (1828), 1 Man. & Ry. K.B. 647; *Doe d. Bishop of Rochester* v. *Bridges* (1831), 9 L.J.O.S.K.B. 113; *Doe d. Earl of Egremont* v. *Courtenay*, [1843–60] All E.R. Rep. 685; *Doe d. Biddulph* v. *Poole* (1848), 11 Q.B. 713; *Ward* v. *Lumley* (1860), 1 L.T. 376; *Noble* v. *Ward* (1867), L.R. 2 Exch. 135.

B As to surrender of leases, see 23 HALSBURY'S LAWS (3rd Edn.) 683–690; and for cases see 31 DIGEST (Repl.) 565–569.

Cases referred to:

(1) *Whiteley* v. *Gough* (1557), 2 Dyer, 140 b; 73 E.R. 306; 31 Digest (Repl.) 575, *6955*.

C (2) *Wilson* v. *Sewell* (1766), 1 Wm. Bl. 617; 4 Burr. 1975; 96 E.R. 359; 31 Digest (Repl.) 576, *6962*.

(3) *Davison d. Bromley* v. *Stanley* (1768), 4 Burr. 2210; 98 E.R. 152; 31 Digest (Repl.) 576, *6963*.

(4) *Southwell (Chapter)* v. *Bishop of Lincoln* (1675), 1 Mod. Rep. 204; 2 Mod. Rep. 56; 86 E.R. 830, 938; 19 Digest (Repl.) 264, *306*.

D (5) *Lloyd* v. *Gregory* (1638), Cro. Car. 501; W. Jo. 405; 79 E.R. 1032; sub nom. *Fludd* v. *Gregory*, 2 Roll. Abr. 495; 31 Digest (Repl.) 575, *6961*.

(6) *Hunt* v. *Singleton* (1597), Cro. Eliz. 564; 78 E.R. 809; 19 Digest (Repl.) 542, *3787*.

(7) *Gybson* v. *Searl* (1607), Cro. Jac. 176; 79 E.R. 154; 31 Digest (Repl.) 583, *7033*.

E (8) *Goodtitle d. Edwards* v. *Bailey* (1777), 2 Cowp. 597; 98 E.R. 1260; 17 Digest (Repl.) 261, *649*.

(9) *Samon* v. *Jones* (1690), 2 Vent. 318.

(10) *Osmere* v. *Sheafe* (1694), Carth. 307; 2 Lut. 1205; 90 E.R. 78; sub nom. *Osman* v. *Sheafe*, 3 Lev. 370; 38 Digest (Repl.) 834, *467*.

(11) *Roe d. Wilkinson* v. *Tranmarr* (1757), Willes, 682; 2 Wils. 75; 2 Keny. 239; F 125 E.R. 1383; 17 Digest (Repl.) 296, *1000*.

(12) *Cross* v. *Hudson* (1789), 3 Bro. C.C. 30; 29 E.R. 390, L.C.; 37 Digest (Repl.) 324, *717*.

(13) *Clere's Case* (1600), 6 Co. Rep. 17 b; Jenk. 260; 77 E.R. 279; sub nom. *Cleer* v. *Parker*, Cro. Eliz. 877; sub nom. *Parker* v. *Clere*, Moore, K.B. 567; affirmed sub nom. *Clere* v. *Parker* (1604), Cro. Jac. 31; 38 Digest (Repl.) G 866, *777*.

Also referred to in argument:

Magennis v. *Mac-Cullogh* (temp. 1714–1727), Gilb. Ch. 235; 25 E.R. 163; 17 Digest (Repl.) 251, *550*.

Lord Leech v. *Leech* (1674), 2 Rep. Ch. 100; 21 E.R. 628; 17 Digest (Repl.) 250, H *540*.

Chamberlain's Case (1366), cited in 1 Leon. at p. 280.

Sleigh v. *Bateman* (1596), Cro. Eliz. 487; 78 E.R. 738; 31 Digest (Repl.) 566, *6859*.

Farmer d. Earl v. *Rogers* (1755), 2 Wils. 26; Bull. N.P. 111; 95 E.R. 666, N.P.; 31 Digest (Repl.) 567, *6886*.

I *Lane's Case*, *Smith* v. *Lane* (1586), 2 Co. Rep. 16 b; 1 And. 191; 1 Leon. 170; 76 E.R. 423; 16 Digest (Repl.) 119, *39*.

Ive's Case (1597), 5 Co. Rep. 11 a; 77 E.R. 64; sub nom. *Ive* v. *Sams*, Cro. Eliz. 521; 31 Digest (Repl.) 571, *6924*.

Thomson v. *Trafford* (1593), Poph. 8; 79 E.R. 1131; sub nom. *Tomson and Trafford's Case*, 2 Leon. 188; 31 Digest (Repl.) 571, *6915*.

Fulmerston v. *Steward* (1554), 1 Plowd. 101; 1 Dyer, 103 a; 75 E.R. 160; 13 Digest (Repl.) 286, *1046*.

Willis and Whitewood's Case (1589), 1 Leon. 322; 74 E.R. 293; 31 Digest (Repl.) 571, *6923.*

Anon. (1602), Cary, 21; 21 E.R. 11.

Mellows v. *May* (1601), Cro. Eliz. 874; Moore, K.B. 636; 78 E.R. 1099; 31 Digest (Repl.) 576, *6971.*

Watts v. *Maydell* (1629), Litt. 268; Hut. 104; 124 E.R. 240; sub nom. *Maydell and Watts Case*, Litt. 279; 31 Digest (Repl.) 575, *6960.*

Bolton v. *Bishop of Carlisle* (1793), 2 Hy. Bl. 259; 126 E.R. 540; 17 Digest (Repl.) 251, *542.*

Moore v. *Waldron* (1615), 1 Roll. Rep. 188.

Leyfield's Case (1611), 10 Co. Rep. 88 a; 77 E.R. 1057; 22 Digest (Repl.) 204, *1914.*

Read v. *Brookman* (1789), 3 Term Rep. 151; 100 E.R. 504; 22 Digest (Repl.) 214, *2022.*

Woodward v. *Ashton* (1676), Freem. K.B. 429; 2 Mod. Rep. 95; 1 Vent. 296; 89 E.R. 320; 17 Digest (Repl.) 251, *545.*

Brereton v. *Evans* (1599), Cro. Eliz. 700.

Edwards v. *Rogers* (1640), W. Jo. 456; 82 E.R. 239; 30 Digest (Repl.) 382, *264.*

Doe d. Simpson v. *Butcher* (1778), 1 Doug. K.B. 50; 99 E.R. 36; 40 Digest (Repl.) 829, *3053.*

Action of Ejectment brought for a messuage and appurtenances in the parish of St. George, Hanover Square, in the county of Middlesex.

At the trial before Lawrence, J., at the sittings at Westminster a special verdict was found, stating in substance as follows: John Lord Berkeley of Stratton being seised in fee of the premises in question, by indenture dated May 19, 1743, demised the same to J. Lumley, his executors, etc., for a term of ninety-eight years from Lady Day, 1741, at a yearly rent (after the first two years of the term) of £32 payable quarterly on the four most usual feast days, free of all taxes, etc. J. Lumley, at the same time, executed a counterpart of the indenture and delivered it to Lord Berkeley. By virtue of the demise, J. Lumley entered into and was possessed of the premises, and afterwards assigned the term for a valuable consideration to the archbishop, the defendant. Lord Berkeley, by his will dated May 21, 1772, devised the reversion of the premises to the use of Mrs. Anne Egerton and her assigns for her life, or till she should marry, and after several intermediate remainders, remainder to the use of the lessor of the plaintiff for life, with other remainders over. The will also contained a power to the several tenants for life, when they should be respectively in the actual possession of the messuages, lands, etc., devised to them, to lease the same by indenture to any person who should be willing to build or to repair any of the same messuages for any term of years not exceeding ninety-nine years in possession, but not in reversion or by way of future interest, so as upon every such lease there should be reserved the best and most improved yearly rent that at the time of making thereof could be reasonably had or gotten for the same, without taking any fine or income for making any such lease, and so as in every such lease there should be contained the like clauses, covenants, and agreements as were usual in building or repairing leases. Lord Berkeley died without altering or revoking his will, and on May 14, 1784, Mrs. Anne Egerton, being by virtue of the said devise seised for life of the reversion and freehold of the premises in question, executed a certain indenture of that date, whereby it was witnessed that for and in consideration of the surrender of the said first-mentioned indenture, and also in consideration of the great charges and expenses which the archbishop had been and might be at in repairing and improving the premises, and of the rent and covenants therein reserved and contained and thereby covenanted to be paid and performed on the part of the said archbishop, his executors, etc., she, Anne Egerton, by virtue and in execution of the power and authority therein stated to be given and reserved to her, in and by the will of Lord Berkeley of Stratton,

deceased, or any other power in the said Anne vested, or to her in any wise belonging, demised the said premises to the said archbishop, his executors, etc., habendum, etc., from Lady Day then last, for the term of ninety-nine years, at the yearly rent of £36 4s. payable quarterly, and clear of all taxes, etc., payable to her for her life, and after her decease to those in remainder during the term. The archbishop accepted the last-mentioned lease, and executed a counterpart thereof by signing and sealing the same, and at the time of the execution of the last-mentioned lease, the first-mentioned lease and the counterpart thereof, were cancelled and exchanged, i.e., the original lease was cancelled and delivered by the archbishop to Mrs. Anne Egerton, and the counterpart was cancelled and delivered by Mrs. Anne Egerton to the archbishop. The jury found that the indenture of May 14, 1784, was not a lease warranted by the power in the will of Lord Berkeley, the rent reserved thereon not being the best that could be got, according to the terms of the power. In May, 1803, Mrs. Anne Egerton died. The special verdict then stated the entry of the lessor of the plaintiff, the eviction of the defendant, and the demise, etc.

Serjeant Bayley and *Frere* for the plaintiff.
Holroyd and *Gibbs* for the defendant.

LORD ELLENBOROUGH, C.J., stated the special verdict, and continued: The question upon this special verdict is whether the lease of May 19, 1743, was determined and put an end to by that of May 14, 1784. The affirmative of this proposition has been contended for on the part of the plaintiff on three grounds: (i) that the acceptance of the second lease was an implied surrender of the former lease; (ii) that the cancelling of the first lease amounts of itself to a surrender of the term thereby granted; (iii) that the execution of the counterpart of the lease of 1784 is a surrender of that of 1743 within the provision of the Statute of Frauds. On the two last of these grounds the court never entertained any doubt, for, as it is enacted by the Statute of Frauds, s. 3 [repealed by Law of Property Act, 1925, of which see now s. 53] that no lease of any lands or houses shall be surrendered unless by deed or note in writing signed by the party or his agent thereunto lawfully authorised by writing, or by act and operation of law, the act of cancellation, which can in no allowable sense of the words be considered as either "a deed or a note in writing," cannot since that statute be a surrender nor can the counterpart of the second lease enure as such unless it does so by operation of law, inasmuch as it does not purport in its terms to be of itself a surrender, having no words in it which denote or can amount to a yielding or rendering up of the interest of the archbishop to Mrs. Egerton, but merely recites that the grant of the new lease is partly in consideration of the surrender of the first indenture (which surrender, however, if any such had in fact been made, ought to have been specially found by the jury), and which fact of previous surrender this recital by no means necessarily imports, for the statement in the counterpart will be sufficiently accurate if the acceptance of the second lease would by operation of law be a surrender of the former. This point was not much pressed by either of the gentlemen who very ably argued this case on behalf of Lord Berkeley. The material ground on which they contended that the acceptance of the second lease was a surrender of the first is that, Mrs. Egerton having a life estate, it was competent to her to make leases by virtue of such interest independent of the power given to her by the will of Lord Berkeley of Stratton, and that the lease of 1784 being a good lease capable of taking effect out of her life estate was not void ab initio, but passed an interest, and, being accepted, worked a surrender of the first lease, inasmuch as the two leases could not stand together.

In support of this contention Co. Litt. 45, was cited, where it is laid down as to ecclesiastical leases that, though not warranted by the Ecclesiastical Leases Act, 1571, they are good against the lessor, if a sole corporation, and during the life of the head, if made by an aggregate one. *Whitley* v. *Gough* (1) (where, a husband

and his wife being seised of an estate tail, the husband made a lease for eighteen years to one who had in the lands demised a term of ninety-nine years, the acceptance of which lease was held to be a surrender of the prior term, though the wife after the death of her husband avoided the lease made by him) was, together with various other cases cited to show that the acceptance of a voidable lease is a surrender though the acceptance of a void lease is not, which contention the counsel for the defendant did not dispute. On the other side it was contended that as between the plaintiff, the Earl of Berkeley, and the defendant, the archbishop, the lease must be taken to be void ab anitio, whatever it might be as between the archbishop and Mrs. Egerton, for that the same instrument may at different times have a different operation, as a lease by a tenant for life and him in remainder is, during the life of the tenant for life, his lease and the confirmation of the remainderman, and after the death of the tenant for life the lease of the remainderman and the confirmation of the tenant for life. That, according to the authority of *Wilson* v. *Sewell* (2) and of *Davison d. Bromley* v. *Stanley* (3), unless the second lease passed an interest according to the contract, it could not operate as an implied surrender, and that those cases further prove that it is no surrender unless the lessee take all the interest which the second lease purports to grant, which under Mrs. Egerton's lease, the archbishop certainly did not do. In support of which contention a case from 2 Rolle's Abridgment 495 letter F., p. 7, was relied on, where it was laid down that a lease by a dean and chapter, not warranted by the Act of 1571, is not a surrender of a prior lease, it being void, and yet, according to the doctrine of Sir Edward Coke, 1 Co. Inst. 45, a., it is clearly good during the life of the dean. But we do not think this last case from Rolle's Abridgment an authority for such a contention, for, although there may be now no question but that such lease would be good during the life of the dean, yet it appears not to have been so understood in the time of Lord Rolle, according to the manuscript note of Sir Matthew Hale, cited by the plaintiff's counsel from the notes in Mr. Hargrave's edition of Co. Litt., p. 45, note 4, and from the case of *Southwell* (*Chapter*) v. *Bishop of Lincoln* (4) 1 Mod. Rep. 204) where Ellis, J., said, that Jones, J., in *Lloyd* v. *Gregory* (5) denied *Hunt* v. *Singleton* (6), which is the authority referred to by Sir Edward Coke in support of his opinion given in 1 Co. Inst. 45.

According to the argument used on behalf of the plaintiff he is entitled to recover the messuage in question because, the lease of Mrs. Egerton not having been made in compliance with the condition in the leasing power, which requires the best and most improved rent that can be got at the time of making the lease to be reserved, would not operate as an appointment of an interest to the archbishop under that power, and that, therefore, he took no estate under the will of Lord Berkeley of Stratton, and, though the lease be void on this account as to the archbishop, i.e., as an appointment under the power, yet that it is not void in toto as to him for that it passed an interest out of Mrs. Egerton's life estate, and operated as to him as a demise for years by a tenant for life, which would pass an interest for so many years as her life should endure. For this last proposition no authority was cited in the argument but the passage in Sir Edward Coke, of which I have taken notice, where he says, that a lease made by an ecclesiastical person, not according to the provisions of the restraining statutes, is good during his life. But that, it must be remembered, is the case of a lease which, but for the disabling statutes, would be good for the whole period contained in it, and which could only take effect in one way, namely, out of the estate of the lessor, and that the question there did not properly turn on the effect of the instrument, but on the construction of the disabling statutes, i.e., whether they made it void ab initio or only void as against the successor, leaving the lease to have the effect and operation it had prior to the statutes for so long time as it did not prejudice the rights which those statutes were made to protect. But the provisions in Lord Berkeley's will did not contemplate, nor had in any manner for their object, the restraint of any faculty or ability to demise, which Mrs. Egerton would have in virtue of her life estate.

One of the first rules for the construction of deeds is "verba intentioni, et non e contra, debent inservire": SHEPPARD'S TOUCHSTONE, 86. In *Gybson* v. *Searl* (7) the rule was recognised in the case of a surrender where the court resolved unanimously that it was not a surrender, "for that ought to be the intent of the parties, and it appears that there was not any intent of the parties"; and afterwards, "this lease was made with an intendment to his benefit, and not to his hindrance, as it should be, if it should be construed a surrender." In *Goodtitle d. Edwards* v. *Bailey* (8), LORD MANSFIELD lays it down that deeds shall be so construed as to

> "operate according to the intention of the parties, if by law they may; and if they cannot operate in one form, they shall operate in that which by law will effectuate the intention."

Such was the law in the time of SIR EDWARD COKE as to conveyances by the common law, though the same rule did not hold as to conveyances by the Statute of Uses, which in many cases were not allowed to operate in any way but in which the party intended they should operate. For it is laid down in 1 Co. INST. 49,

> "that where a man has two ways to pass lands, and both by the common law, and he intends to pass them by one of the ways; yet ut res magis valeat, it shall pass by the other; but where a man might pass lands either by the common law or by raising a use, in many cases it is held otherwise."

Even where a conveyance might operate in one of two ways under the Statute of Uses, as the intent of the parties was considered as working much in the raising and direction of uses, it has been held that if a man intended to pass land one way, it should not pass another way contrary to his intent. To this effect is *Samon* v. *Jones* (9), determined in the House of Lords. And although, as it is said in *Osman* v. *Sheafe* (10),

> "the judges have in later times had more consideration to the substance, to wit, the passing the estate according to the intent of the parties, than the shadow and manner of passing it,"

and where the intent of the parties is apparent to pass a thing one way or another a deed may be good either way, and may enure to divers purposes, and he to whom the deed is made shall have his election which way to take it, and may take it that way which is most for his advantage, yet there is no case or authority which says that, if a conveyance cannot operate in the way intended to pass the estate intended that it shall operate in another way to pass an estate which was not intended, and not within the contemplation of the parties.

> "And though the manner of passing an estate is not to be regarded, [yet] the intent is to be regarded what estate is to pass, and to whom."

So it is laid down by WILLES, C.J., in *Roe d. Wilkinson* v. *Tranmarr* (11) (Willes, at p. 687).

Let us then examine and see what was the intent of the parties in this case. Was it to take an interest under the power only or to take an interest out of Mrs. Egerton's life estate, in case the lease could not operate as an appointment under the power? As to this point it is impossible to doubt. At the time of the new lease the archbishop had fifty-five years, the unexpired remainder of a term of ninety-eight years in the messuage in question, an interest of greater value than an estate for any single life, for this interest he could not mean to substitute a lease during Mrs. Egerton's life only. The lease itself also by its terms shows the intention of the parties to be only an appointment under the power, for Mrs. Egerton professes to make the lease by virtue of an execution of the power and authority given and reserved to her by the will of Lord Berkeley of Stratton. Thus she in most distinct terms refers the act she was then doing to that power, and does not in the slightest degree show any intention of granting an interest

by way of demise, as owner of the life estate, for though the lease after referring to the power goes on with some words more general, as "any other power," yet technically speaking power does not apply to the sort of interest which the ownership gives, for which there is the authority of Lord Thurlow, in *Cross* v. *Hudson* (12) (3 Bro. C.C. at p. 35) if any authority on this head were wanting. The reddendum is consistent with the same intent, and proper for a lease made in pursuance of the power, for it makes the rent payable to Mrs. Egerton herself for life, and afterwards to those in remainder who, had she intended a demise out of her life estate, would have had no claim to any rent to be reserved under it. And the rent is exclusively reserved to those in remainder without any alternative provision for payment of an apportioned part of it in case of Mrs. Egerton's death, to which her representatives would be entitled in the event of her dying between two rent days, and which would have been proper if a demise by her as tenant for life had in any event been intended.

Hence is appears unquestionably clear what was her intention, what the interest she meant to convey, and what the act she meant to execute. The other party to the deed, the archbishop, by executing the counterpart, as distinctly shows on his part what he meant to accept, which could be only what by the lease Mrs. Egerton meant to grant, his object unquestionably being to come in under Lord Berkeley's will, and not under Mrs. Egerton, and to acquire an interest which might precede and take place of all the estates subsequent to Mrs. Egerton's which were limited by Lord Berkeley's will, and were thereby also made subject to the power, and not in any event to let in the interest of the remaindermen on the death of the tenant for life to his own prejudice and to the destruction of the interest he had in the premises. If the new lease be a surrender of the old one, it must so operate by construing the archbishop's acceptance of it to be an assent on his part to take a demise from Mrs. Egerton as owner of the estate contrary to the plain meaning and purport of the deed, to the manifest disadvantage of himself, and this, though he now expressly disclaims, and at no time appears to have claimed any interest which Mrs. Egerton could give him independent of the power. In *Clere's Case* (13), it is laid down, that, if a man make a feoffment to the use of such persons as he should appoint by will and until appointment to the use of himself in fee, and he afterwards devise the land without any reference to his power, he shall be considered

> "as declaring his intent to devise the land as owner, and not to limit an use according to his authority."

So here vice versa as the lease expressly refers to the power and reserves the rent to the persons in remainder, the parties declared their intent that this deed should operate as an appointment, and not as the demise of the tenant for life. In Hobart, 159, it is laid down:

> "If your act may work two ways, both arising out of your interest, election is given to the patient to use it either way: [on the other hand] if the act will work two ways, the one by an interest, and the other by an authority or power, and the act be indifferent, the law will attribute it to the interest, and not to the authority."

Lastly,

> "where interest and authority meet, if the party declare clearly, that his will is, that this shall take effect by his authority or power, then it shall prevail against interest; for modus et conventio vincunt legem."

In this case, the parties have declared most clearly and unequivocally, that their will is that this shall take effect by the authority or power. Whether or not this lease would operate as between the parties to it by estoppel is not material for the present purpose to inquire; it is sufficient to warrant us in deciding for the defendant if it did not pass an interest, which we are of opinion it did not. As in

this case our judgment is formed upon this ground, viz., that, Mrs. Egerton having a power to appoint and an estate also which enabled her to demise independent of her power, both parties intended an appointment under the first and not a grant out of the latter; and that the deed shall not be allowed to operate contrary to such their intention, it will not be necessary to examine *Wilson* v. *Sewell* (2), and *Davison d. Bromley* v. *Stanley* (3), where the lessees could have but one thing in their contemplation, viz., a demise out of the interests which the lessors in those cases either had, or were supposed to have, in the premises demised. It may, however, be observed that the general reasoning to be found in those cases applies most strongly to the present. The effect of our opinion will be that the period of the Earl of Berkeley coming into possession of the estate will not be postponed to any later time than was in the immediate contemplation of the devisor, and that the archbishop will acquire no advantage, and only not suffer a loss by what was probably the mistake of some less cautious or skilful adviser. This result is what one cannot but feel to be the real justice of the case, and it would have been a circumstance to be regretted if the law had found it to be otherwise.

Judgment for defendant.

CHAMBERS AND ANOTHER *v.* GOLDWIN

[ROLLS COURT (Sir Richard Pepper Arden, M.R.), March 21, 1801, and preceding days]

[Reported 5 Ves. 834; 31 E.R. 883]

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), August 13, November 13, 20, 1802; January 29, February 5, 7, 1803; January 31, 1804]

[Reported 9 Ves. 254; 1 Smith, K.B. 252; 32 E.R. 600]

Mortgage—Assignment—Rights of assignee—Mortgagor not party to assignment—Assignee limited to what due between mortgagor and mortgagee—Action for account—Parties.

Where there is an assignment of a mortgage in general cases the assignee takes it entirely at his risk as to what is due between the mortgagor and the mortgagee unless the mortgagor joins in the assignment. If an assignment of a mortgage is taken without the intervention of the mortgagor, whatever the assignee pays he can claim nothing under the assignment but what is actually due between the mortgagor and the mortgagee. In an action for an account in such circumstances the assignee is the only necessary party.

Mortgage — Receiver — Right of mortgagee to a receiver — Appointment of mortgagee himself.

A mortgagee may stipulate for a receiver under the mortgage to be paid by the mortgagor, and may appoint a bailiff and take any other appropriate steps, but he cannot stipulate that he himself should be appointed receiver to be paid a commission for his services, for that would be obtaining a collateral advantage to which he would not be entitled.

Account—Settled account—Setting aside—Fraud—Surcharge and falsification—Error.

Accounts settled are not to be set aside but for fraud, or surcharged and falsified but for error: per LORD ELDON, L.C.

Where there are settled accounts you must show something strong to

impeach the account, or error, so as to set it aside in the one case or to surcharge and falsify it in the other: per Sir Richard Pepper Arden, M.R.

Notes. Considered: *Forrest* v. *Elwes* (1816), 2 Mer. 68. Distinguished: *Sayers* v. *Whitfield* (1829), 1 Knapp, 133. Considered: *Leith* v. *Irvine* (1833), 1 My. & K. 277. Approved: *Denton* v. *Davy* (1836), 1 Moo. P.C.C. 15. Considered: *Mainland* v. *Upjohn* (1889), 41 Ch.D. 126. Referred to: *Quarrell* v. *Beckford* (1807), 13 Ves. 377; *Faulkner* v. *Daniel* (1843), 3 Hare, 199; *Blagrave* v. *Routh* (1856), 2 K. & J. 509; *Robertson* v. *Norris* (1858), 1 Giff. 421; *Eyre* v. *Hughes* (1876), 2 Ch.D. 148; *Warner* v. *Jacob* (1882), 46 L.T. 656; *Ward* v. *Sharp* (1884), 53 L.J. Ch. 313; *Biggs* v. *Hoddinott*, *Hoddinott* v. *Biggs*, [1898] 2 Ch. 307; *British South African Co.* v. *De Beers Consolidated Mines* (1910), 80 L.J.Ch. 65; *Kreglinger* v. *New Patagonia Meat and Cold Storage Co.*, [1911–13] All E.R. Rep. 970; *Re Morris*, *Mayhew* v. *Halton*, [1921] 1 Ch. 172.

As to assignment of a mortgage and the appointment of a receiver, see 27 Halsbury's Laws (3rd Edn.) 261–273, 311–315; and for cases see 35 Digest (Repl.) 428 et seq., 588 et seq.

Cases referred to:

(1) *Taylor* v. *Haylin* (1788), 2 Bro. C.C. 310; 1 Cox, Eq. Cas. 435; 29 E.R. 170; 35 Digest (Repl.) 720, *3863*.

(2) *Scott* v. *Brest* (1788), 2 Term Rep. 238.

Also referred to in argument:

Matthews v. *Wallwyn* (1798), 4 Ves. 118; 31 E.R. 62, L.C.; 35 Digest (Repl.) 302, *230*.

Burt v. *Dennet* (1787), 2 Bro. C.C. 225; 29 E.R. 126, L.C.; 47 Digest (Repl.) 544, *4912*.

Beckford v. *Beckford* (1783), 4 Bro. Parl. Cas. 28; 2 E.R. 26; 1 Digest (Repl.) 615, *2015*.

Bill for an account.

Tristram Ratcliffe, seised in fee of a plantation called Greenwich and other premises in the island of Jamaica, by indentures dated Aug. 11, 1781, reciting that Theodore Foulks had advanced to and for Ratcliffe divers sums to the amount of £9,000 currency and had entered into various engagements for him for payment of debts, and that Ratcliffe had proposed to put Foulks into immediate possession of the plantation and sugar-works, and that the same should continue in his absolute possession and under his sole management and direction, conveyed to Foulks, his heirs, executors, etc., in trust that he should immediately enter and be absolutely possessed and continue to manage, cultivate, improve, work the same, and take the whole crops, rents, etc., and consign and sell the same as he should think proper as factor, but on the account and risk of Ratcliffe, and should apply the money arising from such rents, issues, and produce, first, in payment of the charges, commission to himself, as usually received by trustees, agents, and attorneys acting for absentees, the commissions payable upon the sales as usual among merchants and factors in London or the island, all money to grow due on account of the execution of the trusts, and the necessary supplies and contingencies, etc., for the estate, next, all sums of money Foulks should thereafter advance on account of Ratcliffe or for the cultivation, improvement, etc., of the estate, with interest at 6 per cent., and to pay the overplus, if any, to Ratcliffe, his heirs or assigns.

By indentures dated May 1, 1785, reciting that Foulks had not only applied the rents, etc., in execution of the trusts, but made several advances, and that the sum of £32,000 currency was due to him on account settled, the same plantation and others were conveyed to Foulks in trust to enter and be in actual possession six years, and (in the same manner as by the former deed) to manage, receive, and consign the whole produce in trust to pay £450 a year to Ratcliffe, and after his death among his widow and children, during the remainder of the six years,

and to apply the residue in satisfaction of all expenses, commissions for himself, etc. (as in the former deed). Also to all such sums as Foulks, his heirs, executors, etc., should advance for the cultivation, improvement, etc., and the sum of £32,000 and the interest, and as to the surplus in trust for Ratcliffe with a power to sell in a year after the determination of the six years if the whole sum of £32,000 should not be paid. It was further agreed that the accounts were to be settled annually. By indentures dated May 28, 1787, reciting the former deeds, and that the sum of £32,000 currency remained due, Foulks assigned to Goldwin. To that deed Ratcliffe was not a party. By indentures dated Feb. 10, 1790, reciting that upon account settled in 1789 with Goldwin the sum of £31,299 2s. 11d. was due to him from Ratcliffe, the trust was prolonged to May 1, 1797, till which time it was agreed there should be no sale. The allowance to Ratcliffe and his family was increased to £750 a year, and it was agreed that in future the supplies for the estate should be sent, and the future crops shipped for Great Britain, by Goldwin. In 1791 Ratcliffe died, having devised his plantations, etc., to his sons charged with portions for his daughters. Goldwin was appointed one of his executors, trustees, and guardians of his children, but he renounced and settled the accounts of the West India estates with the other executors.

The bill was filed in 1796 by the daughter of the deceased and her husband against Goldwin and the other executors and the two sons of the testator, praying, that an account might be taken of the personal estate and of what was due to Goldwin, and that he might not be permitted to insist upon any of the accounts settled with the deceased or with the other executors, and also the necessary accounts as to the real estate and other accounts arising out of his management. The defendant Goldwin resisted opening the accounts, contending that this was a trust and not a mortgage and insisting upon all the benefits arising from his management of the West Indian estates as trustee or agent.

Romilly and *Martin* for the plaintiffs.
Piggott, *Richards* and *Hart* for the defendant.

Mar. 21, 1801. **SIR RICHARD PEPPER ARDEN, M.R.**—This case has created in my mind a considerable degree of doubt as to the decree to be made, so as to do justice to both parties, which, from the situation in which the accounts must necessarily stand, may be extremely difficult. The great question is, in what form and under what restrictions the defendant is to account, for, that he is accountable, there can be no doubt.

I shall begin only in the year 1781. At that time Ratcliffe was extremely involved in his circumstances, and he conveyed his estate to Foulks by a very extraordinary deed, and such as it is impossible this court can countenance any further than is absolutely necessary in order to do justice to the person to whom the estate was conveyed for the purpose of paying the debts. Another deed was executed in 1785 which discovers a very unfortunate circumstance, for, though by the former deed part of the estate had been conveyed for the purpose of paying off the sum of £9,000 and everything else, instead of these debts being paid, in the space of four years the debts were increased to the amount of £32,000. It is said that this is not a mortgage, but a trust. I say it is a mortgage, and this is a way of paying a mortgage that this court will look at with very jealous eyes. In 1787 the defendant, without the assent certainly of Ratcliffe, purchases Foulks's interest in the estate under these deeds, but in 1790 Ratcliffe confirms that deed by another conveyance in almost the same words and with the same powers. The only difference is increasing the annual sum payable to himself from £450 to £750 a year. In 1791 he died.

The only question is in what manner these amounts shall be taken. The defendant insists that he regularly settled accounts with Ratcliffe in his lifetime, and that they were not now to be impeached, but he admits he has availed himself of all the powers in the deed and made all those charges that it was competent

to him to make—viz., 6 per cent. commission upon all the money advanced by him and also commission upon the receipts and payments—as a mere trustee, agent, or attorney having no other interest than that would have charged. On the other hand, it is said, this deed was taking advantage of the circumstance of having a distressed man for his debtor, taking possession of his estate, and, though not calling it a mortgage, taking possession as a mortgagee in fact, though under the name of trustee, and that he is entitled to such charges only as a mortgagee could make.

The Act of Assembly [i.e., the appropriate statute of the Jamaican legislature], though, I think, I could make the decree without it, very wisely goes on, after settling the terms to be allowed for an agent, to enact that no mortgagee in possession shall be entitled to any commission for his management or transactions, except what shall be paid by him to the factor for such commission. They knew, and everyone who attends at the Cockpit must see, the great advantage that results from the possession taken under a mortgage of a West Indian estate, having all the consignments, etc. Therefore, they made that provision. It is said for the plaintiffs that notwithstanding the stipulations of the deed it is contrary to equity and good conscience that the defendant should be permitted to avail himself of all the powers given by it. First, as to these being settled accounts, if I am of opinion that under the circumstances the defendant ought not to be entitled to charge commission, the facts proved are fully sufficient to entitle them to surcharge and falsify, for unquestionably the accounts settled allow that commission. It is totally unnecessary to enter into that, admitting that, where there are settled accounts, you must show something strong to impeach the account, or error, so as to set it aside in one case or to surcharge and falsify it in the other. I do not mean to take this up before 1785, though, perhaps, doubts may be entertained whether the sum of £32,000 currency was due at that time. Yet I am not called upon or justified in going beyond that or to unravel the accounts before that period. It would be going back a great many years, and would certainly lay the defendant under great difficulties if I were to unravel that which Ratcliffe did acknowledge under his hand to be the state of the account with Foulks, but it is perfectly clear that the defendant Goldwin must consent to have the account surcharged and falsified, not only during his own time, but also during that of Foulks. But I do not mean to go beyond that.

With regard to the settlement after the death of Ratcliffe, the defendant Goldwin did a very incautious thing in, without calling in those interested in the estate, renouncing the probate of the will himself, for the mere purpose, as it seems to me, of settling with the other executors. I consider this deed as an oppressive, improper, deed, that ought not to have been made, containing powers that ought not to be given and that no creditor ought to have imposed, and in that light I cannot think that accounts settled with this poor man upon the footing of this deed can be considered not liable to be surcharged and falsified. The Act of Assembly would be waste paper if this could succeed merely by his calling himself not a mortgagee, but an attorney, to entitle himself to all these charges for commission. It was unconscientious. The defendant was living in England a great part of the time for which he charges commission. Clearly he is not to be entitled to charge any commission whatsoever, except so much as he paid to others. But distressed men have no right to call upon this court to go back into accounts of several years, and thereby lay persons under insuperable difficulties. Purchasing from Foulks without the intervention of Ratcliffe, the defendant ought to be obliged to account for Foulks's time. I am rather inclined to think he stands in the shoes of Foulks, but then he must account as Foulks would have done. No account is now prayed against Foulks, and it is some disadvantage to the defendant that Foulks is not before the court. I let him start with the deed of 1785, but giving him credit for £32,000, as being due, he has no reason to complain.

The decree declared that the accounts settled with Ratcliffe were not to be unravelled, but that the plaintiffs should have liberty to surcharge and falsify from the date of the deed 1785, that the accounts settled with the executors were not to be considered settled, and that Foulks and Goldwin were not entitled to commission or agency except so far as they had paid money in respect thereof.

The defendant appealed to the LORD CHANCELLOR.

The cause came before the LORD CHANCELLOR upon a petition of appeal by the defendant from the decree pronounced by LORD ALVANLEY (then SIR RICHARD PEPPER ARDEN, M.R.) at the Rolls on the ground that it was erroneous in making the defendant answerable for any part of Foulks's accounts, and in declaring that he and Foulks were not entitled to charge for commission or agency except what they should appear to have actually paid to other persons, and in opening the accounts settled with Ratcliffe's executors.

Besides the deeds which were stated in the pleadings, another deed of the same date as that of 1781 was produced at the Rolls; as found before the hearing. By that deed it was declared that notwithstanding the other indenture of the same date, Ratcliffe was to have the sole management of the premises and stock comprised in the other deed.

Mansfield, *Piggott*, *Richards*, *Hart* and *Lyon* for the defendant.
Romilly, *Martin* and *Leach* for the plaintiffs.

Jan. 31, 1804. **LORD ELDON, L.C.**—The deed of 1781, stated in the pleadings, contains a very loose covenant by Foulks that he and his heirs will faithfully execute the trust reposed in him. The former part of the deed having specified no act whatsoever which Foulks was compelled to do, either by advancing money or in any other way, but paying over the overplus, if any, to Ratcliffe, leaving it altogether to the will and pleasure of Foulks whether he would improve, or do anything else, it is not clear what that covenant means.

This deed is insisted, on the one hand, to be a trust deed for the purpose of entitling the party taking under it to the commission given to trustees, agents, etc., acting for absentees. On the other hand, it is insisted to be a mortgage. As far as it represents Foulks to be a trustee, I should be disposed to say it is a deed holding out a false colour. A deed of the same date was executed, which is not noticed in the pleadings nor in the evidence, otherwise than as found previously to the hearing, and, therefore, produced. It is impossible, therefore, for the defendant to give any account of the transaction as constituted of these two deeds, put together, and, therefore, if any inference arises from the execution of this other instrument at the same time, it cannot be pressed against him in this cause. There is no allegation against him relative to it. He had no opportunity of examining it, or upon the part of Foulks of justifying it or admitting that it was wrong. Considering the law of Jamaica, if it is to be represented as a trust deed, and, therefore, available to give the commission given to trustees acting for absentees, there is strong reason as to Foulks for saying this was a very oppressive and unjust transaction, for in this second deed it is agreed that, notwithstanding that other indenture, Ratcliffe was to have the whole and sole management of the plantation, negroes, and premises, comprised in the other deed. If the question had arisen immediately after the execution of these two instruments as to what was the effect of both, it would have been very difficult to say. If no further explanation could be given, it would be impossible not to say in equity that this was a colour, oppression, usury, a transaction that would not be permitted to stand. But I have no authority to press the effect of it against this defendant, nothing with respect to that transaction being stated in the pleadings.

By the time the next deed, in May, 1785, was executed, the debt, which from one covenant in the deed of 1781 appears to have been represented as capable of being paid off in four years, was increased to £32,000 currency. The Master of

the Rolls was much struck with that circumstance. I have so often stated that I scarcely ever knew a West India cause in which it did not appear that misery was heaped upon misery till the estate became the property of the guardian or trustee that I dare not trust myself with the inference from that. In this case at least I should not make any observation upon that fact prejudicial to the defendant, for it is obvious Foulks might, by paying other debts and from other causes, have his debt very properly and fairly increased, and this further observation arises in favour of the defendant, that, if he is to be charged with the effect of Foulks's transactions in the interval and any improper charge is to be imputed to him upon that, it is right and indispensibly necessary to make that charge upon the pleadings. In a question with this defendant, therefore, there is nothing in this cause authorising me to impute anything to him as a consequence of that fact, the increase of the debt in that time.

There is no evidence, and that is not the fault of the defendant, as to the actual nature of the management and possession of the estate from the execution of the two instruments of 1781 to the execution of that in 1785, nor from that period to the assignment of the defendant in 1787. But, if upon examination it turns out that the second of the former instruments had its effect, and the management and possession were accordingly left with Ratcliffe, it is perfectly impossible to have charged in the account between Foulks and Ratcliffe in the manner in which it is represented in the cause that the accounts were kept. On the other hand, if Foulks had really the possession and management, and was living in the island, the neat question would arise which is determined by this decree, and from which declaration this appeal is presented.

It is said that if this decree is right in giving liberty to surcharge and falsify these accounts as far back as 1785, there is no reason why it should not have gone back to 1781. On the other hand, that is admitted, and, though there is no appeal upon that by the plaintiff, it is said the decree ought to have gone to that extent, and I confess that, if the decree is to go to 1785, I do not see why it should not go to 1781, unless upon a principle which would prevent its going so far back as 1785. If the principle is this, and it can be no other, that, where this is an assignment of a mortgage in general cases the assignee takes it entirely at his risk as to what is due between the mortgagor and mortgagee, unless the former joins; if the principle upon which the decree stopped at 1785 is that where it appears that at a particular time the mortgagor states upon a deed, not impeached, that a certain sum was due at that date, as Ratcliffe by that deed stated that £32,000 was due, and the assignee had a right to say that the mortgagor, having acknowledged upon that deed that sum to be due to Foulks, had authorised him to advance his money upon the credit of that assertion, it follows that, if at any subsequent period any transaction equivalent to that took place, the decree ought not to have gone further back than the date of that transaction, and either it ought to have gone to the original transaction, or not so far as 1785. The transaction by which the defendant purchased Foulks's interest for this very sum of £32,000 currency, is singular, certainly, the same sum appearing due two years afterwards. But there is no charge in the bill leading to any examination of the accounts in that interval. In this stage of the cause, therefore, that must be taken to be the fact. The transaction certainly was hazardous. It is not, therefore, to be considered blameable. The defendant trusts Foulks upon the point of the truth or inaccuracy of the representation, that this sum was then due, for it is settled that if an assignment of a mortgage is taken without the intervention of the mortgagor, whatever the assignee pays he can claim nothing under the assignment but what is actually due between the mortgagor and mortgagee, and I think that rightly settled. I would not say so, but that I know LORD KENYON entertained a doubt of LORD ROSSLYN'S decision upon that subject.

The circumstance that these plaintiffs are volunteers, claiming under the will of Ratcliffe, does not vary the case. They have the same right as if he was

plaintiff. This defendant was named an executor, and it appears Ratcliffe contemplated that he would probably continue to take an active part in the management of the estate abroad. I notice the circumstance that the defendant did not prove the will, for I really think it but fair to say that, in my opinion, the inference stated as pressing upon the conduct of the defendant in the subsequent accounts is carried too far. That circumstance does not afford any fair ground of animadversion. On the other hand, it is impossible to say he has not had that species of intermeddling and dealing with the property that may possibly make him more accountable than he is aware of, upon the ground of being named an executor. He has settled accounts with the other executors in which he is allowed commission, I do not know whether exactly in the manner claimed previously to his coming to England, for it is not distinctly stated in the answer whether the commission claimed previously to coming to England was upon the gross or net figures. He claimed commission after that period upon the net profits.

The law, as well as the act of the parties, provides that accounts settled shall not be set aside but for fraud, or surcharged and falsified but for error. In support of the charges in the bill that in settling the accounts, undue advantage was taken of Ratcliffe's distressed situation, etc., there is no evidence of distress unless the deeds themselves are to be considered so, which is going much further than the court ever has gone or is warranted in going. The charge of threats rests entirely in allegation, not sustained by proof. As to the charge that the defendant caused the accounts to be transmitted and enrolled in Jamaica in order to prevent their being opened, that, which is a circumstance to prove the absence of fraud, would thus be made a circumstance to prove the existence of it. It is clear, if error can be shown, this court will correct an account as far as it is erroneous, whether there is a stipulation for it or not. With reference to the material charge that there are in the accounts, pretended to be settled, several manifest errors and overcharges, and particularly that 6 per cent. upon the gross profits and produce is charged for the management though the defendant now resides, and for several years past has resided, in England, and though the accounts contain various charges as payments to attorneys, etc., the bill must either seek to set aside those accounts as imputing the settlement of them to fraud, or, letting them stand, must seek to surcharge and falsify them, in which case, if they are to be considered settled and signed, the rule is fixed, upon the most obvious principle, that some error must be charged as it is impossible for the defendant to defend himself if, under a general charge, not specifying any error, the plaintiff may come at the hearing with proof of these errors of which the defendant has heard nothing.

The point was decided upon that ground by LORD THURLOW upon my objection that, if accounts are impeached on the ground of error, you must specify some or one error, and prove it, and that is a ground to surcharge and falsify: see *Taylor* v. *Haylin* (1). I do not recollect a case in which the court has gone the length of declaring anything error unless the declaration has been confined to the subject of that which is alleged to be error upon the pleadings. That would be attended with great inconvenience, for it is very possible there might be cases in which the opinion of the court might be clear at the hearing that there was error, and yet, if it was distinctly put in issue, the court might be satisfied that transactions had taken place upon which it was impossible to consider it error.

The prayer of the bill as to opening the accounts is expressly confined to the accounts with the defendant and the executors, and is silent as to the accounts with Foulks. The bill having specified as matter of error the circumstance as to the insurance, upon which there is no judgment but an inquiry directed, and as to the commission taken by the defendant while in England, the question as to the latter article falls to be considered upon the effect of the law of Jamaica and the general rules of equity as far as they prevail there, depending upon the nature of these deeds and the true intent and meaning of the Acts of Assembly in Jamaica. The question seems to have been considered in a greater latitude by LORD ALVANLEY,

for he has not confined his declaration to the commission taken while the defendant was in England or in Jamaica, but has carried the declaration through all the commission taken by Goldwin and also the commission taken by Foulks, and has directed the accounts of both, at least as far as that commission forms an item in them, at least as far as that commission forms an item in them, to be surcharged and falsified. The laws of the Assembly contain several provisions as to the amount of interest to be allowed in the island: originally £10, then £8, now £6 per cent.; and the legislature was extremely anxious to prevent fraud and breaches of trust by attorneys, trustees, etc., and also mortgagees. The Act of 1740 directs that all persons, trustees, etc., acting for persons having estates in and absent from the island, and all mortgagees in possession, sequestrators, appointed by the court, etc., having the management and possession, shall make up accounts, render and file them, under penalties. The Act upon which this question turns, recites that, and enacts that all commissions of attorneys or agents, trustees, guardians, etc., of persons absent, arising from their receipts of the rents and profits, and produce, etc., shall be reduced to 6 per cent., including commission for supplies to the estate, and mortgagees in possession are declared not entitled to any commission except what is paid to the factor for his commission. In case any greater commission is demanded, a penalty of £100 for every offence is imposed, with a proviso that it shall not extend to commission for the sale of negroes and other commodities sent to the island.

Upon the first point made the subject of complaint by this petition of appeal, not the liberty to surcharge and falsify, but that the defendant is made accountable in any degree for the transactions of Foulks, and, that he is not a party, I have, not without great attention to this subject, endeavoured to satisfy myself upon what principle this decree can be said to be right as far as it involves any considerations of Foulks's transactions. I am not satisfied with it, so far as it charges the defendant with those transactions. I do not know upon what ground such a decree could be made as to the commission that would not justify a decree charging the defendant with any other error in Foulkes's accounts. It is clear, as I have said already, that the assignee of a mortgage, provided the transaction is not sanctioned by the mortgagor, will be liable to have the account taken from beginning to end, and nothing that I have to state will involve the inconvenience that has been pressed, that supposing it is necessary in such a case either that Foulks should be a party or that Goldwin should not be charged with his transactions, if twenty mesne assignments had been made, all those parties must have been brought before the court. That is not necessary, for, where there has been an assignment without the previous authority of the mortgagor, or his declaration that so much is due, it is enough to make that man a party who has contracted to stand in the place of the original mortgagee and all assignees, till the title was got in by himself.

But this case cannot be assimilated to the case so put. The principle of the decree, indeed, stopping at 1785, seems some evidence of the opinion of the Master of the Rolls that, if the mortgagor is a party to a transaction, authorising the assignee to believe so much is due to the mortgagee, the mortgagor cannot complain if by his act the assignee is misled, and the decree, stopping at 1785, must be upon the principle that Ratcliffe by that deed authorised Foulks to make that declaration to anyone with whom he should deal. It does not rest there, for, if the deed of 1785 had not been executed and that of 1787 had been the only instrument, if Goldwin thought proper to take Foulks's representation as to the amount of the sum and no act had been done by Ratcliffe afterwards, there is no doubt, if he owed Foulks only £5, he might have brought no one before the court but Goldwin, and might have charged him with all receipts of Foulkes, and reduced his debt to £5. But when the deed of 1785 represented the sum of £32,000 to be due and the deed of 1787 and the subsequent deeds in effect attributed credit to Foulks for that sum, and this bill not imputing specifically any error to the accounts settled between

A Foulks and Ratcliffe, the latter, though he may try the question of error as to the accounts of Foulks with Foulks, cannot with Goldwin.

I have had some conversation with LORD ALVANLEY upon this part of the case, and it is a great satisfaction to me that his Lordship now agrees with me in thinking this decree goes too far in the circumstance upon which I am now commenting, and, if these accounts could be B charged with error at all as against Goldwin, that must have been made the subject of specific and pointed charges. LORD ALVANLEY also agrees with me that, if a mortgagor permits an assignee to pay the assignor a sum of money which he with the knowledge of the mortgagor represents to be due, and, more particularly, if he permits it from day to day and from year to year, he cannot quarrel with that representation, subsequently approved, which subsequent approbation has the same C effect as if previous, but he is bound to institute his quarrel with the person who assigned and with his privity received and retained the money a great many years before the bill filed. I understand, it was contended at the Rolls, that if Goldwin cannot be affected with the receipts of Foulks, no account could be had against Goldwin. To that I do not agree, for it was competent to Ratcliffe, not seeking to disturb the transaction as it stood in 1787, to consider him as if he had been the D original mortgagee, and, giving credit for the sums paid, to desire to have the subsequent accounts taken. That is the more proper upon this bill as it is all that is asked. No accounts of the rents received by Foulks, or of his payments, is prayed. There is some suggestion of error but specific errors are pointed out and relief prayed as to Goldwin only. This decree is wrong, therefore, so far as it charges Goldwin upon the head of error with Foulks's accounts. But, whatever E may be done in this cause between the representatives of Ratcliffe and Goldwin, will not affect the right of the plaintiffs if they choose to call for an account of Foulks's transactions, which appear very suspicious.

The next point is upon the declaration that the defendant is not to charge more commission than he has paid, and that it is matter of error in this account that he has charged more. That declaration is founded upon this, that he is to be con- F sidered as mortgagee in possession, and, therefore, neither upon the general principle nor the law of the island could he take any commission but such as he paid, and goes to this extent, the error charged in the bill being that he has claimed commission for the period after he ceased to reside in the island, and when he resided in this country. I do not misrepresent the bill, saying that upon the point whether he was entitled to commission while he resided in the island, it neither G alleges that he was or was not. It distinctly alleges that he was not entitled to commission while he resided here. First, is it the law that he was not entitled, while in possession and in the island? Secondly, supposing the law to be so, is this the time, considering the form of the bill, in which that ought to be declared? Considering him as a mortgagee independent of the usage and law of the island, courts of justice here apply to the relation of mortgagor and mortgagee upon West India H mortgages all the principles that exist as to that relation here. It is clear the mortgagee cannot originally covenant for a collateral advantage, also, if upon the true effect of the instrument there is nothing more than that the mortgagee shall do what a mortgagee ought to do as a trustee, there is no pretence to say the trust is distinct from the mortgage. There is nothing unfair, or perhaps illegal, in taking a covenant originally that, if interest is not paid at the end of the year, it shall be I converted into principal. But this court will not permit that as tending to usury, though it is not usury [An agreement by a mortgagor to pay compound interest is now valid: see 27 HALSBURY'S LAWS (3rd Edn.) 203, 204, and cases there cited]. So a mortgagee cannot stipulate to be receiver of the rents and profits with a commission. In *Scott* v. *Brest* (2) that has been considered by the Court of King's Bench usurious. But it has been long determined here that, though a mortgagee may stipulate for a receiver to be paid by the mortgagor, and may appoint a bailiff, etc., he cannot himself stipulate for any advantage beyond the interest, and though

it seems to make little difference to the mortgagor who is receiver, yet this court considers it as tending to usury and oppression and a collateral advantage which a man contracting for a loan of money shall not make. So, upon this contract, if a mortgagee stipulates to enter and take possession as trustee and do a variety of acts he ought to do whether he stipulates or not, he not only shall not have any advantage from it, but his stipulating for it might, perhaps, affect his right to the money lent. Upon the general rule also, independent of contract, a mortgagee or trustee cannot charge anything beyond what he paid to the person, for whose estate he is accountable. It is impossible under these instruments to retain a shilling beyond what was paid for commission in this country. There is no doubt on the construction of this instrument that he who took possession under it is, except in the article expressly allowed to him, to act for the person creating the trust, if it is a trust, as he would act for himself, and, if he gets a merchant here to sell the proceeds for half the usual commission, he cannot keep the other half.

As to the commission, I have formed an opinion upon the point how far he is entitled while resident in the island, but I have some difficulty in declaring that opinion lest in a case of this importance with reference to West India mortgages, I should prejudice the question. I am not at present called upon to declare any opinion upon that. The bill states as matter of error that the commission retained by him while in England he cannot have under the law of the island or under the contract, and if by confining my opinion to the question before the court upon the pleadings I secure to the party the opportunity of discussing in the Master's office the other question whether the defendant was entitled to commission while in the island, as what is the law of the island must be looked to as a fact, there will be less risk of mistake by leaving that to be decided where it can be decided upon the fullest information than by deciding it upon the pleadings that do not put it in issue. Leaving that, therefore, to be brought before the Master, I shall determine only the question which is in issue upon the record, viz., whether, after he came here, he was entitled to that commission. As to that, I am clearly of opinion that, neither according to those laws nor a due interpretation of this contract can that commission be charged. According to both, if the commission could be claimed consistently with the law, it could be claimed only by being trustee, agent, etc., in the island, and personally taking care of the management and improvement of the estate committed to the defendant, as such, and if, instead of being upon the island in the actual, personal, management, he trusted that management to others acting as attorneys under him, it is neither the meaning of the laws, nor, what is safer for me to pronounce, is it the true intent and meaning of the contract, that he should have the commission. This is plain upon the whole language of the Act, and it would be a strange construction that he who is to have the commission on account of the absence of the party may himself be absent. The commission is the reward of personal care and attention, and, if that care and attention are not administered, the unquestionable principle of this court is, that not being within the case upon which the commission can be claimed on that ground, he is in the situation of a person entitled only to the commission actually paid.

This decree, therefore, considering the nature of the bill and the particular circumstances of the transaction, ought to be confined to error in the accounts of Goldwin only, but without prejudice to any demand to rectify the account of Foulks in a suit against him. Also, with an opinion upon the point whether the defendant is entitled to commission, while in the island I think it more consonant to the practice of the court to confine the declaration to the error as stated in the bill, viz., that he cannot claim it, while in England, and without prejudice to the question whether he is entitled to commission while in the island, as some light may be thrown upon that in the charge of error before the Master, and it is better to withhold a decision not called for by the pleadings. As to the accounts settled since the decease of Ratcliffe, I do not concur in blaming Goldwin upon that, but upon the principles of this court, and what is required from persons

standing in his situation, I cannot hold those accounts, so settled with the executors, not to be open to full investigation in the Master's office. I shall, therefore, vary the decree as to the former particulars, and confirm it as to the executor's accounts. As to the accounts settled with Ratcliffe, they must be considered as settled, not to be opened, but to be surcharged and falsified.

Order accordingly.

BROWNING *v.* REANE

[Prerogative Court of Canterbury (Sir John Nicholl), November 21, 1812]

[Reported 2 Phillim. 69; 161 E.R. 1080]

Marriage — Validity — Mentally disordered person — Incapacity to understand nature of contract of marriage—Onus of proof of incapacity.

A person who, through disease of the mind, is incapable, at the time of the performance of a marriage ceremony, of understanding the nature of the contract of marriage and of taking care of his or her person and property cannot enter into a valid marriage. Where the validity of a marriage is in question on the ground of the incapacity of one of the parties he who alleges that incapacity must prove it.

Notes. Considered: *Re Spier's Estate, Spier and Spier* v. *Bengen and Mason*, [1947] W.N. 46. Applied: *Re Park, Park* v. *Park*, [1953] 2 All E.R. 1411. Referred to: *Moss* v. *Moss*, [1897] P. 263.

As to incapacity to marry, see 19 Halsbury's Laws (3rd Edn.) 779–785; and for cases see 27 Digest (Repl.) 40–42; 33 Digest (Repl.) 597–600.

Administration Suit brought by the respondent James Reane, who sought administration of the effects of Mary Reane, otherwise White, alleged by him to have been his wife.

Mary Reane, otherwise White, died intestate in October, 1810. Thomas Browning, her nephew and one of her next of kin, denied Reane to be her husband. He did not deny that a fact of marriage took place, but he alleged that, at the time of that marriage being solemnised, the deceased was incapable from mental deficiency to contract a marriage.

SIR JOHN NICHOLL. The issue, therefore, in the cause is whether the deceased, at the time of the alleged marriage, was incapable of legally contracting it. I am of opinion that the person alleging that incapacity must prove it, a marriage having in fact been solemnised.

Upon the law of the case there is little question, and, without going back to ancient authorities, it may be sufficient to state what Blackstone, J., says on this subject:

"A fourth incapacity is, want of reason; without a competent share of which, as no others, so neither can the matrimonial contract be valid. It was formerly adjudged that the issue of an idiot was legitimate, and, consequently, that his marriage was valid. A strange determination! since consent is absolutely requisite to matrimony; and neither idiots, nor lunatics, are capable of consenting to anything; and, therefore, the civil law judged much more sensibly, when it made such deprivations of reason a previous impediment, though not a cause of divorce if they happened after marriage. And modern resolutions have adhered to the reason of the civil law, by determining that the marriage of a lunatic, not being in a lucid interval, was absolutely void."

Here, then, the law, and the good sense of the law, are clearly laid down; want of reason must, of course, invalidate a contract, and the most important contract of life, the very essence of which is consent. It is not material whether the want of consent arises from idiocy or lunacy, or from both combined, nor does it seem necessary, in this case, to enter into any disquisition of what is idiocy, and what is lunacy. Complete idiocy, total fatuity from the birth, rarely occurs; a much more common cause is mental weakness and imbecility, increased as a person grows up and advances in age from various supervening causes, so as to produce unsoundness of mind. Objects of this sort have occurred to the observation of most people. If the incapacity be such, arising from either or both causes, that the party is incapable of understanding the nature of the contract itself, and incapable from mental imbecility to take care of his or her own person and property, such an individual cannot dispose of her person and property by the matrimonial contract, any more than by any other contract. The exact line of separation between reason and incapacity may be difficult to be found and marked out in the abstract, though it may not be difficult, in most cases, to decide upon the result of the circumstances, and this appears to be a case of that description, the circumstances being such as to leave no doubt upon my mind.

The case is to this effect—that Mary Reane was always from her youth a silly or foolish person, possessing a very weak understanding, which nearly approached to idiocy, and was considered to be and was treated as such; that as she grew older her mental faculties more rapidly decreased, insomuch that for several years, and more especially for the last three years of her life, she was wholly incapable of governing, or taking care of herself or affairs; and that by reason of her weak and decayed state of mind, she was incapable of understanding the nature of courtship and addresses, or of consenting and agreeing to be married. It is not denied that, if this case is made out by the evidence, the marriage was in law invalid. It becomes, therefore, necessary to examine the circumstances which are proved in respect to the state and condition of the deceased, and the transaction itself.

The age of the deceased is proved to be upwards of seventy; the age of the man about forty; it is not controverted that she became possessed of considerable property by her brother's death. She was the daughter of a baker. It does not appear that she was, in her infancy, in such a state as to exclude all hope of her instruction or improvement, for she was sent to school, but it does not seem that she was ever able to read or to write her own name legibly. She was put out as an apprentice to a mantua-maker; and it is to be inferred from this that she was thought capable of learning to gain her own livelihood, but the fact is, she never did learn her business, but was employed as a servant in the house, in going on errands, and looking after the children.

Mr. Blissett, examined by the husband, says that he lodged, about thirty years ago, in the house where the deceased served her apprenticeship, and was acting as servant. She twice called upon him, about five, and about three months before her marriage. She told him she was going to be married, and appeared then as capable as when he formerly knew her. But he enters into no particulars of what her state was when he formerly knew her. He admits, upon an interrogatory, that she was of a weak understanding, but he considered her as capable of taking care of herself. He had not seen her for nearly forty years, and, if he is correct in dates, the first of these visits, viz., about five months before her marriage, when she said she was going to be married, it was before Reane knew her, his acquaintance having commenced in December, and she was married on Mar. 2 following. Whether this man is Blissett the player, mentioned in another part of the evidence, and whether it be true that the deceased had a child by Blissett is not proved in any satisfactory manner. If it were, this man's credit as a witness would not rest on any solid foundation, but, taking it otherwise, this evidence is extremely slight, and too little instructed with circumstances for the court to

A rely upon it. Eighteen or nineteen witnesses have been examined who have known the deceased at different periods of her life, some from her infancy, others at a more advanced period, but it is the latter part of her life which is most important. The statement of some of this evidence will afford the best reasons for the sentence the court is about to give.

Mary Silcox, aged eighty-five, deposed that she had lived all her life in Avon B Street, Bath. White, a baker, the father of the deceased, lived in the same street; she had known her from five years old; she went to school with three sisters of the deponent's; about ten or twelve she was put apprentice to one Harper, but on account of her weakness of mind, instead of being taught business, she was put to mind Harper's children. She went afterwards to live with a Mrs. Fry, and used occasionally to call at the deponent's house. On the death of Mrs. Fry, C twelve or fourteen years ago, she for some years, while living at different places, continued to call on the deponent, and complained of being starved, and out of compassion she took her to live in her house about five years ago, where she continued three years. About two years ago one Mrs. Physic took her away, and placed her in some shop, as she told the deponent, and where she still continued to call. The deceased was always from her youth a silly or foolish person, possessing D a very weak understanding, approaching nearly to idiocy, and as such was treated, and her mental faculties more rapidly decreased as she grew older. During the last years of her life she was wholly incapable of governing or taking care of herself or her affairs; no rational talk could be had with her, for where anyone spoke to her, or asked her any question, she would repeat the words in a silly irrational manner instead of replying to the question. She could not sit in a place for five E minutes together, but when at meals would get up from her seat, and run about the room, and when the deponent said to her, "Molly, you have not eat half your victuals," she would say she had enough, and would not abide in the house longer than to have her meals.

The deponent being confined a good deal by gout, had not an opportunity of seeing her from home. She has seen her pull up her petticoats, and expose her F person, and she was such a fool she would not mind making water before any person. She used very often to want to take the deponent's husband round the neck; she was worse in her conduct, and more silly, after the death of her brother than before; she never could be made sensible of her conduct, whatever might be said to her, even in the lifetime of her brother, who died about five years ago, and from whom deponent received a remittance of £20 a year for boarding and G lodging his sister.

Mary Turner said that she had known the deceased as long as she could remember. She was a young woman when the deponent was a girl; their respective fathers had dealings together: the deceased was in the habit of coming to the deponent's house, and would help herself to anything as if she was at home. Many years ago the deceased's brother desired her to look after his sister, which she H accordingly did, and she used to come to her, after which, by his desire, she was placed at Weston, near Bath. She clothed her to go to this lodging, stripping her the same as a child. She lodged in different places in Bath with Mrs. Viston, Mrs. Bristow, and another person who took Mrs. Bristow's house. She was in the habit of coming to the deponent, and she saw a great deal of her till a few days prior to the marriage. From her acquaintance with her she is enabled to I depose that the deceased was from her youth a silly or foolish person, possessing a very weak understanding, nearly approaching to idiocy, not sensible enough to take care of herself, and she was always so considered and treated by her own family. After the death of her brother, she became worse, or her mental faculties more rapidly decreased, notions of her being possessed of a great property being put into her head which were too much for her; she would sometimes repeat questions, would get up in the middle of meals without cause; would run about the markets and streets of Bath. Seeing her ill-used, the deponent several times

took her home, and, finding her violent, she would be obliged to shake her. Boys and idle persons used to follow her, calling out: "Molly White, give a pinch of snuff, where is the fisherman," alluding to a man in the market, of whom she was very fond, and who could not do his business sometimes for her. The person with whom she was placed at Weston signified that she was so troublesome she could not keep her. In the deponent's opinion she was totally devoid of common understanding, and incapable of comprehending the contract of marriage, or giving a rational consent thereto. George White paid for common necessaries for the deceased till his death, after which Mr. Physic, for Mr. Browning, engaged with some person to provide for her. Mr. Browning frequently gave the respondent money to buy snuff for her.

Thomas Field sells fish at the Bath market. About two or three years ago he first came to know the deceased by her asking him the price of fish, but he, concluding she did not want any, and observing her take snuff, asked her for some, which she gave him. From that time for many months she was continually coming to the market, sometimes twenty times a day, and used always to come up to the deponent, whom she frequently followed to a public house. He used then to hear her called Mrs. Field, which she would repeat in a silly way. He first heard her called Mrs. White by one Mrs. Turner, who had the care of her and used to come to drive her out of the market; she used to say to deponent: "Will you marry me?" and on his saying to her, "When will you marry me?" she would repeat the very words. When she came to the public-house she would drink the beer of anyone. She was a nuisance in the market, though she was worse sometimes than others, for if he did not offer to push her away, and talked to amuse her, she would be quiet. He used to pretend to be asleep, and she used to come up and offer to kiss him, and he having flour in his mouth for the purpose, would spout it over her. He considered her as a silly or foolish person of a very weak understanding which approached nearly to idiocy; she was not sensible of the impropriety of her conduct, though sometimes a little steadier than at others, and would take an answer and go away when she was told. He believes she was incapable of consenting to marriage, and would have married him fifty times over.

Jane Bristow knew the deceased eleven years ago, when she lived with Mrs. Fry in apartments in St. John's hospital. The deceased, then in poor circumstances, lived with Mrs. Fry, her aunt, on an allowance from her brother. On death of Mrs. Fry, the deponent succeeded to her apartment. The deceased, to whom she was in the habit of giving a penny to buy snuff, used to come daily to her, as well as to others in the hospital, till the day preceding her marriage. She proceeds to give the same account of her conduct and understanding that the other witnesses have given. There are two other women of the name of Light, who lived in apartments in this almshouse, and knew the deceased seventeen or eighteen years, who give exactly the same account. One of them says, also, that she would come into their apartments when they were drinking tea, take up their cups, and drink their tea. She would take things without being asked. She was guilty of indecencies, but not aware of their impropriety; was sometimes turned out of the apartment, but would return again in a short time; and she often talked of going to be married, but could not say to whom.

Anne Bristow deposes that about Lady Day, 1808, in consequence of an agreement between her husband, brother, and Mr. Physic, the deceased came to board with them, and continued six months. She used to go out early in the morning, but return to meals, and to go to bed. The deponent, being desirous of getting rid of her, agreed with another woman to take her, but she still continued to intrude herself into the house. She found the deceased to be a silly foolish person, approaching nearly to idiocy; she never could have thought she would have been half so bad, till she came to live with her; latterly she was worse, and, her faculties rapidly decreasing, she was incapable of taking care of herself. She never attempted to clean herself; she never answered any question put to her but in a silly irrational

manner repeated the question that had been put to her. She never sat still a moment. In the streets the children would hoot her, and pelt her with dirt, and pull her clothes off her back; that she would pull up her petticoats, and expose her person in the most indecent manner. If talked to about it, she would laugh and repeat the words. She would walk about her rooms and hide candles and other things. On account of her childish and extravagant conduct, she refused to continue the care of the deceased, who was always treated, while under her care, as a person whose understanding was so wholly deranged, or unsound and imbecile, that she had not sufficient to take care of herself and her affairs. On her coming for snuff the day before her marriage, the deponent said: "Mrs. White, I hear you are going to be married." The deceased replied: "Going to be married, married." The deponent believes that the deceased was at that time quite incapable of understanding the nature of marriage, and devoid of understanding. Mr. Bristow, the husband of the last witness, fully confirms this account.

At the time of the marriage the deceased lived under the care of Mr. and Mrs. Eyles. They and their maidservant, Sarah Edwards, have been examined, and they continue the same account of the condition of the deceased, down to the very day of her marriage. Elizabeth Eyles says that Browning worked for her husband, and boarded with them; and in consequence of his wishing to have a creditable place for the deceased, and saying he would allow £100 a year for taking care of her, the deponent was induced to undertake the same; but she had not been a week in the house before the deponent signified that in consequence of her conduct she could not stay there. She continued there eleven weeks, during which time the deponent saw, and was constantly with her. She used to wash her and put her to bed, for the servant could not manage her at all. She then gives the same account of her conduct as the other witnesses, and says that she could have been made to marry a boy, or anyone, or to believe if a post was dressed in man's clothes that she was married, and she used to have a great notion of being married. About eight o'clock on the evening before she was married, she came home very much intoxicated; and the deponent did herself, on account of her ill-using the servant, put her to bed, and never afterwards saw her. She heard her early the next morning about her room, and in the course of the day, missing her, inquired at Emery's, and heard she was married. This account is confirmed by the husband and servant.

In the facts which these witnesses relate, and the conclusions which they draw from these facts, they are perfectly concurrent, and, if they have not given a false account of the conduct of the deceased and totally deceived themselves, it is impossible not to agree with them in their inferences. A more complete picture of a poor crazy old woman cannot well be drawn than is here exposed—totally incapable of doing any one rational act, and never having through life, but particularly in the latter part of it, held a rational conversation, or done any one act in the management of herself or her property. Any attempt to explain this evidence by the deceased's voraciousness or love of drinking, must totally fail. In the first place, this sort of voraciousness is rather a sign of the defect of the mind, and frequently accompanies it—occasional intoxication will as little explain it—as the witnesses are persons who did not see her occasionally, but who were with her at all times and all seasons, and state her to have been always foolish and deranged. Crazy persons, not having lost the use of speech, and possessing the external senses, can walk about and go of errands, and express their wishes and wants, and have some general impressions, but this poor creature's capacity, especially in the latter period of her life, seems to have been further removed from reason than many animals of the brute creation.

It is necessary, however, to look into the evidence on the other side. On the first allegation, merely pleading the fact of marriage, the court could not expect much that was satisfactory. If the marriage was brought about by a fraudulent confederacy, there would be two descriptions of persons present at it, the parties

confederating and those whose presence was necessary and who might be deceived and imposed upon. Six witnesses have been examined as to the marriage, five of whom were actually present at it. Mr. and Mrs. Emery are two of them, who kept a retail shop at Bath, where the deceased used to buy snuff. They are the friends of the asserted husband. The whole matter of the marriage was contrived at their house. There the courtship, whatever it was, was carried on; thence they went to the church; and thither they returned after the ceremony. It is admitted that none of the friends or connections of the deceased was in any degree privy to the transaction—clandestinity is the usual concomitant of fraud. Emery admits her great infirmities, her habit of drinking and her indecent behaviour, but he attributes all her irregularities to her habit of drinking. He admits that on the evening of the marriage he went with the parties to the Cross Hands where the old woman was extremely intoxicated, and that on the bridal-night they all three slept in a double-bedded room. Here, then, is a young man, in the middle of life, marrying an old woman of seventy, an habitual drunkard, and labouring under great infirmities, but possessed of a considerable property which is to be acquired by this marriage without the knowledge of any of her friends or any settlement or security whatever. Upon uncontroverted facts the case has an unfavourable aspect, and has much the appearance of fraud and confederacy. Motives will not invalidate the act, however improper it may be, if the party was capable of acting for herself, but they excite the suspicion of the court, and it will require evidence of capacity from other witnesses not concerned in the transaction, nor will it think the testimony of Mr. and Mrs. Emery deserving of much credit when it is opposed to a cloud of witnesses who give a description of the state and condition of the deceased, irreconcilable with their account.

Martha Solway stated that she never saw the deceased but once before the marriage, did not know her name, and had never seen her since. She was asked to attend the marriage by Mrs. Emery. Whether she is to be regarded as a confederate, or as a person imposed upon, her evidence is of no weight, for she says that the deceased and the other persons held no conversation, and the single observation she recollects is that when the witness offered the deceased her arm, she said: "No, she would take her husband's." This goes affirmatively a very short way, but negatively it is strong that during the time she was in the deceased's company she can set forth no other expression that she used, and can assert that she entered into no conversation. The remaining three witnesses are the clergyman, the clerk, and the sexton, and the main fact relied upon is that she went through the ceremony. That alone cannot be held sufficient; if it were, no marriage could be invalidated unless all the parties were confederates in the fraud. There is no reason to charge the officiating persons as confederates, but as persons deceived. He must be a careless observer of human life who does not know that foolish crazy persons of this description have yet some degree of cunning and docility. This poor creature, whose notion was to be married, and whose common question was: "Will you marry me?" by a very little tuition might be trained and instructed to go through the formality of the ceremony though wholly incapable of understanding the marriage contract, without persons, previously unacquainted with her, discovering her incapacity. The solemnity of the place, and the occasion, of which she might have some general impression, would render her more tractable and orderly. Her appearance, however, did not wholly escape the notice of the clergyman, though he was lulled by the answer given to his inquiries.

Dr. Phillot says that previous to the ceremony he observed to the sexton that she was rather weak, and his answer was that he believed her a well-disposed woman, and that she attended prayers at church every day, always behaving herself with decency. The mere circumstance, however, of attending church constantly and behaving with decency is no proof of capacity, for it has come under my own observation that a person more nearly approaching to absolute idiocy than any which has ever happened to occur to my notice, always attended church, and

A behaved decently. The sexton does not pretend ever to have had any conversation with her. It appears also that the deceased has some degree of deafness, and thickness of speech; and that at the beginning of the ceremony, where she was to repeat after the clergyman, he was apprised of this defect, in order that he might speak louder. These defects would further lull his observation, and induce him to attribute her appearance to them rather than to want of capacity. Dr.
B Phillot states that after the marriage he asked the clerk who she was, and he told him she formerly had an illegitimate child by Blissett, that he understood she had an annuity, and he supposed the man must have married her for that. He asked the deceased, if she could write, to sign the register. She said she could, but, upon seeing the name unintelligibly written, he added: "The mark of Mary White."

C Skrine, the sexton, says that he never spoke to her till the time of her marriage, on which occasion she said to the respondent: "This is my husband," pointing to the prosecutor, and smiling.

This is the whole of the evidence applying to the condition of the deceased at the time of the marriage, and the circumstances are so equivocal and unsatisfactory that the court would have no great difficulty in its conclusion, if it stood
D on these alone. But whatever might have been that difficulty, it would be removed by the subsequent part of the case. Reane has had a full opportunity of producing other evidence and going into proof which should repel that of the next of kin, and show that they had given a false representation or come to a false conclusion. What makes the absence of such proof more forcible is that there could be no difficulty in producing it if the deceased had been a capable person. The deceased
E did not live in a state of seclusion. Of all persons she seems to have been most the object of observation ; the whole of her life was passed in Bath; she was never at home but at meals; the rest was passed in the abbey church, in the market-place, in the public streets of that great city; in these she was every day, and the whole day. If she had been capable of taking care of herself or of the most ordinary conversation, fifty or five hundred witnesses might have been produced to repel
F the evidence produced by Browning. Reane did give in a long allegation contradictory of the case set up by the adverse party. Upon that allegation he has examined six witnesses. Of these six, two only had ever seen the deceased before the marriage. One of them is Mr. Blissett, who has been already noticed, who had seen her only twice within the last thirty years. The other is a day-labourer's wife brought from Upton, in Gloucestershire, who said that she had known the
G deceased for thirty years, and to the time of her death. After her brother's death the deceased was generally employed in going about on errands at Bath, where she often met her. She talked as other people do, and did not repeat questions. This witness, it is to be observed, lived fifteen miles from Bath.

The absence of evidence, under the circumstances, is the strongest possible confirmation of the evidence given by the next of kin. Another species of evidence,
H always the most forcible, is the conduct of the deceased herself. If, throughout life, she had managed herself and her affairs, it would have afforded proof of her capacity. Though not in actual confinement, she appears to have been in a state of pupillage, never a person sui juris, not proved to have done any one act of business, or to have entered into a contract of any sort. She was put out an apprentice, but fails to learn her business so as to get her own livelihood. Her
I brother supports her with common necessaries, not by allowing or paying her money, but by paying other persons to take care of her. After his death, though she became entitled to considerable property, yet she never had the use or possession of it. It is her nephew, or his agent, Mr. Physic, who agrees with people to take care of her. She is washed and cleaned, and put to bed by others.

Having taken this view of the case up to the time of the marriage, it seems unnecessary to pursue it further with any degree of detail, but the sequel is exactly of the same character—the same strength of evidence on one side, coupled

with conduct, and encountered by nothing of any force or effect on the other. A

Upon the evening of the marriage Reane and his friend Emery take the old woman in a return chaise to an inn about twelve miles from Bath, called the Cross Hands. It is not worth while to examine whether she was or was not intoxicated when she arrived there, but she is not treated as a person having understanding. She joins in no conversation; she is carried up to bed, and undressed by the chambermaid; she will have her bonnet laid on the pillow. Reane and Emery, B it is admitted, slept in the same room with her, though Emery denied that they slept in the same bed. The next morning very early they carry her off in a chaise, towards Gloucester. Reane having been a waiter at an inn there, and not choosing to exhibit her, they leave her at a little public-house, a few miles from that town. On the following day they return to the Cross Hands, and again sleep there in the same two-bedded room. On the next morning Reane applies to the landlord to C get some person to take charge of the deceased for a few days till he could provide a proper place for her. The landlord having known Mr. White, the brother, who used to mention to him his foolish sister, out of respect to him offers to take charge of her for a few days. Reane accordingly goes away, leaving her in his hands. While there, she conducts herself in every respect as a silly childish person, and is treated as such, and they are obliged constantly to watch her. She would go D into all the rooms of the house, and take whatever belonged to the guests. She went up to all the carriages that stopped. She accosted the coachmen and drivers, and strangers, clasped them round the neck, and called them her husband. She asked her for "money, money," and the landlord gave her a post-horse ticket; she put it up safely, and supposed it to be a bank-note. In short, she became such a E nuisance that on Thursday the landlord wrote to Emery to desire Reane to come and fetch her away, and on Saturday Reane with another man (who turns out to be a sheriff's officer) fetched the deceased away, and carried her to Bristol.

These circumstances are very fully proved by several witnesses. At the inn at Bristol which was kept by a friend of Reane's the deceased remained several months. There a young woman, named Sarah Silon, was hired to look after her, F as a childish person, and she is treated as such both by Reane and Mr. and Mrs. Griffiths. Silon gives an account of the deceased's conduct exactly corresponding with that of the Bath witnesses. She is confirmed by her mother, to whose house, at the end of six months, the deceased was removed, and there she died. They are corroborated by Arnold, a whitesmith, living in the neighbourhood, to whom she appeared a silly person, always attended by Sarah Silon, as a guard. Griffiths G and Peachey are produced to represent the deceased at this time as, in their opinion, capable. They are the agents and partisans of Reane, and their depositions make no great impression on my mind. Mr. Scott, a surgeon, who attended the deceased three times, about five months after her marriage, for a contusion in the temple, and an inflammation in the eye, deposes that he observed no symptoms of insanity, or idiotism. The deceased being rather deaf, he spoke loud, and she H seemed attentive, and answered in a rational manner, but, a fulness of mouth disenabled her to articulate her words perfectly. She was attended by a female servant; Reane appeared attentive to her, and she was very partial to him. He does not state what his conversation with her was so as to enable the court to judge whether he had any grounds to form his opinion. It is mere negative evidence that he did not discover her incapacity. Attending her for an external I hurt, it was not necessary that he should ask questions about her mental infirmity. The deceased also, being rather deaf, and having thickness of speech, and the husband and attendant being both present, it is not at all probable that such conversation should have taken place between the surgeon and the deceased as should have enabled him to judge of the state of her mind.

With respect to the whole of the transaction, there is the same deficiency of evidence as before. No person can set forth the particulars of one rational conversation; no person appears who has had any social intercourse with her, who has ever

visited her, or has been visited by her. No one act of business is spoken to, no buying, or selling, or hiring, or ordering, no appearance of self dominion, of the care and management of herself. But, as the brother and afterwards the nephew had taken care of her before marriage, now Reane takes care of her, providing the common necessaries of life for her subsistence.

In addition to all this a writ de lunatico inquirendo was taken out and executed six months after her marriage. The verdict was found by a most respectable jury consisting of twenty-one persons; the deceased was produced in person; Reane's counsel and solicitor attended; and, after examining her in person, they found her incapable from two years antecedent. No attempt has been made to impeach this verdict in Chancery, nor have the counsel, or the solicitor, been examined in this cause: If this inquisition had been taken before the marriage, it would by the Marriage of Lunatics Act, 1741 [repealed by Statute Law Reform Act, 1873] have been conclusive against it, though not conclusive certainly against a will. But, taken after the marriage and under the circumstances stated, the deceased having been produced in person before the jury, it is a strong confirmation, if confirmation were wanting, of the other evidence.

Without the verdict, however, and looking only to the evidence adduced in this cause, in the view I have taken of it I have no hesitation in pronouncing against the interest of the asserted husband, and, under the impression I have received, it would be quite inconsistent with the conclusion to which I have come on the merits of the case, not to make it a part of the decree to condemn Mr. Reane in costs.

Order accordingly.

PULVERTOFT *v.* PULVERTOFT

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), January 27, 28, 29, June 29, November 19, 1811]

[Reported 18 Ves. 84; 34 E.R. 249]

Settlement—Voluntary settlement—Enforcement against purchaser—Marriage settlement—Consideration—Marriage—Inclusion of relatives.

If a settlement, though for good consideration, is voluntary, as between the persons claiming under it and a purchaser, though with notice, the purchaser will hold the estate: per LORD ELDON, L.C.

In the case of a father, tenant for life, with remainder to his son in tail, they may agree upon the marriage of the son to settle, not only upon the son's issue, but upon his brothers and uncles. Though not within the consideration of marriage the question would be whether they are not within the contract between the father and the son, both having a right to insist on a provision for relations: per LORD ELDON, L.C.

Notes. Considered: *Buckle* v. *Mitchell* (1812), 18 Ves. 100; *Bill* v. *Cureton*, [1835–42] All E.R. Rep. 317; *Heap* v. *Tonge* (1851), 9 Hare, 90. Referred to: *Smith* v. *Garland* (1817), 2 Mer. 123; *Alexander* v. *Wellington* (1831), 2 State Tr. N.S. 763; *Garrard* v. *Lauderdale* (1831), 2 Russ. & M. 451; *Doe d. Baverstock* v. *Rolfe* (1838), 8 Ad. and El. 650; *Dillon* v. *Coppin* (1839), 4 My. & Cr. 647; *McFadden* v. *Jenkyns* (1842), 1 Hare, 458; *Meek* v. *Kettlewell* (1842), 1 Hare, 464; *Walker* v. *Jeffreys* (1842), 1 Hare, 341; *Hughes* v. *Stubbs* (1842), 1 Hare, 476; *Griffith* v. *Ricketts*, *Griffith* v. *Lunell* (1849), 7 Hare, 299; *Kekewich* v. *Manning*

(1851), 1 De G.M. & G. 176; *Ford* v. *Stuart* (1852), 15 Beav. 493; *Donaldson* v. *Donaldson* (1854), 1 Jur. N.S. 10; *Scott* v. *Scott* (1854), 23 L.T.O.S. 27; *Salt* v. *Standish* (1863), 2 New Rep. 573; *Townend* v. *Toker* (1866), 35 L.J.Ch. 610, n.; *Peter* v. *Nicolls* (1871), L.R. 11 Eq. 391; *Clarke* v. *Willott* (1872), L.R. 7 Exch. 313; *Watts* v. *Watts* (1876), 24 W.R. 623.

As to the avoidance of voluntary settlements and the extension to persons not within of the marriage consideration, see 34 HALSBURY'S LAWS (3rd Edn.) 434, 435, 459–461. For cases see 40 DIGEST (Repl.) 595–600, 567 et seq.

Cases referred to:

(1) *Evelyn* v. *Templar* (1787), 2 Bro. C.C. 148; 29 E.R. 85, L.C.; 25 Digest (Repl.) 266, *748*.

(2) *Parry* v. *Carwarden* (1778), Dick. 544; 21 E.R. 381; 25 Digest (Repl.) 252, *597*.

(3) *Villers* v. *Beaumont* (1682), 1 Vern. 100; 1 Eq. Cas. Abr. 23; 23 E.R. 342, L.C.; 25 Digest (Repl.) 264, *725*.

(4) *Brookbank* v. *Brookbank* (1691), 1 Eq. Cas. Abr. 168; 21 E.R. 963; 25 Digest (Repl.) 257, *655*.

(5) *Doe d. Watson* v. *Routledge* (1777), 2 Cowp. 705; 25 Digest (Repl.) 272, *811*.

(6) *Roe d. Hamerton* v. *Mitton* (1767), 2 Wils. 356; 95 E.R. 856; 25 Digest (Repl.) 251, *594*.

(7) *Scott* v. *Bell* (1672), 2 Lev. 70; 3 Keb. 82; 83 E.R. 454; 25 Digest (Repl.) 251, *593*.

(8) *Lavender* v. *Blackstone* (1675), 2 Lev. 146; 3 Keb. 527; 88 E.R. 490; 25 Digest (Repl.) 272, *808*.

(9) *Ellis* v. *Ellis* (1793), 2 Coop. temp. Cott. 234; Vin. Abr. Supp. vol. 1, p. 475, pl. 4; 47 E.R. 1146; 27 Digest (Repl.) 259, *2092*.

(10) *Roberts* v. *Roberts* (1796), Vin. Abr. Supp. vol. 1, p. 476, pl. 5.

(11) *Holford* v. *Holford* (1672), 1 Cas. in Ch. 216; 22 E.R. 769; 25 Digest (Repl.) 264, *724*.

(12) *Leach* v. *Dene* (1640), 1 Ch. App. 461, n.; 1 Rep. Ch. 146; 12 Jur. N.S. 481, n.; 14 W.R. 811, n.; 21 E.R. 533; 25 Digest (Repl.) 268, *768*.

(13) *Colman* v. *Sarel*, *Sarel* v. *Colman* (1789), 3 Bro. C.C. 12; 1 Ves. 50; 29 E.R. 379, L.C.; 44 Digest (Repl.) 11, *41*.

Also referred to in argument:

Doe d. Otley v. *Manning* (1807), 9 East, 59; 103 E.R. 495; 25 Digest (Repl.) 266, *749*.

Winch v. *Page* (1721), Bunb. 86.

Motion to dissolve an injunction restraining the defendant from selling or encumbering certain estates.

The Bill, filed by Sarah Pulvertoft by her next friend, stated her marriage with James Richards Pulvertoft in 1806, and that by indentures of lease and release dated Jan. 14 and 15, 1807, he conveyed freehold estates to the use of himself for life without impreachment of waste, with remainder to trustees to preserve contingent remainders, and remainders to his wife for life and for the benefit of their children, and in default of issue to himself and his heirs. By other indentures, dated Aug. 13 and 14, 1807, the settled estates with others were conveyed to Thomas Pulvertoft and his heirs to secure the sum of £800 advanced by him by way of mortgage, and, subject thereto, for the separate use of Sarah Pulvertoft with remainder to the use of James Richards Pulvertoft for life, remainder to trustees to preserve contingent remainders, and, as to the estates in the former settlement, after the decease of the survivor and in the event of no children to the right heirs of the survivor, and as to the other estates to the children of James Richards Pulvertoft in tail with remainder, subject to his appointment by will, to the right heirs of the survivor of him and his wife. In June, 1808, another settlement was executed by which the limitations to the wife and children were not varied. The bill further stated that

A the mortgage was afterwards paid to Thomas Pulvertoft, and he and the other trustees being desirous to be discharged from the trusts, another settlement was executed in June, 1810, conveying the estates to other trustees upon the same trusts for the sole and separate use of Sarah Pulvertoft, and after her decease upon such uses and trusts for the benefit of James Richards Pulvertoft and Sarah Pulvertoft, and their issue, if any, and the survivor of him and her, his or her heirs, etc.,
B as were declared by the former settlements. There was no issue. The bill, charging that as against James Richards Pulvertoft the settlement was good, that he was not indebted at the time of the execution of the deeds respectively and that he was about to sell the estate, prayed that the trusts of the several indentures of 1807, 1808, and 1810, might be established and carried into execution, etc., that the defendant James Richards Pulvertoft might be restrained from selling, charging or
C encumbering the estates, and that a receiver might be appointed. An injunction having been obtained, a motion was made to dissolve it.

Leach and *Wakefield* in support of the motion: *Evelyn* v. *Templar* (1) is a decision according to the rule of equity and the principle from which it springs that a conveyance taken against conscience with notice of the defect must be held
D subject to the same conscientious claim. When, therefore, it is decided that a purchaser is not affected by notice of claims under a voluntary settlement, as it is not against conscience for the purchaser to take, it cannot be against conscience for the vendor to sell. The effect of that case is that a voluntary conveyance has no value in contemplation of equity, and *Parry* v. *Carwarden* (2) is another case leading to the same conclusion. The consequence is that a court of equity will not
E interpose for the protection of any interest under a voluntary settlement to execute articles or give any aid to persons claiming under a voluntary settlement so as to present a sale by the author of it.

Sir Samuel Romilly and *Haslewood* for the plaintiff: A court of equity will prevent a man who has made such a voluntary settlement upon his wife and children from disappointing it. In the cases cited an actual sale had taken place,
F and the contest was between an actual purchaser and those who claimed under the voluntary conveyance, but the question here is whether this court will give to a person, who has now no equity, an equity against the wife and children, whether the husband and father shall be enabled to create such an interest in some person for the mere purpose of disappointing the settlement. The objection that, if the purchase is not against conscience, the sale cannot be unconscientious, is answered
G by the Fraudulent Conveyances Act, 1584 [repealed by Law of Property Act, 1925] positively declaring a voluntary conveyance void against a purchaser, not, therefore, involving any question of conscience. Here is no person who has a right to call for the benefit of that statute. It is surely a most unconscientious act in a man, having settled an estate upon his wife and children, to sell and take the money himself, though it may not be unconscientious to propose to purchase if a
H good title can be made.

There are many instances of a good consideration supported and aided in equity: *Villers* v. *Beaumont* (3); *Brookbank* v. *Brookbank* (4). The tendency of the modern cases is that the decisions upon this statute have gone sufficiently far and their effect in defeating such settlements is not to be extended: *Doe d. Watson* v. *Routledge* (5); *Roe d. Hamerton* v. *Mitton* (6). The right to dower, or a jointure given up, has been
I held a valuable interest preventing the effect of this statute, and the court does not enter into the quantum of the consideration: *Scot* v. *Bell* (7); *Lavender* v. *Blackstone* (8). In *Ellis* v. *Ellis* (9), and *Roberts* v. *Roberts* (10) the husband was restrained from assigning the wife's property, thereby defeating her right to a settlement. A contract would be enforced in favour of a wife and children, but the jurisdiction becomes nugatory if the husband by creating an interest in a third person can defeat his own act. Admitting that the right of a third person claiming either by conveyance or contract the benefit of this statute, would prevail, the question is whether

a court of equity will permit the husband to create such an interest which does not yet exist, and thus defeat the act by which he had discharged the moral obligation to provide for his family. The consequence of dissolving the injunction in this stage of the cause must be a decision against the relief under this settlement without a possibility of appeal, a consideration which will induce the court to admit a short delay by continuing the injunction until the hearing.

LORD ELDON, L.C.—The object of the inquiry in *Holford* v. *Holford* (11) was to ascertain whether the brother of the father was under the first settlement a mere volunteer, as, where the limitations extend to brothers or other relations, all within the consideration, those are not cases of voluntary settlement.

It is too late to dispute that, if a settlement, though for good consideration, is voluntary, as between the persons claiming under it and a purchaser, though with notice, the purchaser will hold the estate. It is true the construction put upon both these statutes is singular that a man, paying what in other cases is called an obligation of nature, should be considered as within the penalties of these Acts. I remember, I think, all the cases that have occurred in the courts of justice for the last thirty years upon this point. I have also had considerable information from others, carrying my acquaintance with it back to the distance of half a century, and after granting this injunction I felt extremely uneasy as having taken a step that I believe was never before asked from a court of justice, recollecting also the struggle of late against the doctrine upon the construction of these statutes and Lord Thurlow's opinion on the case [in *Evelyn* v. *Templar* (1)], I argued that the money could not be laid hold of, it seems almost impossible to conceive that, if courts of equity had this jurisdiction, there would not have been found considerable authority leaving no doubt upon it at this day.

I have not had an opportuniey of looking through the cases so thoroughly as I wish, but upon examining *Evelyn* v. *Templar* (1) in my own book I find the printed note very imperfect, and I believe this very point was much discussed there. In *Leach* v. *Dene* (12), which was referred to in that case, it does appear from another very imperfect report that this court did lay hold of the money, and I stated that to Lord Thurlow as a ground for his interposition in a case, much stronger than the common case, an actual covenant, that, if he did sell, he would settle the money to the same uses. In all these cases, whether there should be such covenants or not, there are, generally, covenants for the title upon which the value of the estate might be recovered at law, but there are many cases of that kind, where, if purely voluntary, this court would not do anything upon such a covenant.

Holford v. *Holford* (11) I dare not rely upon without looking more into it. If it was a decision that this court will not execute articles against a voluntary settlement, it contradicts a much later case, *Parry* v. *Carwarden* (2), and others, where this court has executed articles against a voluntary settlement. For another reason also I would not decide upon that case without examining the Register's Book, on account of the case of persons not within the consideration directly, but who have been always so considered, preventing the effect of these statutes. In the case, for instance, of a father, tenant for life, with remainder to his son in tail, they may agree upon the marriage of the son to settle, not only upon his issue, but upon the brothers and uncles of that son, and the question would be whether they, though not within the consideration of the marriage, are not within the contract between the father and the son, both having a right to insist upon a provident provision for uncles, brothers, sisters, and other relations, and to say to each other: "I will not agree, unless you will so settle." The court has held such a claim not to be that of a mere volunteer, but, as falling within the range of the consideration; and, therefore, these statutes would not bear upon it.

Brookbank v. *Brookbank* (4) bears much upon the point. It is clear that a voluntary settlement is good between the parties. I wish also to look at that case in the Register's Book. If it was no more than a voluntary settlement by the father

A and the son, and upon failure of issue the father wished to part with the estate and the uncle filed a bill to have the deed brought into court, first, I doubt extremely whether the uncle would be entitled to that as the son himself would not have been entitled to have the deed brought into court. Next, I cannot agree that, if the deed had been brought into court, it would have prevented a sale by the father if that was a voluntary settlement. The answer would be that the deed, though brought B into court, being no more, the purchaser, getting the prior title deeds, would have been safe.

With regard to *Ellis* v. *Ellis* (9) and *Roberts* v. *Roberts* (10), cited as to the wife's property, it is now very well understood that the doctrine resulting out of those cases will not apply to such a case as this, and many of them would not at this day be held to be law as applying to her property, but if LORD THURLOW did not think C himself authorised to lay hold of the money in *Evelyn* v. *Templar* (1), where there was notice and an express covenant to lay out the money to the same uses, I must take his opinion to have been, as I believe it was, that with a mere voluntary settlement this court has nothing to do.

Another circumstance has been suggested—that this is not a voluntary settlement with reference to the wife giving up her dower. With regard to the fact, estates are D so involved with trusts that in very few cases is the wife entitled to dower. That, however, may be the subject of inquiry, but upon the general point my opinion is that I ought not to have granted this injunction, and I was extremely uneasy afterwards, reflecting upon it.

I have read the settlement in this case, and desire it to be understood that I give no opinion whatsoever whether this settlement was or was not voluntary, being E apprehensive that, refusing the injunction, I should be considered as intimating an opinion that the purchaser would have a good title. If this is a voluntary settlement, I cannot grant the injunction. If it is not a voluntary settlement, I cannot for that mere reason grant the injunction, as the effect would be that any person who conceived himself to have a better title than another might come into this court for an injunction. I cannot, therefore, support the injunction, whether the settle- F ment is voluntary, or not, but I intimate no opinion whether the purchaser will have a good title or not.

An order was made dissolving the injunction.

Nov. 19. The court considered a demurrer filed by the defendant.

Leach and *Wakefield* in support of the demurrer.

G *Sir Samuel Romilly* and *Haslewood* for the plaintiff.

LORD ELDON, L.C.—Upon the principal question I am ready to give my opinion, but I will not prejudice the case by expressing it if the demurrer is at last to be overruled upon another ground. The question is not, as it is now put, whether, if there is a contract for a wife or children, this court would execute that contract as being for a meritorious consideration; it must be considered as not resting in H contract, but a trust, for consideration meritorious or otherwise, by an actual estate in trustees, and the distinction is settled that in the case of a contract merely voluntary (I do not speak of valuable or meritorious consideration), this court will do nothing. If, however, it does not rest in voluntary agreement, but an actual trust is created, the court does take jurisdiction. In one case, I do not recollect whether it was *Colman* v. *Sarel* (13), as far as the obligation rested in the covenant I of the husband, the court would not do anything, but in the very same case, as far as an actual transfer had been made, the court acted upon it, a direct trust being created. Suppose this settlement to the separate use of the wife had given an express power of revocation to the husband, having in his own dominion the means of putting an end to it the moment it was acted upon. Perhaps in such a case, as in case of a quasi estate-tail of renewable leases for lives, the court would not interfere, but here there is no power of revocation by his own act; there must be the concurrence of others. Suppose, trustees were incapable of acting, that there was an

infant heir, it is difficult to maintain that, though an estate and trust were actually created, this court would stop on the ground that the estate might at some period be destroyed by a conveyance for valuable consideration. So, as to a receiver, this court would not refuse a receiver, though there may be a prior estate actually existing, without prejudice to the right of the person, having that prior estate, but where there is no prior estate, and, perhaps, no preferable estate may ever exist, will the court stop short in executing the trust? If the trustees could maintain an ejectment at law, this court must give the parties claiming under the trust the remedies to which they are entitled while that estate exists. The distinction to which I am now adverting resembles that which is acknowledged by this court between the cases where a party can bar by fine and where he is obliged to go through the form of a recovery. This point appears to me to be one of considerable weight, and, therefore, though I have formed an opinion upon the other question, I shall refrain from expressing it, unless I shall find myself justified by the necessity of determining that question.

His Lordship later upon the point last suggested overruled the demurrer, as covering too much, the plaintiff until an actual sale being entitled to an execution of the trust.

DASHWOOD *v.* PEYTON AND OTHERS

[Lord Chancellor's Court (Lord Eldon, L.C.), April 1, 2, May 2, 3, 6, 10, 1811]

[Reported 18 Ves. 27; 34 E.R. 227]

Will—Trust—Precatory words—Creation of trust—Request to devisee on his death to give definite ascertained property to definite ascertained objects.

In equity precatory words in wills have been held to be imperative where the object and the subject are certain. Then a trust is raised either out of the disposition of an interest or out of what amounts to a direction to elect. Where, for instance, property is given to a person with words of request to him to give upon his death definite, ascertained parts to definite, ascertained objects, a trust arises, as it is declared what is to be given and to whom.

Will—Gift—Implied gift—Intention of devisor to part with whole interest—Express devise of only part.

A devise by implication can arise where the devisor, meaning to part with his interest, parts expressly with only a portion of it, and the question is whether that which is not in terms given is by the effect of the will, taken altogether, disposed of.

Election—Will—Intention to give property not that of donor.

An effectual gift may be made in a will by raising a case of election, but for that purpose a clear intention to give that which is not the donor's property is always required: per Lord Eldon, L.C.

Notes. Considered: *Sandford* v. *Raikes* (1816), 1 Mer. 646. Applied: *Coutts* v. *Acworth* (1870), 18 W.R. 482. Referred to: *Fletcher* v. *Sondes* (1827), 1 Bli. N.S. 144; *Adams* v. *Adams* (1842), 11 L.J.Ch. 305; *Mackenzie* v. *Bradbury* (1865), 35 Beav. 617; *Codrington* v. *Lindsay* (1873), 8 Ch. App. 578.

As to precatory trusts, see 38 Halsbury's Laws (3rd Edn.) 823, 833, 834; and for cases see 47 Digest (Repl.) 34–39. As to implied testamentary gifts, see 39 Halsbury's Laws (3rd Edn.) 1161–1170; and for cases see 49 Digest (Repl.) 1198 et seq.

A Cases referred to:

(1) *Bishop of London* v. *Fytche* (1781), 1 Bro. C.C. 96; subsequent proceedings sub nom. *Bishop of London* v. *Ffytche* (1783), 2 Bro. Parl. Cas. 211; 1 East, 487; Cunningham's Law of Simony, p. 52; 1 E.R. 892, H.L.; 19 Digest (Repl.) 419, *2287*.

(2) *Tilly* v. *Tilly* (1743), cited in 18 Ves. at p. 43; 34 E.R. 233, L.C.; 48 Digest B (Repl.) 469, *4234*.

Also referred to in argument:

Hanington v. *Du-chatel* (1783), 1 Bro. C.C. 124; 2 Swan. 159, n.; 28 E.R. 1028; sub nom. *Harrington* v. *Chastel*, Dick. 581; 7 Digest (Repl.) 179, *124*.

Roe d. Bendall v. *Summerset* (1770), 2 Wm. Bl. 692; 5 Burr. 2608; 96 E.R. 407; 49 Digest (Repl.) 1199, *11018*.

C *Bibin* v. *Walker* (1768), Amb. 661; 27 E.R. 429; 48 Digest (Repl.) 471, *4246*.

Poulson v. *Wellington* (1729), 2 P. Wms. 553; 24 E.R. 849, L.C.; 37 Digest (Repl.) 290, *436*.

Motion for an injunction in an action for the delivery up of a bond to be cancelled and an injunction.

D Sir Thomas Peyton by his will dated Jan. 14, 1765, devised real estates, and also the advowson of Doddington, to the use of his nephew Henry Dashwood, afterwards Sir Henry Peyton, for life, with remainder to his first and other sons in tail male, to the plaintiff James Dashwood and his first and other sons and several remainders over, with the following direction:

E "I do hereby order, will and direct, if the living of Doddington in the Isle of Ely in the said county of Cambridge shall happen to become vacant by the death or resignation of the present incumbent or otherwise while my said nephew Henry Dashwood shall be in possession of the estates hereinbefore by me given or limited to him as aforesaid, then and in such case he, the said Henry Dashwood, shall and do present his said brother James Dashwood to the said living and rectory of Doddington."

F At the death of Sir Thomas Peyton the living of Doddington was full, Dr. Proby, afterwards Dean of Litchfield, being the incumbent. Sir Henry Peyton, being seised for his life of the devised estates and the advowson, and being also seised of other estates in the county of Suffolk which he had power to dispose of, by his will, dated Jan. 10, 1789, recited that he was seised or entitled for life G under the will of his uncle Sir Thomas Peyton among other estates of or to the advowson of the rectory of Doddington, with remainder to his eldest son Henry in tail male, with divers remainders over, and continued:

"Subject to a direction in the said will, that my said brother James Dashwood should be presented to said rectory when it shall next become vacant, which it is my wish may be complied with, now I do hereby declare it to be my H desire and earnest wish that in case upon the vacancy of the said living by the death or promotion or resignation or other act of the present incumbent, the said James Dashwood, shall not be then living, or shall decline to accept of the said presentation, or in case the said rectory shall again become vacant after the said James Dashwood shall have been presented to and accepted the said presentation, then and in either of such events my son Algernon Peyton I may be presented to the said rectory or living of Doddington as soon as he shall be qualified and willing to accept of the said presentation; and that in order thereto in case at any time after such vacancy as is last hereinbefore mentioned and before my said son Algernon shall be qualified and willing to accept of the said presentation the said rectory shall become vacant, such fit person or persons successively, giving a preference therein to my nephews according to their seniorities, shall be presented to the said rectory upon his or their executing a bond in a sufficient penalty for resignation of the said

rectory upon the event of my said son Algernon being qualified and expressing a desire to accept of the said living."

The testator then gave and devised all his freehold and copyhold estates in the county of Suffolk to his wife for life, and after her decease to Sir John Rous and John Heigham, and their heirs, upon trust that, in case the testator's son Henry Peyton should as soon as conveniently might be after his attaining the age of twenty-one years secure to or in trust for the testator's son Algernon Peyton the presentation of the said rectory or living "according to my wish and desire hereinbefore by this my will expressed," then his said trustees should convey the said estates

"unto my said eldest son Henry, his heirs and assigns for ever: but if my said son shall refuse or neglect to secure the said presentation to my son Algernon by the space of twelve calendar months next after he shall attain the age of twenty-one years, and be thereunto required by the said Sir John Rous and John Heigham, or the survivor of them or his heirs, and shall wilfully neglect to do any act, by which neglect the said Algernon Peyton shall be prevented from being presented to the said rectory or living, or if my said son Henry shall die without having so secured the said presentation,"

then upon trust to convey the said estates to Algernon Peyton, his heirs and assigns for ever, on his attaining the age of twenty-one years.

By a codicil dated Jan. 17, 1789, with a similar recital, and that he had by his will declared his desire and earnest wish, etc., as stated in the will with reference to the living, the testator declared that, being desirous of expressing clearly and fully his will and desire with regard to the preference to his said nephews according to their seniority, he desired:

"that in case of the last-mentioned vacancy before my said son Algernon shall be qualified to accept of the said presentation as aforesaid, my nephew John Heigham shall be first offered the said presentation to the said rectory or living; and in case of his death or of his refusal or neglect by the space of twenty-one days to execute such bond of resignation as aforesaid, then and in such case my nephew Henry Heighham may be then offered the said presentation; and in case of his death or refusal or neglect for the space of twenty-one days my nephew George Heigham; and in case of his death or of his refusal or neglect by the like space of twenty-one days to execute such bond of resignation as aforesaid, then that some other fit person or persons may be successively offered the said presentation in the meantime and until my said son Algernon shall be qualified and willing to accept the said presentation: every such person previously to his being presented to the said living executing such bond of resignation as aforesaid; and I do hereby declare it to be my will and direct that such bond of resignation as aforesaid shall be in trust for and for the sole use and benefit of my said son Algernon Peyton."

Sir Henry Peyton died in March, 1789, leaving his two sons Henry and Algernon surviving. Sir Henry Peyton, the eldest son, having attained twenty-one, by indenture dated Dec. 15, 1802, demised and granted the advowson to Lord Rous, his executors, etc., for the term of ninety-nine years, if Algernon Peyton should so long live, for the purpose of enabling them to present Algernon Peyton to the living; and to entitle Sir Henry Peyton to a conveyance of the estates in the county of Suffolk. Lord Rous conveyed the Suffolk estates to the use of Sir Henry Peyton and his heirs. Dr. Proby continued the incumbent until his death in January, 1807, having been the rector fifty-seven years. Algernon Peyton was then of the age of twenty-one years. By a letter to the plaintiff James Dashwood dated Jan. 23, 1807, Lord Rous, the trustee, stated that Sir Henry Peyton was anxious to comply with his father's will, and at the same time to guard against a forfeiture of the Suffolk estate to his brother Algernon, to which

Sir Henry was liable if he did not within twelve months after he came of age secure to Algernon the presentation as soon as he should be capable of holding it; that a deed of trust had been prepared accordingly, vesting the living in Lord Rous, as trustee, to present Algernon if the dean had lived, until Algernon attained twenty-four; and in case of the earlier death of the incumbent to give the refusal of it to the plaintiff to hold under a bond of resignation and an agreement not to accept a bishopric until Algernon should be capable of taking it. If the plaintiff should decline for twenty-one days to accept it upon those terms, then it was to be offered to Mr. Heigham, and in case of his refusal for twenty-one days some other fit person was to be found to hold it, and recommending the plaintiff to take it.

The bill stated that at the time of receiving the letter from Lord Rous the plaintiff was ignorant of the contents of the wills of Sir Thomas and Sir Henry Peyton, or that it was competent to Sir Henry Peyton, the son, or the trustees to have secured the next presentation to the plaintiff for his life in preference to Algernon Peyton without requiring any bond obliging the plaintiff to resign in favour of Algernon Peyton on his becoming qualified to hold the living, and the plaintiff, under such ignorance and in reliance on the representations so made to him by Lord Rous, expressed his willingness to accept the presentation on the terms proposed. Accordingly a bond was executed in February, 1807, by the plaintiff reciting the demise of the advowson in 1802 by Sir Henry Peyton to Lord Rous for ninety-nine years, and the vacancy, etc.; with condition that, if James Dashwood should not after his admission, institution, etc., upon the presentation of Lord Rous accept a bishopric, and also, if, when Algernon Peyton should be in Holy Orders and duly qualified and willing to be presented, etc., James Dashwood should within one month after request resign, or if Algernon Peyton should die without being qualified and willing, etc., the bond should be void. The bill further stated that the plaintiff, who was soon afterwards presented, under the same mistake wrote to the bishop intimating his intention to resign conformably to this bond and afterwards discovered that it was intended by both testators that he should be presented without any such obligation, and the bill prayed that the defendant Lord Rous might be decreed to deliver up the bond to be cancelled, and an injunction against proceeding upon it.

The answers, admitting the facts, submitted that it was incumbent upon Sir Henry Peyton, in order to entitle himself to a conveyance of the Suffolk estate, to demise the rectory so that the plaintiff, if he accepted the presentation, should be under an obligation to resign according to the condition of the bond; that by Sir Henry Peyton's will the defendant, Sir Henry Peyton, was not authorised to demise the rectory in trust to present the plaintiff, and upon his death Algernon Peyton, if qualified, and, if not, some other person who should give a bond, etc., that though it was not expressly required by the will or codicil of Sir Henry Peyton that any bond should be required from the plaintiff, yet under the circumstances it was proper and necessary, the plaintiff being entitled to the presentation in the event only of Dr. Proby's death in the life of the testator Sir Henry Peyton, or while he was in possession of the estates devised to him; that it was not his intention that the plaintiff should be presented without any restraint, etc., or except in the event of a vacancy in the life of Sir Henry Peyton, the testator, or while he was in possession of the estates devised to him by Sir Thomas Peyton.

Sir Samuel Romilly, *Hollist*, *Hart* and *Roupell* in support of the motion.
Sir Arthur Piggott, *Richards* and *Johnson* for the defendants.

LORD ELDON, L.C.—This motion is made under very particular circumstances, and though I should have wished, before I decided, to look into the authorities upon the doctrine as to the effect of recital founded in mistake with or without words denoting wish, yet with reference to the nature of the property I think it better not to delay the determination. Independently of the circumstances arising

out of the will, this is the case of a presentation of a person who upon that presentation has given a bond of resignation in favour of a particular individual and a bond never to accept a bishopric, and supposing the case had brought forward more distinctly the objection, the ground of it is to be considered in different views. A

In *Bishop of London* v. *Fytche* (1), the House of Lords held that a general bond of resignation is bad. That case was not followed in the Court of King's Bench with reference to a bond to resign in favour of a particular individual, the son or nephew of the person, to whom the obligation was made. In that case it was said to have been repeatedly decided at law that a general bond of resignation is good, but I believe it will be found that the Lord Chancellor, or that judge who against the opinion of the other judges held a general bond of resignation to be positively bad, denied that such bond had been held good in any instance, and stated that a search would produce that result. It is very difficult also upon the pleadings in *Bishop of London* v. *Fytche* (1) to reconcile the distinction between general and particular bonds of resignation with the principle on which the House of Lords made that decision. It would not, however, become me, having regard to what is the present state of the law on this subject, to interpose in a court of equity on the ground that this is a particular bond of resignation, as, though I agree that this court, if it has a concurrent jurisdiction, is not bound to wait for the decision of a court of law, yet reasonable caution requires a court of equity not hastily to pronounce bad a bond understood to be good at law, and it would at least be proper to leave that question to be reconsidered at law. B C D

I make this observation with another view. If the particular bond is bad, it is so either from motives of public policy, or as being understood to be bad either by statute or the common law. Admitting the cases of relief afforded to a particeps criminis, there is considerable doubt, upon grounds of public policy, whether it is possible for a clergyman to come here stating that he had given a general, or particular, bond of resignation, and on the ground that such bond was bad calling on the court to enable him to hold the living, discharged of the obligation under the bond. In *Bishop of London* v. *Fytche* (1) the living and the bond went together; the clergyman lost his living, and his bond was held good for nothing. In other cases the ground of relief was that a bad and vicious use was made of the bond, but I doubt whether this is a proper ground of relief, and with regard to the other ground of public policy, the engagement not to accept a bishopric, that, if a ground in equity, is equally so at law. I admit the concurrent jurisdiction, but, knowing that there are in fact many such bonds, I should wish to receive information as to the law on that head before I set aside this bond in equity on that ground, being extremely unwilling to interpose against that which in habit and practice it is notorious very constantly takes place. E F G

Supposing the court cannot interpose on either of those grounds, another ground is taken by the plaintiff. Not disputing the legality of the particular bond and his engagement not to accept a bishopric, he insists upon his right to have this living as an interest by devise standing upon implication or the doctrine of election given to him purely and without condition; that terms are imposed on him which ought not to be imposed; that the nature of the transaction was not dealing, treaty, and bargain, but it is a transaction in which to a man, having the right, though not aware of it, this presentation was held out as a favour, but the presentation was clogged with a condition, obliging him to give up the living whereas he ought to have it, as all benefices are by the policy of the law held by a tenure for life. Both parties, the person presenting and he who was presented, had, I believe upon the whole, a very honourable purpose, and I see it in no other view than that these conditions should not be operative if James Dashwood had a right to be presented. H I

The question then is whether he had that right, depending upon a very singular state of circumstances. Upon the first of these wills it is impossible to contend

A that James had any right to the presentation unless the vacancy occurred during the life of Henry and while he was in possession of the devised estates. Upon the will of Sir Henry and the codicil it is clear that the tenant in tail of the advowson of Doddington had made a conveyance of it, amounting to this, that the trustees should upon a vacancy present James Dashwood if he thought proper to accept it, and upon his death should present Algernon, if he was twenty-four years of B age; or, if not, that they should present the Heighams successively in their order. It appears to me that they could not have complained of the trust interposed in favour of James Dashwood, nor could Algernon Peyton have complained of it.

The circumstance that a condition is expressed with reference to one individual and not the other is not sufficient proof that there was no intention to raise a case of election, and, if a case of election is raised by the operation of this will, notwith- C standing the express condition as to the Suffolk estate, yet, if any other property was given to Henry, upon which election can be fastened, the court will apply it without any express direction, and though there is an express direction with regard to another individual, a circumstance, however, which will make the court consider, whether the true construction is not that the testator expressly imposed a condition on one, conceiving it to be a gift to him, and did not impose a condition on the D other as understanding, not that he took a gift, but that he was already in possession by some antecedent title.

It was contended, justly, that James Dashwood must succeed by some title, legal or equitable, in himself, and my opinion is that Algernon could not have come here, while under the age of twenty-four, insisting upon his brother Henry's making any conveyance to exclude James Dashwood. Henry might have said E it was immaterial to him whether the testator expressed himself by mistake, but the conveyance to Algernon of the living after James had possessed it would satisfy the terms of the will. So the Heighams, who might, I think, have claimed free from this condition as to the bishopric, could not have called on Henry for the presentation until James had refused or a vacancy occurred after his possession.

The true question is whether, if Henry chose to satisfy the claims of those F persons, passing over James Dashwood, he had an interest that would in equity support his claim to be relieved against that act. That cannot be upon the ground of a devise by implication which strictly arises where the devisor, meaning to part with his interest, parts expressly with a portion of it only, and the question is whether that which is not in terms given is by the effect of the will, taken altogether, disposed of. Where, for instance, an estate is given to B. after the G death of A., the question is what is done with it, or whether anything is meant to be done with it, during A.'s life. If B. is the heir-at-law, of necessity A. must take the intermediate interest, though not disposed of, as the heir-at-law cannot take during the life of A. So, as to precatory words which in equity have been held imperative where the object and subject are certain. Those are cases of trust, raised either out of the disposition of an interest or out of what amounts to a H direction to elect. Where, for instance, personal property is given to a person for ever with words of request to that person to give upon his death definite, ascertained, parts to definite, ascertained, objects, a trust arises, as it is declared what is to be given and to whom, which, however, may be considered rather a strong decision. So, if personal or real estate is given to A. with an expression of hope and trust that he will give at his death property of his own to B. that is an I imperative trust upon express condition.

The real question is whether this is to be considered as a case of election, and, though it cannot be a direct devise as the testator had nothing to give, it is clear, that an effectual gift may be made by raising a case of election, but for that purpose a clear intention to give that which is not his property is always required. If, therefore, it can be established that the testator has expressly declared, or has shown a clear intention, that James Dashwood should take this presentation, a case of election would be raised, but if upon the whole will, taken together, it is obvious

that the testator thought he had nothing to give to James, that he was already entitled, and the testator under that supposition has not given to him, or expressed an intention that he should take, I find no authority for holding a mere recital, without more, to amount to a gift, or a demonstration of an intention to give.

Upon the whole of this case, admitting that, if there was either a direct gift, or, what amounts to it, an intention to give what was not the testator's property, the condition expressed as to Algernon would not preclude the application of the same doctrine of election as to James Dashwood, yet the expression of that condition shows an anxiety to secure what he intended to give, accounting for the absence of it as to that, which he did not conceive was his to give, and upon the whole will, though, I think, Algernon might have insisted under the age of twenty-four that he should not be disappointed by giving this living to any other person than James Dashwood, that was a question between Algernon and Henry, the Heighams and Henry, and the Heighams and Algernon, and by mistake James Dashwood has not derived such an interest in the property that he could insist upon. The question whether it was lawful to clog the presentation to him with these conditions, I shall not deal with in this court.

As this motion will probably have the effect of a hearing, you may, if you think proper, bring under the review of the court the order for dissolving the injunction.

The motion was again argued, and after the argument the LORD CHANCELLOR mentioned *Tilly* v. *Tilly* (2) from MR. JODDRELL'S notes, where, the owner in fee of a trust estate reciting that his wife was entitled to dower out of that estate, devised it, and that recital was held to amount to a devise to her of a third part of the rents and profits.

May 10, 1811. **LORD ELDON, L.C.**—I am indebted to MR. HOLLIST'S industry and kindness for a very correct note of *Tilly* v. *Tilly* (2) (Registrar's Book, fol. 577, July 13, 1743), an important authority, and the only one that seems to have much relation to this subject, and I have in MR. JODDRELL'S notebook what the Lord Chancellor [LORD HARDWICKE] is reported to have said, which I take to be copied from MR. FORESTER.

Lancelot Tolson Tilly was entitled in the event of attaining the age of twenty-three to a conveyance of real estates in fee-simple, which in the event of his death under that age were devised to the defendant Simpson and his heirs. Tilly in 1733 at the age of eighteen married the plaintiff. Supposing that she would be entitled to dower in case he should live to attain twenty-three, which would be correct if the trustees had made the conveyance, he by his will made a provision for her in the alternative of his death under twenty-three, the case in which she would not have been entitled to dower. When he re-published his will, he was above the age of twenty-three. The will was, therefore, to be considered as speaking after he had become entitled to a conveyance, and, therefore, entitled to call for the legal estate, but not having it. His wife, therefore, was not entitled to dower, but it appeared upon the will that he conceived her to be entitled. The question, therefore, was whether those who were to take under his will could contest with her the propriety of that conception. The court was struck with the hardship, and it is perhaps rather difficult to reconcile what the Lord Chancellor said with sound principle.

The note states that the Lord Chancellor declared it was a very hard case upon the plaintiff, that the court had gone a great way in considering declarations of intent by recital as devise, and, therefore, as the daughter was an infant, he would, without making any precedent, decree a third of the rents to the plaintiff, and leave the infant to show cause when of age. With all deference to that great judge I must say that is not the way in which the court should express its opinion. The authority is weakened by such expressions, and it was difficult to make the decree that appears to have been made without more hazard of forming a precedent than the Lord Chancellor seems to apprehend. It is obvious, however, that, though the court had a strong inclination that the widow should have this provision (and a case of

A greater hardship could not be presented), his Lordship does not seem to hold out his decision as a very high authority. The decree certainly declares that it appeared to have been the opinion and intention of the plaintiff's husband by the expressions of his will that she should have her dower of that part of the trust estates to which he would have been entitled in fee in case he lived to the age of twenty-three, and that the defendants ought not to be permitted to take the benefit of the B devises and bequests to them and at the same time frustrate the testator's intention with regard to dower. An account was decreed accordingly, a day being given, as it must of necessity, to the infant to show cause. As against the infant, therefore, this decree cannot be considered as establishing a case of election upon the declaration of intention by recital in the will, and the person entitled next in remainder, who was adult, appears to have submitted. This is a correct account of *Tilly* v. C *Tilly* (2).

There was in the present case considerable controversy upon the point whether James Dashwood did or did not know the effect of Sir Thomas Peyton's will, and, as clearly Henry Peyton, the tenant for life, was not acquainted with it, I may fairly assume James Dashwood's ignorance, and that there might be a common mistake. After the death of Sir Henry Peyton, upon whose will this question arises, the D present Sir Henry Peyton became entitled as tenant in tail of the manor and right of presentation, and unquestionably under no legal title to present James Dashwood, but Sir Henry, the testator, having a conception that James Dashwood had some interest, and being determined to give an interest to his younger son Algernon, made provision by his will with regard to the Suffolk estate, which led to the advice, taken as to the act to be done, to secure to Sir Henry Peyton the benefit E of the Suffolk estate, securing also the presentation to Algernon. The result was an opinion, upon consideration of both wills, that Sir Henry Peyton was under no obligation to present James Dashwood; that, whatever act might be necessary with regard to Algernon to make good Sir Henry Peyton's title to the Suffolk estate, James Dashwood had no right to call upon him to do anything; and upon the deed his determination is clear to give the living to James Dashwood, as matter, not of F right, but of favour on account of their connection and with the further view of securing to himself the Suffolk estate by securing to Algernon the living, when, having attained the age of twenty-four, he should be capable of taking it. Sir Henry Peyton, therefore, executing the demise in trust to present James Dashwood, cannot be represented as having made an election to take under the will of Sir Thomas Peyton, and if the will of the late Sir Henry Peyton raised a case of election, G and the construction put upon that will is right, an instrument that does not execute the intention attributed to that will, cannot be considered an election to take under it. The election, therefore, if there is a case for it, is still open.

From the correspondence, Lord Rous appears to have conceived that by the terms of these wills James Dashwood, if presented, must give a bond of resignation, and I will presume that he took the presentation under a belief on his part (to state it as H high as I can) that he was to give a bond. The mistake was not unnatural, and I do not believe he had a notion at the time that he had a right. If he had, there is enough of mistake and surprise to afford a ground for relief, but there is no reason to conclude that Sir Henry Peyton meant to give him a right. On the contrary, Sir Henry Peyton acted on the supposition that there was no such right.

Under these circumstances the question naturally arose as to the effect of a I bond of resignation, general, or in favour of a particular person, and I do not see how I could possibly interpose to relieve merely on the ground that such bond was given. Whether he understood, or fancied, that he had the right without giving a bond, or not, he has given it, and two principles oppose his claim to be relieved against it. If, as the Court of King's Bench held, a bond to resign in favour of a particular person is good as not being precisely the same as that which in *Bishop of London* v. *Fytche* (1) was held bad in the House of Lords, on that ground there can be no relief against it. If it falls within the principle on which the bond was in

that case determined to be bad, the plaintiff claims relief against an act, with reference to which this court would not stir, not, as in the case of marriage-brokage, bad upon grounds of policy, and, therefore, admitting relief, but bad, as being a corrupt transaction, the party, therefore, not coming with clean hands entitling him to relief. Upon that question I give no opinion as, if it is to be decided, the opinion of a court of law must be had upon it, and, therefore, there is no reason to grant an injunction against an action on the bond.

This bill, however, does not state that case, contending that the plaintiff under the will of Sir Thomas Peyton has no title nor any legal title under that of Sir Henry Peyton, but that he has under the latter will an equitable title (and, as I must suppose him to say, to this presentation), a case of election being very different from a title to the thing itself. Having this equitable title to the presentation under the effect of the whole transaction, in the course of which this bond was given, he proposes a case of surprise in this respect, that the parties intended to give him that to which they understood him to be entitled, a presentation according to his right; that he proposed so to accept; that they have not given and he has not accepted a presentation according to his right; that all were involved in one common mistake; and the court must regard the presentation as made according to his right, viz., subject to no condition of resignation; that it is, therefore, against conscience to sue upon the bond at law; and, consequently, the injunction should be granted.

The proposition that the presentation was made under a common mistake requires the plaintiff to establish that Sir Henry Peyton meant to give some title which he had under the will of the late Sir Henry, which it is impossible to make out. The present Sir Henry's view of it was that he did not, whatever wish he might have had in James Dashwood's favour, conceive him to be entitled to the presentation. The plaintiff must then take it in another point of view, and contend that he is entitled to the presentation free from all condition upon the legal and equitable effect of the two wills, taken together, and, therefore, he had the title, subject to no condition, that could be enforced by suit, whether intended by Sir Henry, or not, and the effect of their mistake is that the plaintiff has a right to the living discharged from the bond.

In all the cases stated of devises by implication, the party, upon whose will the question arose, had the estate to give by the effect of his own will. That certainly makes some difference. A devise to the heir-at-law of the devisor after the death of his wife raises a necessary implication that the wife shall take for her life as the estate must go to someone in the interval, but from the devise by one man of another man's estate after the death of the devisor's wife there is no implication in her favour. Admitting, however, that upon a similar construction of the will, as furnishing implication, a case of election may be raised, the question is whether Sir Henry did mean to raise that case, and, if he did, whether the consequence, taking the whole will together, is that the plaintiff can insist upon having this living or must be satisfied in equity by the benefit which results from the application of the doctrine of election. With regard to both these considerations this will appears extremely peculiar. The expression of his intention as to the living in favour of Algernon, whose title to take it he seems to think depending entirely upon his expression of intention, is by the alternative as to the Suffolk estate: "if you give the living to Algernon, you shall have the Suffolk estate: if not, he shall have it." Conceiving that the plaintiff was entitled to this living, not in consequence of his (the testator's) expression of intention, he does not by conditional expressions seek to enforce compliance with the will of another person.

With regard to the doctrine of election, Algernon, if the vacancy had happened when he was twenty-one, might have desired to have his uncle James presented without a bond, in preference to anyone else with one, and there is nothing in the will obliging anyone to give a bond not to accept a bishopric. As far as the doctrine of election is to be enforced as to the Suffolk estate, if Algernon did not complain,

A the plaintiff could not. He cannot, I think, work out a case of election by the Suffolk estate, and I strongly incline to the opinion, that he cannot by another estate, which the defendant takes in fee, raise a case of election, though not in terms expressed, by implication upon the general doctrine of the court. That, however, is the utmost he could do, and, where a case of election is raised, it does not give a right to retain the thing itself, though it may give a right to compensation
B out of something else.

The conclusion is that I cannot grant an injunction, but the refusal of it is altogether without prejudice to any question upon the case of election; if the plaintiff chooses to carry on the suit.

C

ROBERTS *v.* WYATT

D [Court of Common Pleas (Sir James Mansfield, C.J., Lawrence and Chambre, JJ.), February 9, 1810]

[Reported 2 Taunt. 268; 127 E.R. 1080]

Sale of Land—Title—Abstract—Abstract to be made at vendor's expense—Ownership of abstract.

E On a contract for the sale of an estate, the abstract of title to be made at the vendor's expense, the purchaser is entitled to the custody of the abstract until the contract is disposed of, and if the contract is determined it becomes the property of the vendor.

Sale of Land—Contract—Provision that contract void on vendor's failure to deduce good title or purchaser's failure to pay purchase-money on appointed day—Effect.

F A proviso in a contract for the sale of an estate that if the vendor could not deduce a good title or the purchaser did not pay the purchase-money on the appointed day the agreement should be void, **held,** to give an option to the vendor to rescind if the purchaser did not pay the purchase-money and an option to the purchaser to rescind if the vendor did not make a good title,
G but neither party could vitiate the agreement by refusing to perform his part of it.

Notes. Distinguished: *Mackereth* v. *Dunn* (1843), 7 Jur. 278. Considered: *New Zealand Shipping Co.* v. *Société des Ateliers et Chantiers de France*, [1918–19] All E.R. Rep. 552. Referred to: *Nicholls* v. *Bastard*, [1835–42] All E.R. Rep.
H 429.

As to remedies under an uncompleted contract of sale of land, see 34 Halsbury's Laws (3rd Edn.) 320 et seq.; and for cases see 40 Digest (Repl.) 89 et seq.

Cases referred to in argument:

Parker v. *Patrick* (1793), 5 Term Rep. 175; 101 E.R. 99; 37 Digest (Repl.) 16, *136.*

I *Roe d. Hale v. Wegg* (1796), 6 Term Rep. 708; 101 E.R. 784; 13 Digest (Repl.) 10, *84.*

Rule Nisi obtained by the defendant to set aside the verdict and enter a nonsuit in an action of trover for the written abstract of title to an estate, and for divers sheets of paper of the value of £1,000.

On May 9, 1808, the plaintiff contracted with Mrs. and Miss Peers for the purchase of an estate in the parish of Alveston in the county of Warwick for £39,500. It was stipulated in the contract that the vendors should, within two

months from the date thereof, make out and deliver a true and perfect abstract of the title to the premises, and should deduce a good and marketable title thereto, and that they would on or before Dec. 21, 1808, on receiving from the plaintiff the sum of £39,500, execute a legal conveyance of the fee simple and inheritance of the premises. There was a proviso that, in case the vendors could not deduce a good and marketable title, such as the purchaser or his counsel should approve, or if the purchaser should not pay the purchase money on the appointed day, the agreement should be utterly void, it being the intention of the parties that no action or suit in equity should be brought thereon. On July 5, 1808, the plaintiff's attorney applied to the defendant, who was the vendor's solicitor, for the abstract, who accordingly prepared it at the vendor's espense and delivered it to the plaintiff's attorney on July 26. The plaintiff's attorney immediately applied for and obtained from him a more perspicuous statement of some things that were insufficiently disclosed and then, without taking any copy, laid the original abstract with a fee before counsel for his opinion on the behalf of the purchaser thereon. On Aug. 20 he received it back from his counsel with his opinion written at the foot of the same original abstract, and with numerous queries written in the margin thereof respecting the proper parties to the assignments of several ancient outstanding terms which he deemed it necessary that the purchaser should get in.

On the following day the plaintiff's attorney left the abstract at the defendant's house with a letter requesting him to take a copy of the opinion and marginal observations, and to return the abstract to himself as soon as he had copied them. After having several times in vain applied to have it restored, on Dec. 20 he formally demanded it of the defendant, who answered that he had been unable to clear up the objections of the purchaser's counsel and that the abstract would, therefore, be useless to the plaintiff; he, therefore, refused to re-deliver it. The plaintiff, who was then present, offered to take the estate with such title as the defendant could make, but the defendant did not assent to the proposal; the plaintiff had never consented to rescind the contract, and he had since filed a bill to compel a specific performance.

In an action of trover for the written abstract of the title to the estate and for divers sheets of paper the value of £1,000, Sir James Mansfield, C.J., thought that it was unnecessary to enter into the question of the general right of property therein; the original opinion, paid for by the plaintiff, was written on the abstract and the queries were not merely subjoined at the end, so that they could be separated, but were spread all over the margins and intermingled in every sheet, so that they could not be severed without minutely dividing every part of the paper; it was clear that the vendor had consented that the abstract should be laid before counsel for the very purpose of writing an opinion thereon; and the plaintiff, therefore, had such a species of property therein as would enable him to recover in this action. The jury under this direction found a verdict for the plaintiff, subject to the opinion of the court on the point reserved, for £50, which it was agreed should be reduced to 1s. on the defendant's agent undertaking to re-deliver the abstract, in case the court should establish the verdict, and consenting that such undertaking should be made a rule of court. Counsel for the defendant obtained a rule nisi to set aside the verdict and enter a nonsuit.

Serjeant Best, *Serjeant Lens* and *Serjeant Vaughan* for the plaintiff, showed cause against the rule.

Serjeant Williams and *Serjeant Shepherd* supported the rule.

SIR JAMES MANSFIELD, C.J.—The case at first struck me as a singular one. I could not immediately make out that the plaintiff had any property in this abstract, but counsel for the plaintiff at the trial nearly satisfied me that he had. Now, on consideration, it is clear that the plaintiff had, not a special but a temporary, property in the abstract, that is, till the contract is disposed of, and then, I think, it reverts to the vendor, because it would not be proper that an

account of the title of a man's estate should get abroad into the hands of strangers. The contract is that the vendors shall make out and deliver a true and perfect abstract of their title. This is no part of their title deeds, nothing like it, but it is a short account of the state of their title. This then is delivered; for what purpose? First, that the purchaser may see whether the title is such as he will accept. He had also a right to it after Mr. Humphreys had given his opinion, in order to take another opinion in case he had not been satisfied with that, and for the purpose of taking further objections and of further considering the title. He must have it too for another purpose, to assist him in preparing his conveyance that he may see who must be made parties, what form of conveyance is expedient, what parcels are to be inserted, and the like; it is delivered then for these purposes and, after it was so delivered, could the owner of the estate himself call on the plaintiff to deliver it up? Certainly not; the plaintiff has a temporary property, not only as against strangers, but as against all the world.

Has anything then been done to alter the state of the parties? Usually, if an attorney wishes to save his employer expense, he lays the abstract itself, not a copy thereof, before counsel, and usually leaves several blank sheets and a wide margin for his conveyancer to write queries on, such as whether a deed is duly executed, whether a will is proved, etc. This abstract is in that state delivered to Mr. Humphreys and, his opinion thereon having been obtained, it is delivered back, together with the opinion, to the defendant. For what purpose? That he may answer the objections and accompany his answers with the re-delivery of the abstract. He says: I cannot answer your objections. The plaintiff might have said: Perhaps some other counsel may think that these objections may be waived, let me have the abstract in order to see; but he goes further and says: I will take the estate with the title such as it is. The defendant still says: I cannot answer this objection of Mr. Humphreys, and the whole transaction is at an end. But that is not so; if the plaintiff had said, the thing is over, the matter might be rescinded. But what says the defendant? I cannot answer the objections. In equity such an answer will not suffice; otherwise a seller who had altered his mind might very easily get rid of a contract; but the courts of equity say that he shall answer on oath first in his answer to a bill filed against him; then on examination before a Master whether a title cannot be made, the courts often make a way to obviate apparent difficulties and compel the seller to procure conveyances in order to complete his title. And the defendant's declaration that he rescinds the contract will not at all defeat the purchaser's right.

This action then must be sustained, for the plaintiff had a temporary property which was not determined, because he had an option whether the thing should go on or not. Something has been argued on the construction of the proviso that if the vendor could not make a title, the contract should be void. But in order to adapt that defence to the present case, the argument must be that, if the defendant says that he cannot answer the objections, it shall be absolutely void at the choice of either party. But that is not so; the meaning is that, if the seller cannot make a good title by the time mentioned, the contract shall be void as against him, and the purchaser has a right to be off his bargain. So, e contrá, if the purchaser does not pay the money, the defendant may avoid the contract, but the purchaser cannot say: "I am not ready with my money, therefore, I will avoid the contract"; nor can the seller say: "My title is not good, therefore, I shall be off." The word is: "if they cannot make," so it must appear by sufficient proof that they cannot make a title. Therefore it seems that the purchaser has a temporary property on which he may recover, not only against a stranger but against the proprietor of the estate, and that property continues until all the purposes are answered for which the abstract was delivered.

LAWRENCE, J.—I am of the same opinion on the construction of the proviso. It would be a monstrous construction if either party could vitiate the agreement

by refusing to perform his part of it. The question then is whether the purpose was answered for which the abstract was delivered; for I admit that it would be a mischievous thing if accounts of a person's title could get abroad and, therefore, not only is the abstract to be returned, but no copy to be kept, lest it should be used for a mischievous purpose. But was the time come when the abstract was to be returned, all the purposes having been discharged for which it was delivered? Certainly not. The abstract is returned for a particular purpose. The plaintiff's attorney tells the defendant that it is delivered to him for the purpose of his examining and answering the objections, and that it must be again restored to the purchaser; and the defendant accepts it on these terms. Having then accepted it on these terms, he cannot afterwards say that he will keep it on other terms. It is not enough for the defendant to say that he cannot remove the objections; the purchaser has a right to a better proof that they cannot be removed than the defendant's assertion.

CHAMBRE, J.—As to the general property in the abstract, it is hard to say who may have it. While the contract is open it is neither in the vendor nor in the vendee absolutely but, if the sale goes on, it is the property of the vendee; if the sale is broken off, it is the property of the vendor. In the meantime the vendee has a temporary property, and a right to keep it, even if the title be rejected, until the dispute be finally settled, for his own justification, in order to show on what ground he did reject the title; but it is not necessary at present to go into the absolute property. This action can be sustained on the right of possession which the plaintiff clearly at this time had; therefore, the rule for a nonsuit must be discharged.

Rule discharged

BRANDON *v.* ROBINSON AND ANOTHER

[Lord Chancellor's Court (Lord Eldon, L.C.), December 18, 1811]

[Reported 18 Ves. 429; 1 Rose, 197; 34 E.R. 379]

Bankruptcy—Property available for distribution—Interest in trust fund—No gift over in event of bankruptcy.

The testator gave his property to trustees to pay the dividends to his son, and directed that they should not be grantable or assignable by way of anticipation. There was no gift over in the event of his bankruptcy. The son became bankrupt.

Held: the son's interest passed to his assignee in bankruptcy.

Notes. Considered: *Wilkinson* v. *Wilkinson* (1819), 3 Swan. 515; *Rochford* v. *Hackman* (1852), 9 Hare, 475. Referred to: *Stroud* v. *Norman* (1854), Kay, 313; *Re Coe's Trust* (1858), 4 K. & J. 199; *Re Dugdale, Dugdale* v. *Dugdale* (1888), 38 Ch.D. 176; *Hood-Barrs* v. *Heriot*, [1896] A.C. 174; *Re Fitzgerald, Surman* v. *Fitzgerald*, [1903] 1 Ch. 933.

As to interests determinable on bankruptcy, see 2 Halsbury's Laws (3rd Edn.) 413 et seq.; and for cases see 5 Digest (Repl.) 705 et seq.

Cases referred to:

(1) *Foley* v. *Burnell* (1785), 4 Bro. Parl. Cas. 319; 1 Bro. C.C. 274; Rom. 1; 2 E.R. 216, H.L.; 21 Digest (Repl.) 582, *754.*

(2) *Miss Watson's Case*, cited in 3 Bro. C.C. at p. 347, n.

A Also referred to in argument:

Dommett v. *Bedford* (1796), 6 Term Rep. 684; 3 Ves. 149; 101 E.R. 771; 5 Digest (Repl.) 710, *6188*.

Shee v. *Hale* (1807), 13 Ves. 404; 33 E.R. 346; 5 Digest (Repl.) 710, *6189*.

Goring v. *Warner* (1724), 2 Eq. Cas. Abr. 100; 22 E.R. 86, L.C.; 31 Digest (Repl.) 435, *5621*.

B **Demurrer** to a bill filed by the plaintiff, the surviving assignee under a commission of bankruptcy, praying an execution of the trusts of a will.

By his will dated Aug. 1, 1808, the testator, Stephen Goom, devised and bequeathed to the defendants, Robinson and Davies, all his real and personal estate on trust to sell and dispose of the same; and after payment of his debts and some few legacies on trust to divide the residue of the produce of such sale among C his children, Thomas Goom, William Goom, Mary Wright, Esther Fuller, Elizabeth Goom, Stephen Goom and Margaret Goom; and he directed that the eventual share and interest of his son Thomas Goom of and in his estate and effects should be laid out in the public funds or on government securities at interest by and in the names of his trustees during his life; and that the dividends, interest and produce thereof, as the same became payable, should be paid by them, from time to time, D into his own proper hands, or on his proper order and receipt subscribed with his own proper hand; to the intent that the same should not be grantable, transferable, or otherwise assignable by way of anticipation of any unreceived payment or payments thereof or of any part thereof; and that on his decease, the principal of such share, together with the dividends and interest and produce thereof, should be paid and applied by his trustees unto and among such person or persons as in a E course of administration would be entitled to any personal estate of his son Thomas Goom, and as if the same had been personal estate belonging to his son and he had died intestate. The testator died shortly after the date of the will. On June 15, 1811, a commission of bankruptcy issued against Thomas Goom, under which the plaintiff was the surviving assignee. The bill prayed that the will might be established; that the clear residue of the estate and effects might be ascertained; F and that the plaintiff might have the benefit of such part as in the character of assignee he should be found entitled to. To this bill there was a general demurrer that the plaintiff had no right or title.

Hart and *Horne* in support of the demurrer.

Leach and *Roupell* in support of the bill.

G **LORD ELDON, L.C.**—Without doubt a testator may limit his property until the object of his bounty shall become bankrupt; but it is equally clear that if he give it for life, he cannot take away the incidents to that estate. The difference is very great between giving an interest to a person while he shall remain solvent, and then over; and giving it for life. If there be a limitation over in the event of insolvency or bankruptcy, then neither the person so becoming bankrupt or H insolvent, nor his assignees, can take any benefit beyond the terms of the will. In the case which arose on Lord Foley's will (*Foley* v. *Burnell* (1)), it was argued, and I thought admitted, that, if the estate went to the sons as property in them, all the consequences must attach.

In regard to property given to the separate use of married women, the directions originally were that the money was to be paid into their proper hands and their I receipts alone to be a discharge; it was held that a married woman might dispose of property so given to her, and that her assignee might take it, as this court would compel her to give her own receipt in affirmance of her own contract. In *Miss Watson's Case* (2), the words, "and not by anticipation," were introduced by LORD THURLOW. His reasoning was this: I do not hereby take away any of the incidents of property at law; this interest which a married woman is suffered to take is a creature of equity, and equity may modify the power of alienation. But it is quite different if the power is for life. Supposing that the bankrupt makes

out that he never has an interest till he attends personally, the act of his receipt being absolutely necessary; yet, if he was never to attend or to give that receipt, and arrears were to accumulate, it is clear that those arrears would be assets for his debts. It is not enough that the testator has said that the fund shall not be transferred; in order to prevent that, it must be given over to somebody else. Unless, therefore, by implication, it falls into the residue, it is an equitable interest, to which the assignees are entitled.

As to the principal fund after the death of the bankrupt, the conclusion is different. The intention of the testator is, "this is my gift, my personal estate," not that of the bankrupt's; to go as my property to certain persons whom I point out by the description of his, the bankrupt's, next of kin. This demurrer must be overruled.

Demurrer overruled.

WARRINGTON AND ANOTHER *v.* FURBOR AND ANOTHER

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), February 9, 1807]

[Reported 8 East, 242; 6 Esp. 89; 103 E.R. 334]

Stamp Duty—Exemption—"Contract for or relating to sale of goods"—Guarantee of price of goods to be purchased.

A written guarantee of the price of goods up to a certain amount to be purchased by a third person, **held** to be exempt from stamp duty as coming within the exemption in the Stamp Acts [now Stamp Act, 1891, Sched. I (heading "Agreement or any memorandum of an agreement")] (21 Halsbury's Statutes (2nd Edn.) 657) applying to an "agreement . . . made for or relating to the sale of any goods . . ."

Guarantee—Surety—Liability—Debt due under bill of exchange—Bankruptcy of acceptor—Liability of surety without proof of presentation of bill to acceptor.

A buyer, who had accepted a bill of exchange for the price of the goods, became bankrupt before the bill fell due, and the surety paid the seller after the bankruptcy of the buyer. In an action by the surety to recover the money so paid from the bankrupt,

Held: this was not an action on the bill, and the surety was entitled to succeed without proving that any demand had been made on the bankrupt as the acceptor of the bill.

Notes. Considered: *Philips* v. *Astling* (1809), 2 Taunt. 206. Not Followed and Distinguished: *Murray* v. *King* (1821), 5 B. & Ald. 165. Distinguished: *Camidge* v. *Allenby* (1827), 6 B. & C. 373. Referred to: *Boydell* v. *Drummond* (1809), 11 East, 142; *Holborow* v. *Wilkins* (1822), 2 Dow. & Ry. K.B. 59; *Van Wart* v. *Woolley* (1824), 3 B. & C. 439; *Hitchcock* v. *Humfrey* (1843), 5 Man. & G. 559; *Rein* v. *Lane* (1867), L.R. 2 Q.B. 144; *Horsey* v. *Graham* (1869), 21 L.T. 530; *Armytage* v. *Wilkinson* (1878), 3 App. Cas. 355; *Barber* v. *Mackrell* (1892), 67 L.T. 108.

As to excuses for non-presentment of bills of exchange, see 3 Halsbury's Laws (3rd Edn.) 197; and for cases see 6 Digest (Repl.) 230.

Cases referred to:

(1) *Curry* v. *Edensor* (1790), 3 Term Rep. 523; 100 E.R. 713; 26 Digest (Repl.) 53, *361*.

(2) *Venning* v. *Leckie* (1810), 13 East, 7; 104 E.R. 267; 39 Digest (Repl.) 316, *618*.
(3) *Whitfield* v. *Savage* (1800), 2 Bos. & P. 277; 126 E.R. 1279; 6 Digest (Repl.) 274, 2002.
(4) *Esdaile* v. *Sowerby* (1809), 11 East, 114; 103 E.R. 948; 6 Digest (Repl.) 238, *1683*.
(5) *Jackson* v. *Richards*, 2 Caines, 343.
(6) *Ball* v. *Denison*, 4 Dal. 165.
(7) *Russel* v. *Langstaffe* (1780), 2 Doug. K.B. 514; 99 E.R. 328; 6 Digest (Repl.) 65, *581*.
(8) *Philips* v. *Astling* (1809), 2 Taunt. 206; 127 E.R. 1056; 26 Digest (Repl.) 70, *494*.

Rule Nisi obtained by the defendant, Furbor, to set aside the verdict for the plaintiffs in an action for money lent and advanced and money paid to the use of the defendants, Furbor and Warrington, the latter of whom suffered judgment by default.

In May, 1801, the defendants applied to one Martin to purchase of him Manchester goods to the amount of £1,079, and proposed the guarantee of the plaintiffs who on Martin's application gave him the following unstamped written guarantee:

"Southwark, May 9, 1801. Mr. Thomas Martin—At the request of Messrs. Furbor and Warrington, who inform us that they are about purchasing goods of you to the amount of £1,000, we hereby guaranty the payment of that sum, if purchases are made—say, at a credit of six months. Your's, etc." (Signed by the plaintiffs.)

The goods were, accordingly, furnished, and a bill drawn for the value on May 30, by Martin upon the defendants, at six months' date, and accepted by them. This became due on Dec. 3, but on the preceding Nov. 21, the defendants became bankrupt and a commission issued against them, in consequence of which the plaintiffs were obliged to pay Martin £1,000 on their guarantee after the bankruptcy of the defendants. They brought this action to be reimbursed.

At the trial before Lord Ellenborough, C.J., in London, a verdict was taken for the plaintiffs, which was moved on a former day to be set aside, and a verdict to be entered for the defendant, Furbor, on the ground that the guarantee was unstamped, or a new trial granted on ground that the bill was not proved to have been presented for payment to the bankrupt acceptors when it became due. A rule nisi was granted accordingly.

Garrow and *Espinasse* for the plaintiffs, showed cause against the rule.
Sir Vicary Gibbs for the defendant, supported the rule.

LORD ELLENBOROUGH. C.J.—Two points have been made: first, whether this be "a contract for or relating to the sale of any goods," within the exception of the Stamp Acts. I think that where the subject is to be charged with a duty, the cases in which it is to attach ought to be fairly marked out, and we should give a liberal construction to words of exception confining the operation of the duty. The only doubt I had at the trial arose upon reading the words of Lord Kenyon in *Curry* v. *Edensor* (1), where he seems to lay stress on the agreement having been made at the time of the particular goods, which does not apply to the agreement in question: but giving a fair and liberal sense to the words of the exception, this agreement did relate to the sale of goods, though not of any particular goods in contemplation at the time, and, therefore, did not require to be stamped. This seems to be the safer construction of the Acts: see *Venning* v. *Leckie* (2).

As to the second point, the same strictness of proof is not necessary to charge the guarantors as would have been necessary to support an action upon the bill itself, where by the law merchant a demand upon, and refusal by, the acceptors must

have been proved in order to charge any other party upon the bill; and this notwithstanding the bankruptcy of the acceptors: see *Whitfield* v. *Savage* (3); *Esdaile* v. *Sowerby* (4); *Jackson* v. *Richards* (5); *Ball* v. *Denison* (6), as was recognised in the argument of *Russel* v. *Langstaffe* (7). But this is not necessary to charge guarantors, who insure as it were the solvency of their principals; and, therefore, if the latter become bankrupt and notoriously insolvent it is the same as if they were dead, and it is nugatory to go through the ceremony of making a demand upon them. The plaintiffs might fairly have said to Martin that the acceptors being insolvent and their effects assigned for the benefit of their creditors, they (the plaintiffs) would not put him to the proof of a demand upon the acceptors, which must have been fruitless, but would pay the money at once and look to their remedy over: see *Philips* v. *Astling* (8).

GROSE, J., declared himself of the same opinion, and said that the necessity of a demand, notwithstanding the bankruptcy of the acceptor, in order to charge the drawer or endorser of a bill, was founded solely upon the custom of merchants.

LAWRENCE, J., on the first point, said that the words of the Stamp Act were general, and there was nothing to limit them to an immediate sale of goods as between vendor and vendee: on the contrary, the observation made at the Bar was material, that the exception extended not only to contracts for the sale of goods, but also to such as related to the sale of goods, and this construction seemed best calculated to give effect to the words of the legislature. On the other point, that though proof of a demand on the acceptors, who had become bankrupts, were not necessary to charge the guarantors, yet that the latter were not prevented from showing that they ought not to have been called upon at all, for that the principal debtors could have paid the bill if demanded of them.

LE BLANC, J.—In construing this revenue law we cannot give effect to the objection as to the want of a stamp, without saying that the words for the sale, or relating to the sale, of goods must necessarily mean the same thing; but parties might make a contract for the sale and relating to the sale of the same goods by different instruments, with different objects. As to the other point, there is no need of the same proof to charge a guarantor as to charge a party whose name is upon a bill of exchange; for it is sufficient as against the former to show that the holder of the bill could not have obtained the money by making a demand upon the bill.

Rule discharged.

Ex parte KENDALL

[Lord Chancellor's Court (Lord Eldon, L.C.), April 29, 30, May 6, 7, 1811]

[Reported 17 Ves. 514; 1 Rose, 71; 34 E.R. 199]

Equity—Marshalling—Limitation of general principle—Prevention of injustice to common debtor—Right of third parties to compel resort to one fund.

If two funds of a debtor are liable to one creditor and only one fund to another, the former creditor shall be thrown on that fund to which the other cannot resort in order that that other creditor may avail himself of his only security, where that can be done without injustice to the debtor or the creditor, but that principle has never been pressed to the effect of injustice to the common debtor, and much less have persons who are not common creditors of the same debtor a right to compel the creditors of both funds to resort to the one in order to leave a larger dividend for those who can claim only against the other.

Notes. The distribution of the property of a bankrupt is now regulated by ss. 62–69 of the Bankruptcy Act, 1914 (2 Halsbury's Statutes (2nd Edn.) 321).

Considered: *Devaynes* v. *Noble, Sleech's Case* (1816), 1 Mer. 539; *Devaynes* v. *Noble, Baring* v. *Noble* (1831), 2 Russ. & M. 495; *Wilkinson* v. *Henderson* (1833), 2 L.J.Ch. 190; *Thorpe* v. *Jackson*, [1835–42] All E.R. Rep. 541; *Winter* v. *Innes* (1838), 4 My. & Cr. 101; *Kendall* v. *Hamilton*, [1874–80] All E.R. Rep. 932. Referred to: *Lyth* v. *Ault* (1852), 7 Exch. 669; *Brown* v. *Gordon* (1852), 16 Beav. 302; *Lodge* v. *Pritchard* (1863), 2 New Rep. 537; *Re Stratton, Ex parte Salting* (1888), 49 L.J. 694.

As to the equitable doctrine of marshalling, see 14 Halsbury's Laws (3rd Edn.) 611–615; and for cases see 20 Digest (Repl.) 526 et seq.

Cases referred to:

(1) *Gray* v. *Chiswell* (1803), 9 Ves. 118; 32 E.R. 547, L.C.; 24 Digest (Repl.) 855, *8507*.

(2) *Ex parte Turner* (1796), 3 Ves. 249.

(3) *Paley* v. *Field* (1806), 12 Ves. 435; 33 E.R. 164; 26 Digest (Repl.) 90, *628*.

(4) *Hoare* v. *Contencin* (1779), 1 Bro. C.C. 27.

Petition for an order postponing the payment to creditors of a dividend in bankruptcy.

The petition stated that in August, 1810, a commission of bankruptcy issued against John Dawes, William Noble, Richard Henry Croft, and Richard Barwick, bankers; that William Devaynes had been in partnership with them up to the time of his death in November, 1809, and from that time the bankrupts continued to carry on business, as before, under the firm name of Devaynes, Dawes, Noble & Co. without opening any new books or making any rest in their accounts, and the accounts between them and the representatives of their deceased partner were not made up when the surviving partners became bankrupts. The petition further stated that by this mode of dealing with the affairs of Devaynes, Dawes, Noble & Co. part of the effects belonging to that concern, consisting of money, notes, bills of exchange, Exchequer bills, and other property of that nature to a large amount, came immediately on the death of Devaynes into the possession of the surviving partners, and other parts thereof were from time to time between the death of Devaynes and the bankruptcy got in by the surviving partners and mixed with their own funds. Other parts thereof remained outstanding. On the other hand the surviving partners had paid off debts of Devaynes, Dawes, Noble & Co. to a large amount, some in full, and some in part.

At the time of the bankruptcy there were (besides creditors, who never had any dealings with the house in Devaynes's life) creditors of the following descriptions claiming to prove under the commission: (i) creditors in respect of debts owing by the house at the death of Devaynes upon which there had not been any payments

since or who had been paid in part only by the surviving partners; (ii) creditors by debts owing at the death of Devaynes, which had been increased since by payments to, or dividends, interest, or other moneys received by, the surviving partners, but on which no payments had been made by either firm; (iii) creditors who were such when Devaynes died and continued their accounts with the surviving partners by drawing and making payments as their occasions required, so that between the dissolution of the first partnership and the bankruptcy of the second they had drawn from the surviving partners various sums, amounting in some instances to more, in others to less, than was due, but yet remaining creditors in regard that their payments have exceeded their drafts; (iv) creditors who at Devaynes's death were debtors to that concern, but who likewise continued their accounts with the surviving partners and by their subsequent dealings with them have turned the balance in their favour; (v) creditors in respect of stock standing in the name of Devaynes & Co. or one of them on account of the others as trustees, or of India bonds, Exchequer bills, bills of exchange, or other securities of that nature, specifically deposited with them for safe custody or other special purposes, but which without the knowledge of the creditors had been disposed of against good faith, partly in the life-time of Devaynes, and partly since his death; and the money applied for the purposes of the respective firms at the times of the transactions. The petition further stated that the funds under the commission consisted of specific assets which belonged to the partnership at the time of the death of Devaynes, of subsequently-acquired partnership effects, and of the separate effects of each of the bankrupts; and that a bill had been filed in the Court of Chancery by certain joint creditors of the firm of Devaynes & Co. on behalf of themselves and all other such creditors for an account of the assets of Devaynes, and for a decree to admit the joint creditors to have the benefit of his assets, after his separate debts were paid.

The petitioners proved joint debts under the commission, viz., George Yelverton Kendall, a joint debt of £483 9s. 2d.; Philip and David Cooper, £1,153 14s.; Alexander Tulloch, £909 2s. 8d.; Nugent Kirkland, £1,927 0s. 10d.; William Smith, £2,387 14s. 6d.; and George Wagner, £85 13s. 8d.; and he was executor of another joint creditor who had proved £1,308 18s. The prayer of the petition was that the dividend under the commission might be ordered to be postponed, until after the decree should have been obtained in the cause. The affidavits as to the solvency of the house at the death of Devaynes were contradictory, and it was insisted that the accounts produced made no allowance for bad debts, particularly one from an insolvent house at Liverpool to the amount of £120,000, which made the balance against them decisive.

Sir Samuel Romilly and *Cooke* for the petitioners, and *Bell* for the assignees in the bankruptcy, in support of the petition: This petition rests upon the principle under which a surety may call upon a creditor who has another fund which the surety, paying the debt, cannot make available, to resort to that fund in the first instance. These petitioners, creditors of the four surviving partners, are entitled to relief of a similar nature by an application of the surplus of the separate fund of the deceased partner to the joint debts, according to *Gray* v. *Chiswell* (1), and other cases; and, if upon the state of the accounts they were insolvent at Devaynes's death, his representatives cannot, as he, if living, could not, claim in competition with the creditors. It is clearly for the benefit of all the creditors that the joint creditors of the five should go in under the suit instituted against Devaynes's estate to that extent relieving the creditors of the four. Your Lordship will consider what is most for the advantage of the whole body of creditors, and, to obtain that, will postpone the dividend, disregarding the wish of any particular creditors to receive their dividend immediately.

Martin, Leach and *Abercomby* for the executors and widow of Devaynes.

Richards and *Hart* for the son and residuary legatee of Devaynes, also claiming as creditors of the bankrupts.

Wetherell for other creditors: This is a new application, not upon the principle of making a just and equal distribution of the estate of the bankrupts among the different classes of creditors according to their respective rights. Your Lordship, if you have authority, which is at least doubtful, will not suspend the dividend when satisfied that the delay must be of considerable duration, viz., until all the inquiries, that may be necessary for investigating the different claims, shall be completed and the questions, arising upon them, decided. The object of this petition is to relieve the creditors of the bankrupts by marshalling the assets of Devaynes, a purpose which cannot be the subject of a petition but must be effected by a suit in which the facts, being matters of account, may be clearly ascertained. Your Lordship will not upon the speculation suggested interfere with the right of creditors to their dividend. The principle of the bankrupt law is that securities and reversionary interests are to be sold and the produce divided without regard to the disadvantage of an immediate sale and the possible improvement from delay. This will be attempted upon every mortgage.

LORD ELDON, L.C. The real question upon this petition is whether, at the instance of creditors of the four bankrupts suggesting that there are creditors of the four who are also creditors of the five, I ought to stay the dividend until payment shall have been recovered out of Devaynes's estate by those creditors who are creditors upon both funds. That the creditors of the four have a clear interest to turn those creditors upon Devaynes's estate is evident upon the circumstances, but whether they have the right, whether it is just that they should do so, is a very different consideration.

The first question is whether I have any right to stay the dividend—a point upon which, as I have formerly intimated, my opinion is in some degree different from that of Lord Thurlow who in the bankruptcy of Sir George Colebrook expressed a very strong opinion that no circumstance as to the impropriety of selling a West India estate ought to induce him to stay the sale for the purpose of making a dividend, without the consent of all the creditors. I have intimated my opinion that, if the dividends are not made at the very periods prescribed by the Act of Parliament, it must of necessity be in the sound discretion of the court to control the time, as it remains with the court to direct when the dividend shall be made, and it would be impossible for assignees to act in complicated cases unless, exercising a sound discretion with reference to the period when the assets are to be converted into money, they would be justified. A different rule would in many concerns impose upon them as a duty the necessity of ruining the property. My opinion, therefore, is that I have a right to postpone the dividend where I am satisfied it is for the interest of all the creditors claiming under the commission, and just to all whom the order would affect.

The next consideration is whether the creditors of the five have a separate demand against Devaynes's estate. Upon the authority referred to and others, where parties think proper to enter into a joint instead of a joint and several contract, though I am surprised that courts of equity have not left that to its fate as a joint contract, they have, I admit, said that there is a remedy against the assets of one deceased if the survivors cannot pay. That must be, however, subject to many considerations that may arise out of circumstances of subsequent dealing with the survivors, the effect of which may be that the creditors have no remedy against the assets, but to oust their prima facie demand it must be shown that their subsequent dealings are of such a nature as to shift the equitable obligation to pay from the estate of the deceased partner.

Another question is whether, if this was a bill filed by creditors of the four, they would have a right to insist upon the benefit sought by this petition. We have gone this length. If A. has a right to go upon two funds and B. upon one, having

both the same debtor, A. shall take payment from that fund to which he can resort exclusively, that by those means of distribution both may be paid. That course takes place where both are creditors of the same person, and have demands against funds, the property of the same person. Here, it is true, there may be creditors who have demands against the four and others who have demands against the one, but it was never said that, if I have a demand against A., and B. a creditor of B. shall compel me to go against A. without more, as if B. himself could insist that A. ought to pay in the first instance, as in the ordinary case of drawer and acceptor, or principal and surety, to the intent that all the obligations arising out of these complicated relations may be satisfied, but, if I have a demand against both, the creditors of B. have no right to compel me to seek payment from A., if not founded on some equity giving B. the right for his own sake to compel me to seek payment from A. If, therefore, I had before me a case in which it was clear that the creditors of the five could go against the estate of Devaynes and the four, yet, if it was not also clear, that the latter could have turned those creditors against the other fund, it does not advance the claim that without such an arrangement they will get less. Unless they can establish that it is just and equitable, that Devaynes's estate should pay in the first instance, they have no equity to compel a man to go against that estate, who has resort to both funds. I do not know that it would be even a useful arrangement, as I can conceive a possible case that, if the creditors of the five applied against the separate estate, the answer to that application might be, admitting his right, that he should first go in, and prove against the estate of the four.

I admit the distinction that Devaynes, being himself the debtor, could not claim in competition with the creditors: see *Ex parte Turner* (2); *Paley* v. *Field* (3); but there might be a surplus, and it appears to me perfectly competent, if not to the executors, to the creditors, to oppose this petition that the dividend may be postponed on the ground that there will be an equitable application of Devaynes's estate to the satisfaction of some of these creditors, in the course of which they are to proceed, insisting on the extreme probability that, instead of this right in the creditors of the four, the separate estate of Devaynes would, if the creditors of the five should go against it, have a demand against the estate of the four. That depends on the state of the accounts with reference to which it is impossible to conclude with certainty, that there is any such right, and my opinion is that the creditors of the four have no right whatsoever against the will of the creditors of the five to turn them upon the estate of the fifth, unless the four, if they were solvent, could turn those creditors, suing them, against the estate of the fifth. It is very doubtful whether such a case exists, and, unless it does exist and there is a very strong probability of advantage, which is due in equity to the creditors of the four, from postponing the dividend, though I have the power, I should not without a very clear case be disposed to exercise it.

May 6, 7, 1811. **LORD ELDON, L.C.**—With regard to the doubt stated in the discussion of this petition whether I can order the dividend to be delayed, upon consideration my opinion remains that, if the dividend is not made at the precise period pointed out by the Act of Parliament, the court of necessity has a discretion for the general benefit of the creditors, and, as having the right to take order for the distribution of the property, to make such order as to the time of making the dividend as shall appear to be for the general benefit of the creditors.

The object for which I am pressed to postpone the dividend is that certain of the creditors, having a right to prove under the commission of bankruptcy are also entitled in equity, as having been joint creditors in Devaynes's life, to go in against his separate estate, subject to his separate debts, and ought to be called upon to do so, and that, by the effect of their receiving payment from that estate, a larger dividend may be left, applicable to the creditors of the present firm. It was contended that though at law the debt survives, a demand may under the

A circumstances be maintained in equity against the assets, and that it is so in many cases is established, though doubted extremely by Lord Thurlow in *Hoare v. Contencin* (4). That is, however, an equitable right only, to be met, therefore, by equitable circumstances, and it does not follow in the distribution of such an estate as this that, as some creditors may have that right in equity, all the creditors of the five must have it. The answer may be that, being equitable creditors, they B have dealt so that in equity they should not be considered creditors upon that estate. In a court of equity, therefore, the case of every creditor, seeking resort against the assets must be examined.

This petition, however, takes another ground, proceeding upon the notion that those who are creditors of the four surviving partners and never were creditors of the five have a right to say to the latter: "You shall not interpose to take a C dividend from the estate of the four until for our benefit you have taken a part of the assets of the fifth." That is an equity which the creditors of the four have not. I am extremely well satisfied that a creditor having a demand against one estate only of his debtor may in equity, proposing just terms, confine another creditor having a demand against two estates of the same debtor to make good his demand against that upon which the former has no claim, that he may go against D the other, but the proposition is perfectly different that creditors of the four partners, having no demand against the separate estate of Devaynes, shall compel the joint creditors of the five, being also legal joint creditors of the four, to go against the separate estate of Devaynes whether it may be just, or not. The creditors of the four have no other right than the four themselves would have had, and the equity of the creditors in these cases is worked out through the equity E which the debtors themselves have. At the death of Devaynes in 1809, laying out of consideration the debts of the partnership to the individual partners, my conclusion upon these accounts was that the partnership was equal to the demands upon them, admitting, that, if the sums standing to their credit were due upon bad bills, and if the large debt at Liverpool was under similar circumstances, then certainly they were insolvent. Assuming the former fact, if the four had remained F solvent and made a demand against the separate estate of Devaynes, the answer might have been that as to him the partnership was dissolved by his death, the account ought to be taken at that time, and the specific assets applied to the debts.

It is perfectly clear that the operation which is the object of this petition would, if the creditors of the four partners have a right to demand it, produce a larger dividend than would otherwise be payable to them, but a previous consideration G is whether, if any creditor would not submit to this delay of the dividend, preferring a less dividend immediately, I have authority to postpone it. Commercial affairs, it is obvious, have become so complicated that the directions of the [repealed] Bankrupts Act, 1731, fixing certain periods at which the assignees are to make distribution can in very few instances be adhered to, and then it must belong to the discretion of that authority which has from the legislature the order and H disposition of the bankrupt's estate to direct the distribution at such time as will be most beneficial and for the general interest of the creditors. It is impossible to put the construction upon the Act that it is imperative on the assignees, having neglected to make a distribution on the precise day, to make it as soon afterwards as possible even if the effect should be the sacrifice of nine-tenths of the interest of all the creditors.

I My opinion, therefore, is that I have a discretion to arrange the time of making a dividend for the general benefit of the creditors, but it is proper to observe that Lord Thurlow appears to have thought this discretion much more limited than it seems to me to be. I must, however, when called on to delay the distribution, take care not to interpose that delay unless satisfied that those who apply have a right to call for it, and that finally it will be beneficial to them and the general creditors. That in this case depends upon the point whether the creditors who were not creditors of the partnership in Devaynes's lifetime, which I take to be

the case of all these petitioners, have a right to insist that those who are also creditors of the four surviving partners still have a demand against the separate estate of the deceased partner, and, therefore, creditors, who never were creditors of the five, have upon principles of equity a right to call on the creditors of the five, to resort to the assets for the benefit of those who never stood in that relation. The first consideration with reference to that is whether the creditors of the five can resort to the separate estate of the deceased partner, and without going through all the authorities and repeating LORD THURLOW'S doubt in *Hoare* v. *Contencin* (4), and my own surprise that a court of equity should have interposed to enlarge the effect of a legal contract, the modern doctrine certainly is that where a man has chosen to take the joint credit of several, though at law his security is wearing out as each of his debtors dies, yet it is fit that the creditor whose debt remains at law only against the survivors should resort to the assets of a deceased debtor, and a court of equity will under certain modifications constitute that demand.

It must still be recollected that this is a demand in equity only, to be enforced only upon equitable principles. It is, therefore, too much to hold that, as this doctrine prevails here, creditors of the four who were also creditors of the five may in certain circumstances go against the assets, therefore, every man who can show that he was a creditor of the five is still to be so considered, and that it is competent to every such individual to go in under a decree for the separate creditors of Devaynes against his assets as still retaining the right to resort to those assets. That right standing only upon equitable grounds, if the dealing of a creditor with the surviving partners has been such as to make it inequitable that he should go against that fund, he would not upon general rules and principles be entitled to the benefit of that demand. I do not recollect an instance that this right to go in upon the separate fund, not given by the legal contract, was extended beyond those who were creditors of the whole firm.

Supposing that all those creditors could go in, the next question is whether the creditors of the four can compel them to go in. With regard to that, though much artificial doctrine has been introduced in this court, yet creditors, as such, independently of the effect of any special contract, have no lien or charge upon the effects of their debtor. and in all these cases of distribution of joint effects it is by force of the equities of the partners among themselves that the creditors are paid, not by force of their own claim upon the assets for they have none. The four surviving partners could only call upon the estate of Devaynes after all the assets belonging to the partnership were applied to the satisfaction of the creditors at the time of the dissolution produced by his death. The partners might then have said, if there was a deficiency of the assets to pay the creditors of the partnership, the partners must contribute to that deficiency in the proportions in which they are respectively interested in the partnership. Supposing, for instance, the deficiency of £80,000, and Devaynes's proportion £30,000, they might have called on his assets to contribute in that proportion, they contributing in the proportion of £50,000, but they could not possibly call upon his assets to contribute in a greater proportion. If, therefore, the deficiency is larger, as it is represented in this case at £110,000, and they can call for more, it is not by their right, but, if the assets are liable at all, it must be by the will and pleasure of those creditors alone whose demands are not satisfied. If the four surviving partners themselves could not call upon the assets for this deficiency of £110,000, I cannot conceive how their creditors can do so. The equity is clear upon the authorities that, if two funds of the debtor are liable to one creditor and only one fund to another, the former shall be thrown upon that fund to which the other cannot resort in order that he may avail himself of his only security where that can be done without injustice to the debtor or the creditor, but that principle has never been pressed to the effect of injustice to the common debtor, and much less have persons who are not common creditors of the same debtor a right to compel the creditors of both

funds to resort to the one in order to leave a larger dividend for those who can claim only against the other.

The conclusion is that these creditors have no right to stay the dividend upon a ground which may finally fail altogether. Further, in many cases the representative may be entitled to say to a creditor who chooses to make the demand that justice requires the surviving partners to pay the debt. They are to be considered the principals; he is merely a surety; and, therefore, a court of equity would not permit them to call upon him for payment, except upon an equitable arrangement and modification requiring them to assign the dividend. The consequence is that this petition certainly cannot be complied with, for the reason that I do not think I could say upon a bill that these creditors have the equity now represented.

Petition dismissed.

CLARKE *v.* PARKER AND OTHERS

[Lord Chancellor's Court (Lord Eldon, L.C.), December 12, 15, 1811, January 6, February 7, 1812]

[Reported 19 Ves. 1; 34 E.R. 419]

Will—Condition—Relief—Substantial compliance with condition—Requirement of consent of trustees to marriage of beneficiary—No fault by beneficiary—Fraud of trustee—Need for trustee to give reason for refusal.

Where property is given by will to a beneficiary on her marriage with the consent of the trustees of the will, with a gift over in the event of her marrying without that consent, a court of equity may think itself at liberty to hold that consent has been given if it is given substantially though not in terms and the failure strictly to observe the condition is not due to the fault of the beneficiary or fraud on the part of the trustees. In such a case a trustee is not required to give his reasons for refusing to give his consent.

Trustee — Several trustees — Need for concurrence — Consent to marriage of beneficiary under will.

Where the consent of trustees is required [e.g., to the marriage of a beneficiary under a will] the trustees, for their consent to be effective, must all concur in it. The consent of the majority of the trustees is insufficient.

Notes. Applied: *Worthington* v. *Evans* (1823), 1 Sim. & St. 165. Referred to: *Re Birch* (1853), 17 Beav. 358; *Re Brown's Trusts* (1881), 44 L.T. 340; *Re Smith, Keeling* v. *Smith* (1890), 44 Ch.D. 654.

As to the duty of trustees to act concurrently, see 38 Halsbury's Laws (3rd Edn.) 971, 972, and for relief against conditions in wills, see ibid., vol. 39, pp. 929–931. For cases see 47 Digest (Repl.) 372, 373; 48 Digest (Repl.) 351 et seq.

Cases referred to:

(1) *Mesgrett* v. *Mesgrett* (1706), 2 Vern. 580; 23 E.R. 977; 48 Digest (Repl.) 356, *3069.*

(2) *Daley* v. *Desbouverie* (1738), 2 Atk. 261; 26 E.R. 561; sub nom. *Daly* v. *Desbouverie*, West temp. Hard. 547, L.C.; 48 Digest (Repl.) 356, *3066.*

(3) *Lord Strange* v. *Smith* (1755), Amb. 263; 27 E.R. 175, L.C.; 40 Digest (Repl.) 619, *1135.*

(4) *Dashwood* v. *Lord Bulkeley* (1804), 10 Ves. 230; 32 E.R. 832, L.C.; 48 Digest (Repl.) 357, *3082.*

(5) *Harvey* v. *Lady Aston* (1737), 1 Atk. 361; 2 Com. 726; 5 Vin. Abr. 89, pl. 10; 26 E.R. 230; sub nom. *Hervey* v. *Aston*, West temp. Hard. 350; Willes, 83, L.C.; 40 Digest (Repl.) 620, *1139.*

(6) *Scott* v. *Tyler* (1788), 2 Bro. C.C. 431; 2 Dick. 712; 29 E.R. 241, L.C.; 48 Digest (Repl.) 354, *3043.*

(7) *Long* v. *Dennis* (1767), 4 Burr. 2052; 1 Wm. Bl. 630; 98 E.R. 69; 48 Digest (Repl.) 333, *2865.*

(8) *Burleton* v. *Humfrey* (1755), Amb. 256; 27 E.R. 170, L.C.; 48 Digest (Repl.) 356, *3072.*

(9) *Wykham* v. *Wykham* (1811), 18 Ves. 395; 34 E.R. 366, L.C.; 40 Digest (Repl.) 641, *1335.*

Also referred to in argument:

Bellasis v. *Ermine* (1663), 1 Cas. in Ch. 22; Freem. Ch. 171; 22 E.R. 674, L.C.; 48 Digest (Repl.) 352, *3020.*

Jarvis v. *Duke* (1681), 1 Vern. 19; 23 E.R. 274, L.C.; 18 Digest (Repl.) 353, *3025.*

Earl of Salisbury v. *Bennet* (1691), Nels. 170; 21 E.R. 818; sub nom. *Bennett* v. *Lord Salisbury*, Freem. Ch. 118, H.L.; 48 Digest (Repl.) 353, *3026.*

Garret v. *Pritty* (1693), 2 Vern. 293; 23 E.R. 790; 48 Digest (Repl.) 353, *3027.*

Semphill v. *Bayly* (1721), Prec. Ch. 552; 2 Eq. Cas. Abr. 213; 24 E.R. 252; 48 Digest (Repl.) 353, *3032.*

Peyton v. *Bury* (1731), 2 P. Wms. 626; 24 E.R. 889; on appeal sub nom. *Painton* v. *Berry, etc.* (*Administrators of Thornton*) (1732), Kel. W. 37, L.C.; 48 Digest (Repl.) 358, *3092.*

Underwood v. *Morris* (1741), 2 Atk. 184; 26 E.R. 515; 48 Digest (Repl.) 353, *3038.*

Reynish v. *Martin* (1746), 3 Atk. 330; 26 E.R. 991; sub. nom. *Rhenish* v. *Martin*, 1 Wils. 130, L.C.; 48 Digest (Repl.) 356, *3071.*

Wheeler v. *Bingham* (1746), 1 Wils. 135; 3 Atk. 364; 95 E.R. 535, L.C.; 48 Digest (Repl.) 353, *3039.*

Stackpole v. *Beaumont* (1796), 3 Ves. 89; 30 E.R. 909, L.C.; 48 Digest (Repl.) 354, *3044.*

Bill filed by a beneficiary under a will alleging breach of trust by trustees.

Charles Elwes by his will dated Sept. 14, 1795, in the event of his leaving no issue who should become entitled under his marriage settlement, devised his settled estates in the county of Hertford to his executors, Edward, Richard, and Joseph Parker, in trust that they or the survivors or survivor or the executors or administrators of such survivor should, as soon as conveniently might be, sell the estates and put out the money at interest upon the several uses and trusts following, viz., as to one third, to pay the net interest, dividends, and produce, subject to the proviso hereinafter contained, into the proper hands of Sarah Creswicke Clarke, daughter of his late sister-in-law, Susannah Clarke, during so long time as she should live and continue single and unmarried, and if Sarah Creswicke Clarke should at any time after his decease marry with the consent and approbation of his trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, but not otherwise, then in trust that his trustees should previous to such marriage effectually settle and assure one equal third part or share of the principal moneys, with the interest, dividends, etc., unto and to the use and behoof of Sarah Creswicke Clarke and the issue of her body lawfully to be begotten in such manner as his trustees should think most fit, prudent, and advisable, but if Sarah Creswicke Clarke should marry in his lifetime, then upon trusts declared for her separate use and for her children after her decease.

The testator gave one other third part to the use of Mary Creswicke for life with limitations to her issue and remainders over to her brothers, Henry and Humphrey, on attaining twenty-one, and in case of their deaths under that age

A then for the separate use of Sarah Creswicke Clarke and her children and grandchildren, and, if she died without leaving any, then such bequest was to sink into his residuary estate. He gave the remaining third to John Barrow, but if he should die under twenty-one, then to the separate use of Sarah Creswicke Clarke with the same limitation over as the second-mentioned third. He further devised to Edward, Richard, and Joseph Parker his messuages and premises at Stokes
B Croft, to hold to them and the survivor and his heirs upon trust to let the premises and pay the rent, etc., subject to the provisoes and encumbrances, into the proper hands of Sarah Creswicke Clarke during so long time as she should continue single and unmarried, and if she should at any time after his decease marry with the consent and approbation of his trustees, then his trustees should previous to such marriage effectually settle and secure the said messuages and premises unto and
C to the use and behoof of Sarah Creswicke Clarke and the issue of her body, in such manner as his trustees should think most fit, prudent, and advisable, but, in case of her marriage in his lifetime, upon the same trusts for her separate use as before stated.

The testator further gave to his said trustees certain sums of stock and all other sums standing in the 3 per cents., to hold to them upon trust to pay the dividends,
D subject to the proviso hereinafter contained, into the proper hands of Sarah Creswicke Clarke during so long time as she should continue unmarried, and to settle the principal upon her marriage after his decease with consent, in the same terms as were expressed with respect to the third of the personal fund before limited, and he gave all the rest, residue, and remainder, of his estate and effects whatsoever, etc., to Sarah Creswicke Clarke to hold to her, her heirs, executors,
E administrators, and assigns, subject to debts, etc., and to the proviso that if she should at any time or times after his decease marry with any person or persons whomsoever without the full consent and approbation of his trustees, or should refuse to join in and execute such settlement or settlements as his trustees should think proper and advise, then and in any of the said cases the said several devises, legacies, and bequests therein before by his said will given and devised in trust
F to and for the use, benefit and advantage of Sarah Creswicke Clarke and her issue should cease, determine, and be utterly null and void to all intents and purposes whatsoever, and he then gave and bequeathed all the estates, moneys, goods, chattels, and effects, by him thereinbefore given to his trustees in trust for the use, etc., of Sarah Creswicke Clarke, to several other persons upon their attaining the age of twenty-one, to hold to them tenants in common.

G The testator died in 1796 without issue. The three trustees, who were his cousins, proved the will, but Edward and Richard Parker only took upon themselves the execution of the trust. Previously to 1796 Samuel Pearsall paid his addresses to Sarah Creswicke Clarke, and they were afterwards married. Samuel Pearsall died in 1799 without issue, having bequeathed all his personal estate to his wife and appointed her his executrix. She died in 1801. The plaintiff was her general
H devisee and residuary legatee.

The bill, filed against the three trustees and the persons entitled under the limitation over upon a marriage without their consent, stated that Edward and Richard Parker, having at first objected to the marriage, at last in the name and on behalf of themselves and Joseph Parker consented, and a correspondence took place between Edward and Richard Parker, who were attorneys, and Samuel
I Pearsall, Sarah Creswicke Clarke, and the plaintiff, who was her attorney, as to the settlement. Edward and Richard Parker on behalf of themselves and Joseph prepared the draft of a settlement, making the three Parkers parties, reciting the intended marriage by and with their consent and approbation, and witnessing that they did convey and transfer accordingly upon trust for the separate use of Sarah Creswicke Clarke for life, with remainders to Samuel Pearsall for life, and to their children, with the ultimate limitation, subject to her appointment, to her, her heirs, executors, etc., which draft was approved by the plaintiff, and engrossed

by Edward and Richard Parker, who appointed a day for the parties to attend and execute the settlement. At the time appointed Edward and Richard Parker, on behalf of themselves and Joseph, attended, and the settlement was read and approved, but, before they would allow the execution, they produced their accounts as trustees and their bill of costs for preparing the settlement and on some other accounts, claiming to be paid the balance of £61. They refused to execute until it was paid, and for that reason only the settlement was not executed by any of the parties. The marriage took place immediately afterwards. Pearsall and his wife afterwards paid to Edward and Richard Parker their bill for preparing the settlement.

The bill stated that Pearsall and his wife were willing to execute the settlement, that Edward and Richard Parker, acting on behalf of themselves and Joseph, consented, and Joseph, if he did not personally consent, never acted in the trusts of the will unless for conformity, leaving the management to the other two with authority to consent for him; that his consent, therefore, if necessary, must be presumed, or, if not, it would be a fraud in him, having never acted, but having left the execution of the trusts to them, now to act only in refusing his consent; the trustees having once given their consent, they could not withdraw it, or, if they could, only on reasonable cause; that it was a fraud and breach of trust to withdraw it because the balance of their account was not paid, especially as it consisted in part of their bill for preparing the settlement, and, if they had not insisted on retaining a balance of £67 for the debts of Samuel Clarke, who had been dead above twenty years without any demand upon them, which they have not yet paid, no balance would have been due to them.

The defendants Edward and Richard Parker by their answer admitted that they acted almost wholly and Joseph very little, merely joining in granting some leases; that they had objections, but afterwards reluctantly consented to prevent the indiscretion of a marriage without a settlement; that the draft of the settlement was approved by Edward on behalf of all the three; that they refused to execute the settlement to which no objection was made at the meeting, but on Edward's desiring to have the balance discharged Pearsall and his wife said they were not prepared with the money, and after some conversation upon a proposal of security and gradual payment by Pearsall, rejected by the defendants, particularly as they were desirous that the accounts should be settled before the marriage, and after a proposal by Pearsall of postponement for a few days for the reasons before mentioned the settlement was not executed, and that they received the balance from Mrs. Pearsall after the marriage. They denied that they refused or withdrew their assent, no further conversation taking place at that meeting about the execution, but only as to the accounts. The defendant Joseph Parker, admitting that he took probate, stated that he received nothing but a small legacy and never acted in the execution of the trusts of the will, except by executing a lease and some other deed at the request of the acting executors; that he was wholly a stranger to the circumstances, except having heard of the courtship; that he was ready to act as the court should direct; that he never refused or declined to act; the two others, who were his cousins, to whom he once was clerk, acting generally without consulting him, had no authority to use his name; that the acts he did were only for conformity; and that he had no interest in the bills of costs of the other defendants. He denied all correspondence upon the subject, and that he, or anyone on his behalf, caused a draft of a settlement to be prepared, or agreed to any day for execution.

Hart, *Bell* and *Beames* for the plaintiff.
Richards, *Sir Samuel Romilly* and *Roupell* for the defendants.

LORD ELDON, L.C.—Before I give judgment in this cause I shall find it necessary to review all the cases. Feeling that, if this property did not belong to the testator's niece, her expectation has been disappointed by a most singular state

of circumstances, and, that, if I was at liberty to take that into consideration, there never was a case of greater hardship, I must admit that the court has much to struggle with before it can reach that conclusion. Where a parent or person placing himself in loco parentis gives property on the marriage of his child with an express condition for the consent of one individual or more, the jurisdiction which this court has assumed upon that subject, whether consent has been given or whether it has been reasonably withheld, is very dangerous to the peace of families and to the rights of parents. If this court inquires whether the person to whom discretion is given, meaning to act honestly, has made precisely the same decision as that which the court would have made, it amounts to reading the will as requiring the consent of this court, and it is obvious that many reasons might operate against individual consent, into which this court could not providently inquire, and which it would be quite competent to the party to refuse to disclose.

There are cases of a different kind, where no good reason for withholding consent is suggested; others, still stronger, where you can discover a bad and vicious reason. *Mesgrett* v. *Mesgrett* (1) is an instance. The daughter, who had been living with one of the trustees, the courtship passing under his eye, removed afterwards to another. It proceeded without interruption by him, and the marriage was actually with his privity. The former trustee was, as LORD HARDWICKE says, considered as having consented by not expressing dissent, and the latter as not expressly dissenting, but withholding express assent for a corrupt reason, the LORD KEEPER COWPER holding that the former might be understood to have encouraged the match and that of the latter might be said in a stronger sense qui tacet consentire videtur, his silence being for the express purpose of inveigling her into the match with the view of transferring the portion from her to his children. It would be difficult to support that case if consent in writing had been required, and the Lord Keeper lays stress upon the circumstance that, as writing was not required, consent might be signified by acts without a formal consent.

Daley v. *Desbouverie* (2) is excessively strong. It is extremely difficult to represent the letter in that case as a consent given even by the writer, much less by the other trustees, but LORD HARDWICKE so considered it. Observe the consequence. In *Lord Strange* v. *Smith* (3), reported by MR. AMBLER, who had a very considerable knowledge of the decisions of his own time, LORD HARDWICKE does not venture to put it upon that, his own, ground, but says it was decided, as *Mesgrett* v. *Mesgrett* (1), upon the fraud by the encouragement given, and decides *Lord Strange* v. *Smith* (3) upon that very principle that consent actually given could not be withdrawn. I do not admit that it could not be withdrawn for any reason, good or bad, having already stated in *Dashwood* v. *Lord Bulkeley* (4), that it might be the positive duty to the trustees to countermand it, a doctrine which in that instance I practically applied.

I feel the hardship of the case, but it comes distinctly to this—whether upon the authority of that dictum in *Harvey* v. *Lady Aston* (5) I can say that the consent of two is the consent of three, a proposition requiring more authority than is found to support it and contradicted by much authority, or whether I can under the particular circumstances consider this trustee as knowing so much that I may fairly say he was consulted and gave his consent by the acts of the others, or, if not, so much encouragement by his conduct, with the degree of knowledge he had, as makes this a case of fraud within the authorities I have alluded to. The extreme hardship of this case demands a review of all the others.

Dec. 6, 1811. **LORD ELDON, L.C.**—In this case I am obliged to say, speaking with all deference to that great judge, LORD MANSFIELD, that I cannot agree to the doctrine which I find laid down in some cases that whatever is a good consent to a marriage in equity is a good consent at law.

Without entering at large into the discussion of *Scott* v. *Tyler* (6), and the variety of cases upon this subject, the distinction between conditions precedent

and subsequent, the doctrine of this court endeavouring to sustain a uniformity with the civil law as to personal legacies, the difference between personal and real estate with reference to conditions in terrorem as they are called, which are supposed to alarm persons when we know they contain no terror whatsoever, and the distinction, which has been much agitated, whether a residuary devise is a devise over, I consider it as now well settled, both with regard to real and personal estate, clearly as to the former, and where personal estate is given with an express limitation over, that, if there is a breach of the condition, that limitation over will take effect.

This is a case in which the testator, in order to vest the interest under the former part of the will, has made necessary the consent of the trustees, if all of them shall be living, or of the survivors, if two, or the survivor, or of the personal representatives of the survivor, if all the trustees shall be dead. Taking the effect of the will to be, as I have represented it, the condition, upon which the devise over is to take effect is marrying without such consent, or refusing to execute a settlement such as the trustees should propose.

It was contended for the plaintiff that the condition was not broken, but this lady had that consent to her marriage which in equity is a sufficient compliance with the condition. That was contended in various ways: (i) upon the dictum of Comyns, C.B., assisting Lord Hardwicke in *Harvey* v. *Lady Aston* (5), that the consent of the major part of the trustees is sufficient and two had consented. As to the passage cited from Atkyn's Report, I have seen a manuscript note, in which the Chief Baron says no such thing. He has published his judgment in his own reports where no such passage appears, and I have not found any case in which the court has said that where the consent of trustees was required the consent of the major part, without more, is sufficient. The court has said what upon that hypothesis was not necessary, that where a trustee has withheld his consent for a vicious or unreasonable cause, that should not be permitted to affect the consent, given by the majority, where it was reasonable that they should consent. It was fairly argued that, considering what we see in this case, this testator could not be anxious that these persons, or the survivors in whom he could not have a particular confidence, or the representatives of the survivor of whom he could know nothing, should give their consent. To that I answer, as the Master of the Rolls said in a late case, that, if the testator has made that consent necessary, I have no authority to say it is not necessary. This is the judge in whom he reposed his confidence, and if he has expressed that those persons whom he states shall give their consent, this court has no authority to strike out that condition and deprive those who under an express devise over have an interest given to them of that interest.

The case is reduced to what Sir Samuel Romilly stated accurately to be the real question. It is said that this is not a case where the consent of three trustees must be given, as there were not three acting trustees. It is a case certainly of extreme hardship. Of these three trustees, all of the name of Parker, it is said Joseph Parker never acted, and, if that were so, I should have been strongly disposed to say that there is, though no execution of a previous settlement, such a consent on the part of the two acting trustees and the lady herself to the execution of the settlement proposed, as would entitle this court to say she stood in equity with regard to her rights as if the settlement had been actually executed, though that was prevented by circumstances which one cannot help lamenting. It is, on the other hand, insisted, that it is not sufficient to show the consent of the two trustees and of the lady herself as there was a third trustee, who never consented, whose consent was never asked, who was not proposed as a party, who never heard of the marriage except by the rumour that there was something like a courtship or treaty, to which he gave no sort of encouragement, which was never laid before him, and the circumstance that it had got so far towards its conclusion as a proposal had never reached him.

This trustee, who now states that he was not an acting trustee, proved this

A will, and it appears that he executed some instruments in execution of the trust, not accurately remembering what they were. The two other trustees have gone the length of swearing that they drew the settlement on behalf of themselves and that other trustee, who, it is now represented, never acted, and never heard of the settlement. I wish this had been explained. The person preparing the settlement for his execution could not consider him as not an acting trustee. I take the B meaning to be that, in the confidence that he would execute it if tendered to him, it was perused and settled on his behalf. If the meaning is that they were authorised to settle it on his behalf, Joseph Parker cannot say he was not an acting trustee, withholding his consent. There is no examination as to this except of one witness, a creditor, to whom Joseph Parker said he was not an acting trustee, and he never would act. That is not conclusive without further inquiry as to the C situation in which he actually stood.

There is no case in which it has been held that, the consent of three trustees being required, that consent which, if there were only two, would have been quite sufficient, would do, the third not having been at all consulted. There was a discretion in him as well as the others, and there is no authority that, if the consent of three is required, a marriage with consent of two only is that, which D the will has prescribed. As to the two trustees, they appear to have been adverse; but they did consent. Being attorneys, they prepare a settlement, very proper in itself. They agree to it as do the husband and wife, and they meet for the purpose of execution. The husband and wife come to execution with a full persuasion that there was the consent of all three, founded on the language and conduct of the two, not of the third, for whom those two held themselves out as E authorised to act.

Another, and a new, view of the subject is whether it can be made out that the circumstance of her being misled by this misrepresentation operating as (though I do not say it was) imposition upon her is a ground for relief in this court. It was not so put at the Bar, but I have looked at it in that view with great attention to all the doctrine upon conditions which have been held not violated where the F breach was not occasioned by the fault of that person, and a court of equity has upon that ground said that the party should stand in the same situation as if the condition had been observed. The difficulty is to determine whether the want of personal communication with the third trustee is to be considered as amounting to negligence, making it the fault of the party, or, whether the conduct of the other trustees creates that sort of excuse that would lay a foundation for relief in equity. G When they met, had they proceeded to execution, I conscientiously believe Joseph Parker would have executed, as he did execute the leases, but, the other trustees representing that they had some demand upon the estate which the parties had not the means of satisfying, the settlement was on that account not executed, and the marriage took place.

There are authorities in this court sufficient to prove that this cannot be con- H sidered such a non-accession to the settlement and non-consent to the marriage as would have any operation if the two trustees only were to consent. I doubt whether it would do at law. *Mesgrett* v. *Mesgrett* (1) is not an authority that the consent of the majority will do where all are required to consent. That case was in *Lord Strange* v. *Smith* (3) put upon the ground of fraud in the trustee, withdrawing his consent with the view that a benefit should go to his child, I and I suppose the court thought itself at liberty to examine whether the refusal proceeded from a vicious, corrupt, or unreasonable, cause, a dangerous power which, however, has been always assumed by the court. That is Lord Hardwicke's own account, who says also in *Lord Strange* v. *Smith* (3) that *Daley* v. *Desbouverie* (2) went upon fraud, i.e., upon the inclinations, affections, and passions of the young people. There is another way of putting it, that the execution by two (for the consent of the majority was sufficient there) was a consent, but Lord Hardwicke, in another case, says that upon this subject of marriage the court will construe

otherwise than upon other subjects, and that must be the ground upon which he held that execution to be a consent. Otherwise, I think, no one would say it was a consent, and, accordingly, in *Lord Strange* v. *Smith* (3) his Lordship puts it, not upon that ground, but upon fraud. If it is to be maintained upon that ground of fraud upon the young people, there must have been some circumstances we are not quite aware of, for that letter was not more than five or six days before the marriage, and if there was time for that letter to come to the knowledge of the parties, it is difficult to say their affections were entangled, etc., in that short period. Taking Lord Hardwicke, however, to have decided upon the letter, the conclusion is that he decided upon his own view of its meaning, and upon such a point of construction one judge may differ from another.

There is a case, of some importance, which was not cited, *Long* v. *Dennis* (7). I mention it both on account of the decision, and some doctrine that I find there stated. The court said that these conditions about marriage are so odious that, in the case of real estate, they would construe the will with reference to such a condition in any way to make the words bend to the construction in order to get rid of the forfeiture, representing the clause, expressed in the alternative, that, if the son should marry any woman, not having a competent portion, or without consent of the trustees, the estate should go over, as importing that consent was not necessary if he got a competent portion.

This case might, perhaps, admit application in another way, the condition on which this property is given over being in exactly the same alternative words—that if she shall marry without consent of the trustees, or shall refuse to join in such settlement as they shall advise, the property shall go over. If, then, she married without consent, did she refuse to execute such settlement? Upon that question, if *Long* v. *Dennis* (7) can be supported, there is little difficulty in concluding that the Court of King's Bench would have said that if no settlement was proposed to her for execution, she did not refuse to execute, and, therefore, there was no forfeiture. That case is important in another point of view. Lord Mansfield states another case, *Burlton* v. *Humfrey* (8), which was not mentioned at the Bar, and, speaking with all deference, but with due anxiety for the information of those whom these books are written to instruct, I cannot help saying that this is not the only instance how extremely difficult it is to rely upon the circumstances stated as the reasons of the judgment. That case is thus represented:

> "The condition was, that, if she married without the consent of N. H. in writing, then, etc.; and the estate was given over. She married without his privity, but he gave his consent as soon as he knew of the marriage. Lord Hardwicke held this a sufficient consent to entitle her to the real and personal estate, which was given her, if she married with the consent and approbation of N. H. to be signified in writing."

The condition appears to be that in case his daughter shall marry with the consent and approbation of N. H. (such consent to be testified in writing) then the property shall go to the husband or to the uses of the marriage, but, in case she shall marry without such consent or approbation, or shall die unmarried, then it was given over. The trustee, supposed to have given his consent as soon as he knew of the marriage, did not give it for eleven months after the marriage. Lord Hardwicke struggles to distinguish between consent and approbation, and, the condition being in the latter part of the clause expressed in the alternative, inclined to the opinion that the subsequent approbation would do. Lord Thurlow, however, denied that, as he did not see why subsequent approbation, if sufficient after eleven months, would not do at any time during the whole life of the trustee, during which it must be quite uncertain whether the marriage was had in conformity with the condition or not. Lord Hardwicke proceeds to observe that the daughter was heiress-at-law, and notice of the devise could not be legally implied against her, being entitled and in

A possession in that character. Upon that ground, therefore, he decided, that there was no forfeiture against her as heiress-at-law.

LORD MANSFIELD, in *Long* v. *Dennis* (7), says further (4 Burr. at p. 2056):

"I mention these cases to show, that the court ought not to make strides in favour of a forfeiture."

B The strides, if any, were quite the other way. What follows resembles his observations on the execution of powers: *Wykham* v. *Wykham* (9). I agree to the next passage that there can be but one true legal construction of a condition, but, if the proposition is that a court of law can hold a condition to be performed in all circumstances in which a court of equity says, though it is not performed, relief shall be given against the non-performance, that is utterly unfounded. Another passage C states that, if the person, whose consent is required, is a devisee over, he must show his reason for his dissent. With regard to that, the testator must know that he has made necessary the consent of a person who has an interest, and then it is very difficult to maintain that he must show a reason for his dissent, and that the other party is not required to show that he has unreasonably refused his assent.

With these observations I break this case, rather with the view to be informed D whether counsel will speak to it again than to decide it at this moment. If counsel declines to extricate me from the pressure of so hard a case, I must express my opinion which I would rather decline at present.

The plaintiff's counsel desired to speak to it again.

Feb. 7, 1812. **LORD ELDON, L.C.,** inquired whether the fact that Joseph E Parker would have consented was upon the record.

Hart for the plaintiff said it was not, adding that under the permission of the court to bring forward circumstances or authorities, they were prepared to prove that Joseph Parker had a general knowledge of the courtship which was proceeding for two years before the marriage, viz., from 1796 to 1798; that he resided in the neighbourhood and never expressed any disapprobation; and that he refused for a F considerable time to receive his legacy on the ground that, not having acted, he did not deserve it, and was at length persuaded to receive it by another of the trustees, who, having taken credit for that legacy as paid, wished to have his account regular. He now says he would have consented, had an application been made to him under the direction of the other trustees, and, if his consent at this time will be of any avail, he will give it, and he would have executed the settlement without further G inquiry, assigning his reason that he knew the testator's motive was, not to impose a general restriction upon his niece, but to guard against an intercourse with a particular individual, not the gentleman she afterwards married.

LORD ELDON, L.C.—The view I take of this case, which is perhaps as hard as circumstances can frame, is this. If Sarah Creswicke Clarke should marry without consent, or refuse to execute such settlement as the trustees should advise, the H property is given over. It is extremely delicate and difficult for this court to say that the property shall not go over in these circumstances according to the terms of the instrument in which it is given over. The settlement proposed was not only represented to her by two of the trustees as having the consent of the third, whom she and her intended husband happened not to consult, but the two other trustees say by their answer, that they did prepare it on behalf of all three. To the argument, I that the consent of the two would prevent its going over, founded upon the dictum supposed to have fallen from COMYNS, C.B., in *Harvey* v. *Lady Aston* (5) (1 Atk. at p. 375), I may venture to say that he expressed no such dictum as we have in his reports his own publication of his argument upon the advice given by him to the LORD CHANCELLOR of which I have also seen a manuscript note, and neither contains any such passage.

There are so many cases in which the court has thought itself at liberty to conceive consent to have been given substantially, though not in terms, that I do not

think it right to decide this case without directing inquiries with a view to bring fully before the court matter which is in some degree before it, and I think it better not to express my opinion until the facts are brought forward, as they ought to be, that the court may appreciate their worth upon the authorities that may be considered as governing the case, if these facts, upon which the court appears to have determined, form a part of it.

The cause was not brought before the court again.

Ex parte EARL OF ILCHESTER

[Lord Chancellor's Court (Lord Eldon, L.C., assisted by Sir William Grant, M.R., and Lord Alvanley, C.J.), April 4, May 21, 1803]

[Reported 7 Ves. 348; 32 E.R. 142]

Infant—Guardian—Appointment to act as guardian "to my son H. or any other sons that may be hereafter born"—Applicability to sons of second marriage.

By an "additional memorandum" to his will a testator appointed his wife and his brother S.S. "to act as guardians to my son H. or any other sons that may be hereafter born." The wife died and the testator married again. Two sons having been born of the second marriage, the testator died.

Held: on the true construction of the memorandum, S.S. was appointed guardian of all the testator's sons and not only of the one son of the first marriage.

Infant—Guardian—Duty of guardian—Attention to wishes of parent—Implanting filial and dutiful feelings towards parent.

This court looks with great anxiety to the execution of the duty belonging to a guardian, and the attention expected to be paid to the reasonable wishes of the parent. Implanting in the hearts of the children filial and dutiful feelings towards the parent is the most important duty imposed on the guardian by the deceased parent: per Lord Eldon, L.C.

Will—Revocation—Dependent relative revocation—Need for later disposition to be valid and of legal effect.

Where a testamentary disposition is made and subsequently there is executed a further disposition which would have the effect of revoking the earlier disposition, and it is evident that the testator could not have intended the revocation of the first disposition for any other purpose than to make way for the later disposition, if the later disposition turns out to be invalid and of no effect there is no revocation of the earlier disposition.

Notes. Applied: *In the Goods of Middleton* (1864), 3 Sw. & Tr. 583. Referred to: *Johnston* v. *Johnston* (1817), 1 Phillim. 477; *Andrew* v. *Andrew* (1855), 3 Sm. & G. 130; *Dickinson* v. *Stidolph* (1861), 11 C.B.N.S. 341; *Louis* v. *Louis* (1864), 3 New Rep. 369; *Ibbott* v. *Bell* (1865), 34 Beav. 395; *Dancer* v. *Crabb*, [1861–73] All E.R. Rep. 692; *In the Goods of McCabe* (1873), L.R. 3 P. & D. 94; *Alexandra* v. *Kirkpatrick* (1874), L.R. 2 Sc. & Div. 397; *In the Estate of Tollemache*, [1917] P. 246; *Ward* v. *Van der Loeff*, *Burnyeat* v. *Van der Loeff*, [1924] All E.R. Rep. 542; *In the Goods of Hope Brown*, [1942] P. 136.

As to guardianship of infants, see 21 Halsbury's Laws (3rd Edn.) 203 et seq., and as to dependent relative revocation, see ibid., vol. 39, pp. 899, 900. For cases see 28 Digest (Repl.) 650 et seq.; 48 Digest (Repl.) 209–214.

A Cases referred to:

(1) *Mountague* v. *Jeoffereys* (1595), Moore, K.B. 429; 1 Roll. Abr. 615; 72 E.R. 674.

(2) *Eggleston* v. *Speke* (1689), 3 Mod. Rep. 258; 87 E.R. 170; sub nom. *Eccleston* v. *Petty* (*alias Speke*), Carth. 79; sub nom. *Edleston* v. *Speak* (*alias Petty*), Comb. 186; sub nom. *Anon.*, 2 Vent. 72; 28 Digest (Repl.) 689, *1968.*

B (3) *Onions* v. *Tyrer* (1716), 1 P. Wms. 343; 2 Vern. 741; 24 E.R. 418; sub nom. *Onyons* v. *Tryers*, Prec. Ch. 459; Gilb. Ch. 130, L.C.; 48 Digest (Repl.) 201, *1774.*

(4) *Beard* v. *Beard* (1744), 3 Atk. 72.

(5) *Hawes* v. *Wyatt* (1790), 2 Cox, Eq. Cas. 263; 30 E.R. 122; reversed, 3 Bro. C.C. 156.

C (6) *Hick* v. *Mors* (1754), Keny. Ch. 117; Amb. 215; 96 E.R. 1329, L.C.; 48 Digest (Repl.) 193, *1683.*

(7) *Radcliffe* v. *Roper* (1712), 10 Mod. Rep. 89; 88 E.R. 639; sub nom. *Roper* v. *Radcliffe*, 9 Mod. Rep. 181; on appeal sub nom. *Rooper* v. *Radcliffe* (1714), 5 Bro. Parl. Cas. 360; sub nom. *Roper* v. *Radcliffe*, 9 Mod. Rep. 167; 10 Mod. Rep. 220, H.L.; 48 Digest (Repl.) 181 *1569.*

D (8) *Shove* v. *Pincke* (1793), 5 Term Rep. 124, 310; 101 E.R. 72, 174; 38 Digest (Repl.) 876, *886.*

(9) *Limbery* v. *Mason* (1734), 2 Com. 451; 92 E.R. 1155; 48 Digest (Repl.) 209, *1872.*

Also referred to in argument:

E *Lady Teynham* v. *Lennard* (1724), 4 Bro. Parl. Cas. 302; 2 E.R. 204, H.L.; 28 Digest (Repl.) 655, *1498.*

Eyre v. *Countess of Shaftesbury* (1725), 2 P. Wms. 102; 2 Eq. Cas. Abr. 710, 755; 24 E.R. 659; sub nom. *Earl of Shaftesbury* v. *Shaftesbury*, Gilb. Ch. 172; 28 Digest (Repl.) 540, *541.*

Ex parte Jordan (1757), 1 Dick. 294; 21 E.R. 282; 28 Digest (Repl.) 654, *1480.*

F *Ex parte Champney* (1762), 1 Dick. 350; 21 E.R. 304; 28 Digest (Repl.) 658, *1534.*

Lugg v. *Lugg* (1696), 2 Salk. 592; 1 Ld. Raym. 441.

Brown v. *Thompson* (1701), cited 1 Eq. Cas. Abr. 44; 21 E.R. 1143.

Parsons v. *Lanoe* (1748), 1 Wils. 243; Amb. 557; 1 Ves. Sen. 189; 95 E.R. 597, L.C.; 48 Digest (Repl.) 17, *48.*

Christopher v. *Christopher* (1771), 2 Dick. 445; 21 E.R. 343; 48 Digest (Repl.) 15, *20.*

G *Doe d. Lancashire* v. *Lancashire* (1792), 5 Term Rep. 49; 101 E.R. 28; 49 Digest (Repl.) 742, *6948.*

Gibbons v. *Caunt* (1799), 4 Ves. 840; 31 E.R. 435; 25 Digest (Repl.) 1120, *31.*

Kenebel v. *Scrafton* (1807), 13 Ves. 370; 33 E.R. 332, L.C.; 35 Digest (Repl.) 754, *4260.*

H *Roper* v. *Constable* (1813), cited 8 Vin. Abr. 141.

Hyde v. *Hyde* (1708), 3 Rep. Ch. 155; 1 Eq. Cas. Abr. 409; 21 E.R. 755, L.C.; 48 Digest (Repl.) 200, *1773.*

Earl of Shaftesbury v. *Hannam* (1677), Cas. temp. Finch, 323; 23 E.R. 177; 28 Digest (Repl.) 654, *1491.*

Cranvel v. *Sanders* (1618), Cro. Jac. 497; 79 E.R. 424; 48 Digest (Repl.) 159, I *1400.*

Burtenshaw v. *Gilbert* (1774), 1 Cowp. 49 E.R. 750; sub nom. *Berkenshaw* v. *Gilbert*, Lofft, 465; 48 Digest (Repl.) 207, *1845.*

Thompson v. *Sheppard* (1789), 2 Cox, Eq. Cas. 161; 1 Ves. & B. 394, n.; 30 E.R. 74; 28 Digest (Repl.) 684, *1899.*

Gray v. *Altham* (1752), cited in Amb. at p. 490; 27 E.R. 320.

Jackson v. *Hurlock* (1764), 2 Eden, 263; Amb. 487; 28 E.R. 899, L.C.; 48 Digest (Repl.) 224, *2024.*

Brady v. *Cubitt* (1778), 1 Doug. K.B. 31; 99 E.R. 24; 48 Digest (Repl.) 447, *3989.*

Petition by infants for the appointment of a guardian.

The Earl of Ilchester, being married but not having at that time any children, by his will, dated Feb. 28, 1778, and duly executed to pass real estate, after bequeathing a leasehold house in trust for his wife for her life and giving her all the household goods, furniture etc., that should be therein, and the sum of £500, to be paid upon his decease, committed the care, tuition, and guardianship, of all his daughters born or to be born unto Mary, Countess of Ilchester, his wife, during their minorities, and he committed the care, tuition, and guardianship of all his sons hereafter to be born unto his wife and his brother Stephen Fox Strangways, or the survivor of them, during their minorities. The testator then gave and devised all his estates, subject as to his estates in the county of Dorset to a jointure of £1,000 a year to Lady Ilchester, to the heirs male of his body begotten or to be begotten, and, for want of such issue, to his brother Stephen Fox Strangways, his heirs and assigns for ever, if he should be living at the time of the testator's decease, and if he should die in the testator's lifetime, then to his youngest brother Charles Fox Strangways, his heirs and assigns for ever. He gave all his personal estate not specifically disposed of to Stephen Fox Strangways and appointed his wife and Stephen Fox Strangways executor and executrix. The testator afterwards made several codicils, giving legacies and various directions. He also left other papers in his own handwriting, and most of them signed by him, but not attested, entitled: "Additional Memoranda;" the first of which, dated April 3, 1788, soon after the birth of his son, Lord Ilchester, was expressed thus:

> "I wish that my friends Mr. Robert Scott and Stephen Digby would be kind enough to act as guardians together with my wife and brother Stephen Strangways, to my son Henry or any other sons that may be hereafter born.
>
> (Signed) Ilchester."

Lady Ilchester died in 1790, leaving Lord Ilchester, her only son, and several daughters surviving. After her death the testator wrote the following memorandum, also unattested.

> "1790. In case of any accident happening to me it is my earnest wish, that my dear sister Harriet would take under her care and protection my unfortunate children. I know it is a heavy and an anxious task; yet on consideration of the love she bore their dearest mother and the forlorn and helpless situation they will be in I am inclined to hope and think she will undertake it. My dear Eliza though young has good sense and heart full of tenderness; and I do not doubt but she will assist her aunt to the best of her abilities; and prove a mother to her younger sisters and brother who will need to have the best of principles instilled in him, before he is sent adrift to a public school. Good principles once fixed in him will stay with him for ever."

The testator then, observing that his daughters could not have very large fortunes, there being so many, expressed a wish that Harry, should he have the advantage of a long minority, would add £2,000 a piece to them, if his fortune could prudently bear it; and proceeded thus:

> "I mean, he should go first to a small school and afterwards at a proper age to Eton, should that school be then in good repute. I have requested my dear brother Stephen, Mr. S. Digby, and Mr. Scott, to be his guardians after the time that my sister shall think fit to give him up, which I should think would be about the age of ten, or, when he goes to a public school. I request his guardians would endeavour to sell Redlynch for him, if it can be done to his advantage."

Then followed some other directions and legacies. Some of the other papers also

A gave legacies and annuities, and directions to his son and the guardians, by the general description "my son's guardians."

In August, 1794, the testator married Maria Digby. By the settlement on that marriage, dated Aug. 27, estates in the counties of Dorset and Somerset were conveyed to the use of the testator for life, with remainder, subject to a jointure of £1,500 a year, to him, his heirs, and assigns for ever, and by a deed of appointment B of the same date, reciting his former marriage settlement in 1781 of an estate in Somersetshire upon himself for life, with remainder, subject to a jointure of £500 a year, to the first and other sons of the marriage in tail male, with power to him, in the event of his surviving, to appoint £500 a year by way of jointure, charged upon that estate to any future wife, he executed that power in favour of his second wife. It was admitted at the hearing that there was a provision by this settlement C for the children of this marriage. By this marriage there was issue two sons, William Fox Strangways and Giles Fox Strangways.

The last testamentary paper was written and signed by the testator, but not attested, and was thus expressed:

> "December 8, 1801. A codicil to be considered as part of my will. I will that D Maria, my present wife, do act as sole and only guardian to all my children, and do sincerely desire her to take that trust upon her. I do also desire that she may have my house, gardens, etc., with the use of the park at Redlynch to reside in herself, if she chooses, for her life; or, if she prefers the house at Abbotsbury for that purpose, then that she should have that house to reside in herself for her life: if she does not however reside in either of the houses, E that they should be let for the advantage of my eldest son. If she chooses to reside in either of the houses, then that house, whichever it may be, to be kept in repair for her at the expense of my eldest son."

The testator died in September, 1802. A petition was presented by the present Lord Ilchester, then of the age of fourteen, and the other children of the testator, two sons and two daughters, to the Master of the Rolls praying that Lady Ilchester F might be appointed guardian of their persons and estates during their minority, and a reference to consider what it would be proper to allow for maintenance, etc. Upon that petition the Master was directed to approve a proper person to be guardian of the two daughters and to state what relations the petitioners had and upon what grounds he approved of such guardian, but as to the sons the Master of the Rolls did not think proper to make any order. Since the date of that order G Lady Ilchester had issue another son, of whom she was pregnant at the decease of the testator, and this petition was presented to the Lord Chancellor by all the sons praying that Lady Ilchester might be appointed guardian to the petitioners, or that it may be referred to the Master to approve a proper person to be their guardian.

The petition suggested that the will of 1778 was revoked by the subsequent marriage and the subsequent birth of children, and although the codicils, and H particularly that of Dec. 8, 1801, might be a re-publication of the will, yet a codicil containing an express declaration that a different person from the testator's brother should be the sole guardian could not operate as a re-publication of the will so far as it was a testamentary appointment of guardians, and though the codicil of Dec. 8, 1801, could not operate as a testamentary appointment of a I guardian, not having been executed in the presence of witnesses, yet it amounted to a revocation of the appointment of the testator's brother if that appointment was not revoked by the marriage and birth of children.

Romilly and *Newbolt* in support of the petition.
Richards and *Fonblanque* against the petition.

LORD ELDON, L.C.—If the points upon this petition had been confined to that which arises upon the second marriage and the birth of children by that marriage

under the circumstances in which that marriage and the birth of those children took place in this particular case, notwithstanding that question must have been determined, not merely with respect to this matter of guardianship, but must have had relation to, and effect upon, the property of this family, which I take to be considerable, I should not have been justified in giving the Master of the Rolls and the Lord Chief Justice the trouble of attending upon that point, for I had no considerable doubt at first, nor has that been increased since, that the second marriage and the birth of children by that marriage should not under all the circumstances be taken to be a revocation. My opinion is that it ought not to be so considered. I am happy to find that the Master of the Rolls and the Lord Chief Justice concur with me upon that, and, without stating any opinion upon the cases that have been cited, I may state the sentiments of us all to be that, where a testator stands in the circumstances, which appear in this case with regard to the children of the prior marriage, and the circumstances in which he placed himself as to the children of the second marriage, this case forms a case of exception. I do not go further, for it is too obvious from what has since passed, that from the rule, originally adopted and now settled, whether to be considered a rule of law or a presumption, whether going upon the intention or an implied condition, those difficulties have arisen which some judicial persons, one in particular, foresaw. I think it better, therefore, to confine the opinion in these terms—that under all the circumstances of this case, this appointment is not revoked by the subsequent marriage and birth of children.

The point upon which we wish to take a little time to consider is whether this codicil, most clearly demonstrating that to the extent of effectuating the special purpose the testator meant to revoke the appointment by the will, but being incomplete for the effect of appointing a guardian, shall be sufficient to revoke the appointment of a guardian by testament. That depends upon two points, first, whether the want of two witnesses would have made it ineffectual even if this codicil upon the face of it proposed a purpose of revocation in all events, and, secondly, if not professing that general purpose of revocation, whether the circumstance of expressing a special purpose will make it ineffectual as to that appointment because ineffectual to accomplish that special purpose. That will depend upon the points very ably put in the argument. The question takes this turn, whether, as it is necessary under the statute that the instrument, whether a deed, which I take to be only a testamentary instrument in the form of a deed, or a will, should be executed in the presence of two witnesses, the statute not using the same expression as the Statute of Frauds, it is, therefore, also necessary that any instrument revoking that shall be executed in the presence of two witnesses. It is argued that it is not necessary, but that anything that can be admitted as evidence of a change of intention is sufficient, though by an instrument not attended with the same forms and ceremonies as the original instrument. That is said to follow from this, that the Statute of Wills, 1540, would admit of a parol revocation if the Statute of Frauds had not been made, and upon the latter statute many cases are to be collected in which certain ceremonies are prescribed as necessary to the creation of an instrument which may be destroyed without those ceremonies. With respect to the difference between ss. 5 and 6 of that statute [repealed, with savings, by the Wills Act, 1837] it may be observed that a will is made revocable by a great variety of acts. The three witnesses are all witnesses to the sanity, as well as other circumstances. But he may obliterate or cancel the will in the presence of no one, or, if before a single person his proof will destroy the will, yet there is not the same guard. The argument is worthy of attention that, if that clause had not directed that a revocation in writing should be with three witnesses, it would have been inferred without those circumstances of attestation. Upon agreements and in other instances the statute affords inferences for the same point.

LORD ALVANLEY, C.J., stated the case and delivered the following opinion: The questions are, first, whether the will of 1778 giving the guardianship of the daughters of the late Earl of Ilchester to his first wife and that of his sons to her and his brother, or the survivor, must, according to the true construction and legal effect of that clause, be restricted to the children of the marriage at that time, or whether it extends to all the children he might have by that or any future marriage; and next whether, supposing all are included, the paper signed by the testator in 1801 has revoked the appointment of guardian by that will.

If I was at liberty to indulge conjecture, I should certainly be apt to suppose that he had not in his contemplation any future marriage. I have read this will with an anxious desire to satisfy myself that I could state to your Lordship as my judicial opinion that it would admit of the restrained construction, but upon the rules and principles that I have ever thought it my duty to observe in the administration of justice I have ever thought it imposed upon me not to make any intendment contrary to the plain and usual sense of the words used, unless from other parts of the will I could plainly see, that the testator could not have intended them to have that extensive operation which the words themselves could carry. On this will and all the other instruments, if I can take them into consideration, I cannot see any decisive inference that necessarily and unavoidably this testator must have meant to restrain the guardianship to the children of his then wife. It cannot be denied that the survivorship as between the brother and the wife was not confined to a survivorship to commence after the testator's death, for it is clear, though the wife died before him, the brother would have been the guardian of any sons by his deceased wife. It cannot, therefore, be construed "provided they both survive." The word "survivor" must have its natural meaning, viz., whether both survive him or only one, and though, considering it as the case of a wife, it must be supposed that the testator had not in his contemplation any sons but those of that marriage, yet it has been repeatedly determined, and is not to be departed from, that, though he might not have contemplated the event that happened, yet that will not affect the construction. I cannot illustrate it better than by supposing that he had accompanied the guardianship by a bequest to any sons he might have: then all the inclination of the court would be to include after-born sons which proves the impropriety of being swayed against the natural import of the words by arguments that probably correspond with the intention. I must, therefore, reluctantly declare my opinion that in point of law this clause extended to all the children either by that or any future marriage and is not to be restricted to children by that marriage only.

Your Lordship having disposed of the question whether the subsequent marriage and birth of children effected a revocation, the next question is whether the testator's brother being, as the survivor constituted by this clause, the guardian of all sons by that or any future marriage, the paper-writing of Dec. 8, 1801, is a revocation of that clause. The paper was made after the other papers pointing to the guardianship he supposed to exist, intimating either that he had given the guardianship or that he intended by some sufficient instrument to confer it. He unfortunately neglected to procure this codicil to be attested by two witnesses, and the question is whether, notwithstanding it will not have the effect of giving the guardianship to Lady Ilchester, it nevertheless operates as a revocation of the clause in the will creating the guardianship in his brother, the survivor of the two persons appointed. This will in a great measure depend upon the determinations as to wills of land. It is clear that by the common law a man could not by any testamentary disposition affect either his land or the guardianship of his children. The latter appears never to have been made the subject of testamentary disposition till the Tenures Abolition Act, 1660. It is impossible to contend that it was comprehended under the Wills Act, 1540 [repealed by Wills Act, 1837]. Till that time, as to land, and as to guardianship till the statute of 1660 the law pointed out the person to succeed, and it was incompetent to the party by any testamentary

act to alter the succession of the person to inherit the real estate, or, whom the law pointed out as guardian, whether the party died intestate, or not. A

Very soon after the statute authorising devises of land, the question arose as to what sort of testamentary acts would be sufficient to revoke them, and it was soon determined that an act inconsistent with the will, though by some accident independent of the instrument it failed of effect, yet produced a revocation. Therefore, upon a covenant to make a feoffment to the use of the covenantor and Mary, B the daughter of the covenantee, whom he intended to marry, which covenant was executed by letter of attorney to make livery, and livery was made of one manor, but not of the other land, it was contended in *Mountague* v. *Jeoffreys* (1), that, as the intention of feoffment would not have full effect for want of the livery, the devise was revoked only as to the manor. The book (Moore, K.B. 429) says, that it seemed (that is the expression) to the court a countermand of the whole. My C opinion is that that is right, for there was no defect in the instrument making a different disposition. That was complete if the act had been done after the execution. The party made the letter of attorney, authorising a person to do the act, which would have made it complete, and that has been determined since the Statute of Frauds to be a revocation of a will of lands according to the statute.

Upon the question as to parol revocations, a great number of cases are alluded D to in 1 Rolle's Abridgment 614, in which the question has been determined in a manner forbidding your Lordship to say they are wrong, that if there is a devise according to the statute and a revocation by parol in the presence of certain persons, and the testator says that when he comes to D. he will alter it, and before he comes to D. he is murdered, it is a revocation, though not in writing. The E great question has been whether inchoate acts, inconsistent, shall revoke, but in all the cases it is admitted that if the act gives power to destroy the will, though the act is not done, yet the will is revoked. I collect that previously to the Statute of Frauds or the Tenures Abolition Act, 1660, as to guardianship, any declaration from which an intention to revoke could be collected would have been sufficient, equally as if it was in writing. That continued as to land down to the Statute F of Frauds. But the Act of 1660 intervened. It is extremely material to observe the words of that statute, for it is necessary to contrast them with those of the Statute of Frauds. Nothing appears to have arisen bearing upon this question in point of the construction of this statute as to the power of revocation by parol, prior to the Statute of Frauds. The words of that statute as to devises of land are much more extensive than those of the Act of 1660. The words in s. 5 of the Statute of Frauds "or else they shall be utterly void and of none effect" are the G foundation of those determinations, which have in subsequent times worked so much injustice, that wills not executed according to the statute have no operation, not even to raise an election against a person taking a benefit in the personal estate. Those words do not occur in the Act of 1660. The difference between ss. 5 and 6 of the Statute of Frauds is most singular, and, if I am at liberty to impute mistake to the legislature, it is hardly possible not to suppose it in this H instance and to imagine that they meant to institute one sort of revocation, so nearly approaching and not exactly conformable to the mode of disposition prescribed. But this is demonstration, that by the common law an act might not be sufficient to give that might be sufficient to revoke, the legislature specifying, what shall be sufficient to revoke. It was enforced at the Bar that if that clause of revocation had not been inserted, a parol revocation might have been sufficient I even after the statute, and this is legislative authority that a revocation need not have been accompanied with all the sanction of disposition, especially when the sanction prescribed differs from that, by which a disposition is to be made.

A great number of decisions have been made upon revocation since the statute, and from *Eccleston* v. *Speke* (2) and *Onions* v. *Tyrer* (3) it has been held that where a disposition is made so as to have legal effect, and afterwards another, by which the former would be revoked, and the other substituted, and it is evident

that the testator, though using the means of revocation, could not intend it for any other purpose than to give effect to another disposition, though, if it had been a mere revocation, it would have had effect, yet, the object being only to make way for another disposition, if the instrument cannot have that effect, it shall not be a revocation. In those cases the testator, so far from intending to revoke, only took other means of carrying the purpose into effect; for in both the uses were the same. In *Onions* v. *Tyrer* (2) the Lord Chancellor thought it necessary to express in the decree the reasons, which is very uncommon now and was not usual even then. The essential circumstance in those cases is that the disposition was the same, and, therefore, they do not go the length of this case.

There are many other cases of different sort where the act done was set aside, the act in itself upon the face of it being valid for the whole purpose, but by some circumstance, either disability in the person to take or some matter dehors or subsequent to the will, it was ineffectual, and then upon the principle of *Mountague* v. *Jeoffereys* (1) it was a revocation. *Beard* v. *Beard* (4) is a case of that sort. *Hawes* v. *Wyatt* (5) and *Hick* v. *Mors* (6) do not bear much upon this question, but as the decree in *Hawes* v. *Wyatt* (5) was reversed, and as the great authority of the noble Lord who reversed that decree may be brought in some degree to bear upon this subject, I shall make some observations upon them. In that case the son after the disposition went abroad. During his life he never intimated any intention to quarrel with it. The bill was filed to set it aside upon the exertion of parental authority, such, that this court would not permit an instrument so obtained to stand, and I was of opinion that the deed could not operate against the heirs of the son, yet I was of opinion, it would revoke the will for the son thought it absolutely revoked, and, therefore, to permit it to stand would be against the principle. Lord Thurlow differed upon that, but I believe *Hicks* v. *Mors* (6) was not then adverted to. Now there is the authority of Lord Hardwicke, that such an instrument is sufficient to revoke a will.

Those cases afford these principles—that a will may be revoked by an instrument not attested, as would be required in order to give it effect; that any disposition which would by the instrument in question have completely and entirely put an end to that will shall have that effect, though the instrument by any accident or circumstance dehors the will becomes ineffectual, as in *Beard* v. *Beard* (4), and *Rooper* v. *Radcliffe* (7), as if the person becomes incapable of taking. *Shove* v. *Pincke* (8) struck me at first, and according to the margin of the report it seems as if the court had almost determined the question. The point argued by Serjeant Shepherd is that there was no power to make the deed, and as the deed was in itself good for nothing it was not a revocation. Counsel on the other side was stopped. By the judgment and certificate it is clear the court did not intend to decide that question, but determined upon another question, viz., that the deed was not null and void, but operated as a covenant to stand seised to uses. This puts that case entirely out of the question, for it was not determined on this ground. The certificate, independent of the reasoning, is decisive that this question did not arise, and there is nothing in the judgment or the reasons from which it is to be collected that they determined upon that ground, except in the preamble of Lord Kenyon's judgment where the words are certainly extremely wide and in their widest sense would embrace this question. But his Lordship clearly decides, and certifies as the ground of the decision, that which shows that this question never arose, viz., that the deed was valid as a covenant to stand seised to uses. There is, therefore, no authority in the way of the proposition that an instrument, imperfect to the point to which it is directed, shall operate as a revocation of a will duly attested.

As to the principle upon which the courts are at liberty to reject all instruments not duly attested by which wills may be revoked or altered, and even to permit one part of the instrument to have effect as to the personal estate, though not as to the real estate, that must proceed upon this, that wills of land or guardianship

requiring to be attested in a particular manner, if the testator leaves an instrument which cannot have the effect of giving the land, but is sufficient to give personal estate, the person entitled under it may claim the personal estate, and, if he is heir, he may take the real estate only upon the ground that, if a person having power to give by a certain mode has executed that power, and afterwards disposing by a mode not effectual and having no operation until accompanied by certain solemnities, neglects to add those solemnities, the court can consider that instrument only as an intimation of what he would do, and not having consummated it by the solemnities required he leaves it an inchoate act, not competent to any purpose whatsoever. Those are the principles upon which a will, rejected totally as to one part, not even raising a case of election, and effect being given to it as to the other upon the clause in the Statute of Frauds declaring the will null and void, must proceed, and though those words are not contained in the Tenures Abolition Act, 1660, yet it requires that the will must be executed in the presence of two witnesses. But I admit that, if the object of this instrument was to revoke, though it was not sufficient to give the guardianship to another, it must have had that effect. But the object was to make a new guardian, which was attempted by an insufficient instrument, not sufficient to revoke the appointment of guardian, and not effectual to appoint another. My opinion, therefore, is that the writing, dated Dec. 8, 1801, is not sufficient to revoke the will, so far as it is an appointment of the testator's brother as guardian as surviving the first Lady Ilchester.

SIR WILLIAM GRANT, M.R.—The first point having been already disposed of, with respect to the second, the codicil, said to be a revocation though not a valid appointment of a new guardian, the Tenures Abolition Act, 1660, authorising a father to appoint a guardian by deed executed in his life, or by will with two or more witnesses, is silent as to the manner in which such appointment may be revoked. But it has been contended against this application that, as a solemnity is prescribed for the appointment, the revocation ought to be authenticated by a solemnity of the same sort. The civil law, proceeding upon the rule

> "nihil tam conveniens est naturali æquitati quam unumquodque dissolvi eo ligamine quo ligatum est,"

required the same solemnity to annul an instrument that was necessary to its perfection. Till the time of JUSTINIAN seven witnesses were required to the revocation as well as the completion of an instrument. That emperor decreed that in certain cases a mere revocation might be with three witnesses. But the rule was never adopted in its full extent in this country in opposition to the former rule. The Statute of Wills, 1540, prescribed writing, yet it was held that a parol revocation was sufficient. It is determined that agreements in writing, and required by the Statute of Frauds to be in writing, may be determined by parol, and it is observable that different solemnities are required by the statute for the framing and for the revocation of wills. I should, therefore, have been of opinion that, if the professed object of the codicil had been only a direct revocation, that object would have been accomplished, though without two witnesses. But this instrument has no words of direct revocation, nor any other indication of an intention to revoke than by an attempt to make a new appointment. It is contended, however, that the intention so indicated ought to prevail, and that the codicil, though not effectual as to the appointment of the guardianship, constitutes a revocation, and if an intention absolutely to revoke the first appointment could with certainty be collected from the design to substitute another guardian, it ought to be held a revocation of the first appointment.

If I am right, the court has before it an instrument capable of operating as a revocation, if a revocation be contained in it, as it would, if the intention was sufficiently manifested. There can be no doubt that part of the intention was to revoke the appointment, otherwise Lady Ilchester could not be the only guardian.

A But the question is whether that was the substantive, direct, object, or only as an incidental and necessary part of the ultimate object, and whether it would ever have been entertained except with reference to that. A new devise might be expressed so as to show absolutely and at all events an intention to annul the former, as if the testator showed a dislike of the person first appointed. That might show an intention absolutely to revoke. But, where there is nothing but B the mere fact of a new devise, the intention to revoke can be considered only with reference to the new devise and as the testator means to give effect to it, and, if the instrument is so made as to be incapable of operating, I cannot conceive how an instrument, inoperative to its direct purpose, can give effect to an intention of which I know nothing but by that purpose. I know nothing of this intention, but by the manifestation of the other. There is no legal certainty. C The statute has prescribed the mode by which alone the intention to appoint a guardian can be effectually shown. If that is not pursued, he does not furnish complete evidence of his intention. Upon a devise of land by an unattested will no notice can be taken of the intention so as to raise a case of election. The answer is that it is not competent to him to express an intention as to land by such an instrument. The cases of feoffment without livery and bargain and sale D without enrolment do not affect this. The reasoning in those cases is that the instrument is complete. There is no intrinsic defect to prevent its being read as full evidence of the intention to pass the land, and revoke the devise. It is from something extrinsic and subsequent to the complete manifestation of the intention by the instrument that the effect it is in its own nature capable of producing is prevented.

E In each of the cases in Rolle's Abridgment 615 the party had done all, and the intention failed from a circumstance extrinsic. In one case a complete power of attorney authorising a person to make livery was executed, but the livery was not made. In the other, a grant of a reversion before devised the tenant did not attorn. That did not take from the sufficiency of the grant, fully and legally manifesting the intention of the grantor. It is said in Rolle that, if there is F devise to one by will in writing, and a subsequent devise to another by parol, the latter, though void as a will, is a revocation of the former. That is given as a dictum of Popham, C.J., not as a decision, and it cannot be supported if I am right in these principles. It is said that *Rooper* v. *Radcliffe* (7) proves that a will may be ineffectual to the object in view and yet shall operate as a revocation. But that does not bear upon the question whether a will defectively executed and G incapable as a will shall be a revocation. There the will was perfect and complete, though the devisee was prevented by personal incapacity from taking. A perfect and complete will, inconsistent with a former, must necessarily be a revocation, though the devisee may never derive any benefit from it. So in *Beard* v. *Beard* (4) the deed poll had no defect in itself, and, therefore, notwithstanding the personal incapacity to take it revoked the will.

H *Eccleston* v. *Speke* (2) and *Onions* v. *Tyrer* (3) prove that even an express revocation of all former wills, though not wanting in any circumstance for a revocation, shall not operate as such as it was evident that the only purpose of revocation was to give effect to the new will. It is true that the uses were nearly the same, but those cases prove that an express intention declared to revoke, if only subservient to another purpose, for which the instrument is incompetent, I shall not revoke. In this case the purpose to revoke is only subservient to another purpose, for which it is incompetent; and, therefore, it is incapable of effecting a revocation. Besides in *Onions* v. *Tyrer* (3) Lord Cowper says it would have made no difference in his judgment if the latter will had been in favour of a different person. His Lordship is speaking of an instrument containing also an express revocation, but in this instance there is only an implication from the new and ineffectual appointment. I should have no difficulty of acceding to this doctrine, for the revoking clause is only intended to operate as part of the will, and the rule

of the civil law, is: "Tunc prius testamentum rumpitur, cum posterius perfectum est."

In *Limbery* v. *Mason* (9) that is laid down as the rule of our law (2 Com. at p. 454):

> "There is no doubt, but the testator by any writing directly designed for the purpose, and executed as the [Statute of Frauds, 1677] directs, or by any cancelling, obliteration, etc., designed merely to disannul the former will, might have revoked it without more: but he designs to do it by a new will; and unless such writing be effectual to operate as a will, it shall not amount to a revocation."

Upon the whole my humble opinion is that the codicil of 1801 does not revoke the appointment of Mr. Strangways to be guardian.

The question then is whether he is appointed guardian of all the sons, or of those only by the first marriage. From the circumstance of committing the guardianship to the wife and brother or the survivor it may be argued that the testator could only mean sons of that marriage as the wife could not by survivorship be guardian of any other sons. I thought that probable at first. But the words are large enough to comprehend all sons born after the will. No restriction is imposed upon the generality of the expression. The inference, though probable, is not necessary, and I am not inclined, any more than my Lord Chief Justice, to put a construction upon words requiring none, as having in themselves a plain and distinct meaning, because some other words do not quite so well accord with them as upon the proposed construction. There is no direct repugnance between the different parts of the clause. The whole might operate as the event should turn out, and the guardianship of all the sons would be provided for in the event of either surviving so that the guardianship could be claimed. If Lady Ilchester had survived, she would necessarily have been guardian of all unless the case of a divorce and children by a second marriage in her life can be supposed, which certainly was not in the testator's contemplation. She having died first, he will be guardian. There is no inconsistency in saying that the guardianship shall extend to all, making it necessary to restrain it, for either could take the guardianship of all at the time either could claim the guardianship. Mr. Strangways, therefore, is the guardian of all the sons.

LORD ELDON, L.C.—I have only to express my entire concurrence in the judgments that have been delivered, and I do not think that I can more correctly express my acknowledgments to the Master of the Rolls and the Lord Chief Justice than by referring myself to the reasons, that have been so ably stated in those judgments.

The consequence is that this petition must be dismissed. In this case I need not add that, though the effect of the appointment of a guardian is to commit the custody of the guardianship, this court looks with great anxiety to the execution of the duty belonging to the guardian, and the attention expected to be paid to the reasonable wishes of the natural parent. Though it is not necessary in this instance, upon such a contest it is important to observe, that it can never end happily but by implanting in the hearts of the children filial and dutiful feelings towards the parent, the best and most important duty imposed upon the guardian by the deceased parent.

Petition dismissed.

A

AMEY *v.* LONG

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Le Blanc and Bayley, JJ.), May 28, 1808]

[Reported 9 East, 473; 103 E.R. 653]

B *Practice—Subpoena duces tecum—Writ of compulsory obligation—Objection to produce document—Matter for court.*

A writ of subpoena duces tecum is a writ of compulsory obligation and effect in the law, but it is always a question for the court of trial whether, on the principles of reason and equity the production of the documents called for should be required of the person to whom the writ is directed.

C **Notes.** In criminal cases witness summonses have been substituted for the writs subpoena ad testificandum and subpoena duces tecum: see Criminal Procedure (Attendance of Witnesses) Act, 1965, s. 8 (45 Halsbury's Statutes (2nd Edn.) 233). As to the present practice as to and form of the writ of subpoena duces tecum see R.S.C. 1965 Ord. 38, r. 14, and Form 28, Appendix A, Supreme Court Practice.

D Considered: *Crowther* v. *Appleby* (1873), L.R. 9 C.P. 23. Explained: *R.* v. *Stuart* (1885), 2 T.L.R. 144. Referred to: *Summers* v. *Moseley* (1834), 4 Tyr. 158; *R.* v. *Russell* (1839), 3 Jur. 604; *R.* v. *Greenaway* (1845), 7 Q.B. 126; *Eccles* v. *Louisville and Nashville Railroad Co.* (1911), 56 Sol. Jo. 74; *R.* v. *Wiltshire Appeal Tribunal, Ex parte Thatcher* (1916), 86 L.J.K.B. 121; *Rowell* v. *Pratt*, [1937] 3 All E.R. 660; *R.* v. *Hurle-Hobbs, Ex parte Simmons*, [1945] 1 All E.R. 273.

E As to subpoena duces tecum, see 15 Halsbury's Laws (3rd Edn.) 427–429, as amended by Laws Supplement; and for cases see 22 Digest (Repl.) 421 et seq.

Cases referred to:

(1) *Pearson* v. *Iles* (1781), 2 Doug. K.B. 556; 99 E.R. 352; 22 Digest (Repl.) 444, *4849*.

F (2) *R.* v. *Dixon* (1765), 3 Burr. 1687; 97 E.R. 1047; 22 Digest (Repl.) 424, *4597*.

(3) *Miles* v. *Dawson* (1795), 1 Esp. 405; Peake, Add. Cas. 54, N.P.; 22 Digest (Repl.) 426 *4632*.

Also referred to in argument:

Bateson v. *Hartsink* (1801), 4 Esp. 43, N.P.; 22 Digest (Repl.) 272, *2745*.

Leeds v. *Cook* (1803), 4 Esp. 256, N.P.; 22 Digest (Repl.) 233, *2242*.

G *Wakefield's Case* (1736), Lee temp. Hard. 313; 95 E.R. 202; 22 Digest (Repl.) 417, *4497*.

Action on the case, in which the declaration stated that the plaintiff, in 1806, in the Court of King's Bench, impleaded one K. Smith in a plea of trespass to the plaintiff's damage of £500.

H An issue was directed to be tried, and on Nov. 28, 1806, the plaintiff prosecuted out of the said court His Majesty's writ of subpœna duces tecum directed to one Railton, W. F. Hope, C. Long (the defendant), and A. Grace, by which writ the King commanded them that they should appear before Lord Ellenborough, C.J., at Westminster Hall on Dec. 2, 1806, and that they the said C. Long and A. Grace, or one of them, should produce and show forth at the time and place aforesaid, a certain warrant granted to them or one of them by the sheriff of Surrey, upon a certain writ I of non omittas testatum fieri facias issued out and under the seal of the court, on or about May 13 then last between the plaintiff and S. Glover, defendant, and the paper writing or instructions which accompanied the same warrant, and then and there to testify and show all and singular those things which they knew, or the said warrant, papers, etc., might import, of and concerning the action between the plaintiff and K. Smith. This writ the plaintiff, on Dec. 1, 1806, caused to be made known and shown to the defendant, and a copy thereof to be left with him, and then and there paid him 1s., being a reasonable sum for his costs and charges in

attending as a witness, according to the tenor of the writ. The defendant, in part obedience of the writ, did, on Dec. 2, 1806, appear as a witness on the trial of the issue, and it was alleged that although he could and might, in obedience to the subpœna, have produced and shown forth at the time and place aforesaid on the trial of the issue the warrant referred to in the writ of subpœna, and although the production and showing forth of the warrant was material evidence for the plaintiff and would have enabled the plaintiff to have obtained a verdict on the issue, yet the defendant wrongfully and unjustly intending to injure the plaintiff and to deprive her of the benefit of the evidence, did not nor would on the trial of the issue, produce or show forth the warrant although he was then and there solemnly called upon by the court for that purpose and had no lawful or reasonable excuse or impediment to the contrary, and by reason thereof the plaintiff was non-suited in the action, and proceedings were later taken which resulted in K. Smith recovering against the plaintiff £52 10s. costs. The plaintiff said that not only was she obliged to pay Smith the said sum of £52 10s. but was hindered and delayed in the recovery of her damages in the plea, and was obliged to lay out £200 more in and about the prosecution of the action. The defendant denied liability, but the plaintiff obtained a verdict.

A motion was made on behalf of the defendant to arrest the judgment on two grounds: (i) that it was not sufficiently alleged in the declaration that the defendant had it in his power to produce the warrant which the writ of subpœna duces tecum required him and another person to whom it was directed, or one of them, to produce at the trial; (ii) that which is commonly called a writ of subpœna duces tecum was not of compulsory obligation in the law.

Park, *Marryat* and *Pell* for the plaintiff, showed cause against the rule for arresting the judgment.

Sir Vicary Gibbs and *Garrow*, for the defendant, supported the rule.

LORD ELLENBOROUGH, C.J., delivered the following judgment of the court: The judgment in this case was moved to be arrested on two grounds—first, that it was not alleged in the declaration with sufficient certainty that the defendant had it in his power to do the thing which the writ of subpœna duces tecum required him and one Grace, or one of them, to do, viz., to produce the sheriff's warrant upon a testatum fieri facias to them, or one of them, directed; secondly, that the supposed writ of subpœna duces tecum mentioned in the declaration was not a writ known to the law nor had any such compulsory force and obligation attached to it as the declaration supposes.

As to the first of these objections, which applies to both counts of the declaration equally, it appears to us that the allegation

> "that the defendant could and might in obedience to the said subpœna have produced and shown forth at the time and place aforesaid at the said trial of the said issue the said warrant mentioned and referred to in the writ of subpœna"

in the plain, natural, and obvious sense of these words, imports an immediate physical ability to do the thing required to be done on the part of the defendant, i.e., that the defendant was able, by having the warrant in his own possession, to have produced it, and not that by application to others who had the custody of it he could and might have acquired the means and indirectly have become the instrument of producing it. The latter sense of the word is indeed so remote from the ordinary understanding of mankind on such a subject, and has so little reference to the duty sought to be enforced, viz., the production of that by the witness which the witness could, in obedience to the subpœna, personally produce, that, after verdict, it is not to be intended that the judge at the trial received proof of the words in this strained and unnatural sense of them. When it is afterwards said in the count that the defendant did not nor would at the time and place of trial produce the warrant although solemnly called upon by the court for that purpose, "and

A although he had no lawful or reasonable excuse or impediment to the contrary," it certainly excludes the case of the warrant being in the possession of another, and on that account attainable only through the means or by the delivery of such other person, inasmuch as the existence of such circumstances, if they had in fact existed, would have afforded "a lawful and reasonable excuse and impediment to the contrary," and, of course, have falsified the allegation upon which the blame B of non-production is rested, no man being obliged, according to any sense of the effect of such a subpœna, to sue and labour in order to obtain the possession of any instrument from another for the purpose of its production afterwards by himself in obedience to the subpœna. We are of opinion, therefore, that there is no ground for arresting the judgment upon this first objection.

As to the second, and most material objection, viz., that a subpœna duces tecum C is not a writ of compulsory obligation and effect in the law, it has been principally maintained in argument, on the part of the defendant, on the ground that no such writ is to be found in the REGISTRUM BREVIUM, nor anywhere else prior to the time of Charles II when the instances to be found in CLERK'S MANUAL, 31, THESAURUS BREVIUM, 304, and OFFICINA BREVIUM, 385, first occur. But when it is recollected that the REGISTRUM BREVIUM does not even contain the common writ of subpœna ad D testificandum, the antiquity and compulsory effect of which is not disputed, the observation arising from the omission of the writ in question becomes less important.

HIS LORDSHIP referred to *Pearson* v. *Iles* (1), where it was laid down by LORD MANSFIELD that the courts of Westminster Hall proceeded against witnesses who wilfully absented themselves as for a contempt before the Perjury Act, 1562 E [repealed by Perjury Act, 1911], and that statute refers to process out of courts of record to testify concerning matters depending in those courts, as process then known and in use, and continued : Indeed there are a multitude of writs in daily use and of unquestioned legal validity and effect which are not inserted in that collection. One need not go further for an instance than the very writ of non omittas F fieri facias, mentioned in this same declaration.

The right to resort to means competent to compel the production of written, as well as oral, testimony, seems essential to the very existence and constitution of a court of common law which receives and acts upon both descriptions of evidence and could not possibly proceed with due effect without them. It is not possible to conceive that such courts should have immemorially continued to act upon both G without great and notorious impediments having occurred, if they had been furnished with no better means of obtaining written evidence than what the immediate custody and possession of the party who was interested in the production of it, or the voluntary favour of those in whose custody the required instruments might happen to be, afforded. The courts of common law, therefore, in order to administer the justice they have been in the habit of doing for so many centuries, H must have employed the same as, or similar means to, those which we find them to have in fact used from the time of Charles II at least, according to the entries before referred to, unless indeed it is to be inferred from the circumstance of those particular entries being found to respect books and papers in the custody of rectors, vicars, and churchwardens, that the compulsory power of the court related only to books and papers of that description and producible only by such persons and upon I the question of nonage merely, a supposition to which we can by no means accede. They may be taken, therefore, as known and recorded special instances of a general practice to compel by writ the production of necessary written testimony at the trial of suits at law.

In *R.* v. *Dixon* (2), it was held by LORD MANSFIELD, and the rest of the court that an attorney who had been served with a subpœna duces tecum out of the Crown Office to produce certain vouchers which his client, a Mr. Peach, had exhibited and relied upon before a Master in Chancery, which subpœna had been served upon the attorney in order to found a prosecution for forgery against his client, was not

bound to produce those required vouchers. In that case no objection was taken to the writ, but to the special circumstances under which the party possessed the papers so that the court may be considered as recognising the general obligation to obey writs of that description in other cases. Indeed, the nisi prius case of *Miles* v. *Dawson* (3), in which LORD KENYON refused to compel a witness to produce a power of attorney in his possession, establishes in principle nothing more than that there are circumstances in respect of which the production of an instrument required in the terms of a subpœna would not be enforced by the authority of the court, which is a proposition too clear to be doubted. And, to be sure, though it will be always prudent and proper for a witness, served with such a subpœna, to be prepared to produce the specified papers and instruments at the trial, if it be at all likely that the judge will deem such production fit to be there insisted upon, yet it is in every instance a question for the consideration of the judge at nisi prius whether, upon the principles of reason and equity, such production should be required by him, and of the court afterwards whether, having been there withheld, the party should be punished by attachment.

I have not thought it necessary to advert to certain extrajudicial opinions, supposed to have been entertained and expressed by several eminent lawyers on this subject, as they afford no safe basis for judicial determination and are contradicted by the actual practice and experience of courts of law during the period already alluded to, as well as opposed by the convenience and necessity of common law trials which must have at all times required, and may, therefore, be presumed to have had, the use of some such means as the writ in question, to conduct them to any useful and effectual termination. Upon the whole, therefore, as to the general question, whether a writ of subpœna duces tecum be a writ of compulsory obligation and effect in the law, we are of opinion that it is, and, therefore, that neither upon this second ground, any more than upon the former, ought this judgment to be arrested.

Rule discharged.

A

R. *v.* ARCHBISHOP OF CANTERBURY AND ANOTHER

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Le Blanc and Bayley, JJ.), February 8, 1812]

[Reported 15 East, 117; 104 E.R. 789]

B *Mandamus—Writ to prevent defect of justice—Enforcement of right where no other specific remedy—Statutory duty to exercise discretion—Writ to compel exercise, but not method.*

In exercising its authority to grant the writ of mandamus the court will render it as far as it can the means of securing substantial justice in every case where there is no other specific legal remedy for a legal right, and so prevent C that defect of justice which might otherwise ensue, and it will provide as effectually as it can that others exercise their duty wherever the subject-matter is properly within its control.

Where a statutory duty is placed on a person to exercise his discretion, e.g., to approve or disapprove the fitness for an office of some other person, a mandamus can be granted to compel the first person to exercise the discretion D but not to direct how it should be exercised, for that would be to usurp the functions of the person to whom the writ is addressed.

Notes. Applied: *R.* v. *Leicester Guardians*, [1899] 2 Q.B. 632; *R.* v. *Bishop of Liverpool* (1904), 20 T.L.R. 485; *R.* v. *Poplar Borough Council, Ex parte London County Council (No. 1)*, [1921] All E.R. Rep. 429. Considered: *R.* v. *Stepney* E *Corpn., Ex parte Walker & Sons, Ltd.* (1932), 148 L.T. 180; *R.* v. *Archbishop of Canterbury* [1943] 2 All E.R. 791. Referred to: *Ferguson* v. *Kinnoull* (1842), 9 Cl. & Fin. 251; *R.* v. *Canterbury* (1902), 71 L.J.K.B. 894.

As to the writ of mandamus and its application, see 11 Halsbury's Laws (3rd Edn.) 84 et seq.; and for cases see 16 Digest (Repl.) 315 et seq. For the Act of Uniformity, see 7 Halsbury's Statutes (2nd Edn.) 583.

F Cases referred to:

(1) *Specot's Case* (1590), 5 Co. Rep. 57a; Jenk. 258; Gouldsb. 35, 52; 3 Leon. 198; 77 E.R. 141; sub nom. *Specot* v. *Bishop of Exeter*, 1 And. 189; 19 Digest (Repl.) 425, *2376*.

(2) *Bishop of Exeter* v. *Hele* (1693), Show. Parl. Cas. 88; Holt, K.B. 609; Comb. 239; 1 E.R. 61; sub nom. *Hele* v. *Bishop of Exeter*, 3 Lev. 313; 2 Salk. G 539; 4 Mod. Rep. 134; 2 Lut. 1094; sub nom. *Bishop of Excester* v. *Hele*, Carth. 311, H.L.; 19 Digest (Repl.) 426, *2389*.

(3) *Withnell* v. *Gartham* (1795), 6 Term Rep. 388; 1 Esp. 321; 101 E.R. 610; 19 Digest (Repl.) 304, *754*.

(4) *R.* v. *Archbishop of York* (1795), 6 Term Rep. 490.

H (5) *R.* v. *Marquis of Stafford* (1790), 3 Term Rep. 646; 100 E.R. 782; 19 Digest (Repl.) 422, *2336*.

(6) *R.* v. *Blooer* (1760), 2 Burr. 1043; 97 E.R. 697; 19 Digest (Repl.) 454, *2726*.

Also referred to in argument:

R. v. *Bishop of London* (1811), 13 East, 419; 104 E.R. 433; 19 Digest (Repl.) I 388, *1874*.

R. v. *St. Bartholomew's (Churchwardens)* (1700), 13 East, 421, n.; 104 E.R. 434; sub nom. *St. Bartholomew's (Churchwardens) Case*, Holt, K.B. 418; 3 Salk. 87; 19 Digest (Repl.) 388, *1871*.

Colefatt v. *Newcomb* (1705), 2 Ld. Raym. 1205; 92 E.R. 296; 19 Digest (Repl.) 388, *1872*.

Ex parte King (1805), 7 East, 92, n.

Giles's Case (1730), 2 Stra. 881; 93 E.R. 914; sub nom. *Anon.*, 1 Barn. K.B. 402; 30 Digest (Repl.) 73, *545*.

R. v. *Young and Pitts* (1758), 1 Burr. 556; 97 E.R. 447; 30 Digest (Repl.) 28, *181.*
R. v. *Kent Justices* (1811), 14 East, 395; 104 E.R. 653; 33 Digest (Repl.) 362, *1751.*
R. v. *Bishop of Ely* (1788), 2 Term Rep. 290; 100 E.R. 157; 8 Digest (Repl.) 508, *2323.*
R. v. *Bishop of Litchfield and Coventry* (1735), 2 Stra. 1023.
R. v. *Bishop of Oxford* (1806), 7 East, 600; 3 Smith, K.B. 570; 103 E.R. 233; 19 Digest (Repl.) 419, *2301.*
R. v. *Field* (1791), 4 Term Rep. 125; 100 E.R. 930; 19 Digest (Repl.) 281, *458.*
R. v. *Bishop of Exeter* (1802), 2 East, 462; 102 E.R. 445; 19 Digest (Repl.) 281, *459.*

Rule Nisi for a writ of mandamus directed to the Archbishop of Canterbury and the Bishop of London.

In Eastern term, 1811, the court discharged a rule for a mandamus to the Bishop of London obtained on the application of the Rev. Richard Povah to license him to the endowed lectureship at the parish church of St. Bartholomew, Exchange, London, which application had been made on the ground that he had been chosen to be lecturer by a majority of the inhabitants of the parish to whom the choice was given by the founder, and had tendered himself to the bishop with the usual credentials of his election, and of his being in priest's orders, and had offered to read and subscribe the thirty-nine articles, as required by the Act of Uniformity; but that the Bishop had refused to license him on the general ground that he did not approve of him as a fit person for the lectureship, without specifying the reasons of such unfitness or personally examining him in that respect, though required so to do. That rule was discharged on a preliminary objection taken to it that no previous application for a licence had been made to the Archbishop of Canterbury as well as to the bishop, both of whom were severally authorised by the Act of Uniformity to grant such licence, and, accordingly, in Michaelmas Term, 1811, *Garrow* applied for and obtained a rule upon the archbishop and the bishop

> "to show cause why a mandamus should not issue to them, or one of them, calling upon them, or one of them, to admit Richard Povah, LL.D., before them, or one of them, to read, in the presence of them, or one of them, the thirty-nine articles of religion, with declaration of his unfeigned assent to the same, and also to do and perform all other matters and things required by law to be done by him, in order to the said Richard Povah's being licensed to preach the Friday morning lecture at St. Bartholomew, Exchange, London; and also commanding them, or one of them, that they, or one of them, do thereupon, if the said Richard Povah shall by them, or one of them, be found to be a fit and proper person to preach the said lecture, license him accordingly."

In addition to an affidavit on which a former application for a writ of mandamus had been made, respecting the general circumstances and merits of the case, which turned principally upon a charge, alleged on the one part and denied on the other, that Dr. Povah had preached against infant baptism, the present rule was grounded upon further affidavit of the like application having been made to the archbishop for a licence to Dr. Povah, to which the archbishop returned that, having considered that section of the Act of Uniformity, which directs the proceedings of archbishop and bishops in the matter of granting licences to lecturers, he thought it his duty to decline interfering in the case submitted to him. The affidavit of Dr. Povah also stated another application to the Bishop of London for a licence, since the former rule was discharged, and his lordship's continued refusal. By way of answer to the objection before urged by the bishop of the deponent's unfitness, he stated that the bishop had refused to call upon him to meet his accuser in his (the bishop's) presence in order to his entering into an examination of the truth or falsehood of the charge exhibited against the deponent, and that the bishop had also declined to enter into the ability and moral fitness of the deponent although he had frequently

called upon his lordship to point out or institute any satisfactory mode of examination and inquiry, and was still ready and desirous that such an examination and inquiry should take place. It appeared that Dr. Povah had had several interviews with the bishop, and had been informed by his lordship of the general nature of the principal charge preferred against him, of having preached against infant baptism, mixed with other matters of objection, and the bishop had heard what he himself had to say in answer to the charges, and received documents of his own and others confirmatory of his denial of them. But the ground of his complaint was that the bishop would not, on any of those occasions, disclose his informant, nor appoint a time and place for hearing Dr. Povah and his accusers face to face, as he urged the bishop to do. The information on which the bishop had acted was now disclosed in the affidavits of the several persons by whom it was communicated.

In answer to the writ now prayed for, the principal affidavit upon which the decision of the court mainly rested, was that of the Bishop of London in which his lordship stated that the said Richard Povah had been repeatedly admitted before him with a view to his being approved and licensed by him to preach the Friday morning lectures, etc. He had made diligent inquiry respecting the conduct and ministry of Richard Povah as a clergyman, and, being convinced from such inquiry that he was not a fit person to be allowed to preach the said lecture, he had conscientiously, and according to the duty of his office as Bishop of London, and for no other motive or reason whatsoever, decided and determined, after the said Richard Povah had been so admitted before him, and after having heard him, that he could not approve or license him thereunto. That decision was formed by him and was still adhered to upon a full and deliberate consideration of all the circumstances he had been able to learn respecting the said Richard Povah, and in forming such decision, and through the whole of this transaction, he had acted according to the best of his judgment, and from a conviction that the duty imposed upon him by his office required that he should not approve of or license anyone to a lectureship whom he did not in his conscience believe to be a fit person to fill the office. He had not called Richard Povah before him to read the thirty-nine articles of religion or to do or perform any other matters or things required by law to be done by him in order to his being licensed to preach the said lecture because he could not approve him as a fit person to be so licensed and because such matters and things were not usually done unless the person applying to be licensed had been previously approved. The accustomed form of the licence given to lecturers by the Bishop of London was set forth in the affidavit of the bishop's secretary, which licence begins thus:

> "John, by divine permission, Bishop of London, to our beloved in Christ, greeting: We do by these presents give and grant to you, on whose fidelity, morals, learning, sound doctrine, and diligence we do fully confide, our licence and authority to perform the office of lecturer in the parish church . . ."

When the rule was moved in its present form, and it was opened to the court that the archbishop, on application to him for the licence, had declined interfering in the matter, Lord Ellenborough, C.J., suggested that the writ should be directed to the archbishop in a different form, namely, to hear as well as to decide on the application. On the next day his Lordship again said that it appeared to the court in the present state of the case as disclosed by the affidavits to be more proper to grant a rule on the archbishop alone as one of the persons to whom the Act of Uniformity had directed the application to be made, commanding him to hear and determine the application for the licence, for the Bishop of London had already heard and determined the matter by refusing the application on the ground of unfitness of the candidate. Dr. Povah's counsel thereupon desired time to consider of the matter and two days after they repeated their application to the court for the rule against both in the form above stated which was then granted, the court desiring to have it understood that the party took it in this

form upon his own responsibility and not on the suggestion of the court. A

The Attorney-General (*Sir Vicary Gibbs*), *Dampier* and *Abbott*, showed cause against the rule.

Garrow, *C. Warren*, *Comyn* and *Brougham*, supported the rule.

LORD ELLENBOROUGH, C.J.—The duty which is in this case cast by law upon the bishop is constituted by the Act of Uniformity [1616] which, in s. 19, B contains these words:

> "No person shall be received as a lecturer, or permitted, suffered, or allowed to preach as a lecturer, or to preach or read any sermon or lecture in any church, chapel, or other place of public worship within this realm of England, or the dominion of Wales, and town of Berwick-upon-Tweed, unless he be first approved and thereunto licensed by the archbishop of the province, or C bishop of the diocese . . ."

The question of construction arising upon these words is: What is the approval which the bishop is to bestow upon the party, and upon what ground is he required to grant his licence to him? It is a condition precedent that the bishop should first approve—"unless the person be first approved"—without that he cannot lawfully exercise the function in question. D

It has been endeavoured in argument to liken the situation of a lecturer in all respects to the office to which a person is admitted by the institution of the bishop in the case of an ecclesiastical benefice and to the cases of curates and schoolmasters, in respect of which latter appointments there are particular provisions which certainly do not apply to the case now before the court. There have been many dicta of judges cited, from none of which am I prepared to differ, E or to deny to any of them their proper weight and authority. The result of them is, in effect that this court, in the exercise of its authority to grant the writ of mandamus, will render it as far as it can the means of substantial justice in every case where there is no other specific legal remedy for a legal right and will provide as effectually as it can that others exercise their duty wherever the subject-matter is properly within its control. The right of the court to apply these means for F the attainment of such an end, and to prevent that defect of legal justice which might otherwise ensue, has been in general admitted, and if the bishop had not in this case inquired so as to enable himself to give a considerate approbation or refusal on the subject, it might have been a fit case for the interference of the court to further such inquiry.

The affidavits originally laid before the court stated that the bishop had objected G first of all upon the ground that Dr. Povah had only deacon's orders and had not obtained priest's orders, which latter description of orders he thought essential to his duly filling the office of lecturer. But this objection of the bishop's was afterwards in fact removed by the applicant's obtaining priest's orders from the Bishop of Sodor and Man upon the manner and circumstances of obtaining which H I make no comment. The Bishop of London, however, did not, upon the removal of that, resort to any new ground of objection to which he had not adverted before, for it will be recollected that very early in the application to him, he had stated an objection to Dr. Povah on the ground of his having maintained opinions contrary to the doctrine of the church of England in regard to infant baptism. But it seemed at least (according to the first view of the original affidavit) to be a little I doubtful upon what ground the bishop had refused his approbation so it might be to a degree questionable whether he had given that deliberate refusal, and exercised that considerate judgment in the act of refusing which it would be required of him to exercise upon a subject in which the rights of others were so materially involved. The court, therefore, granted a rule to show cause, which has produced a distinct answer from the bishop in his first affidavit, and a still more full answer in his last affidavit. In the first he states the ground of his refusal in these terms:

A "That his sole reason for refusing to license the Rev. Richard Povah to the Friday lectureship at the church of St. Bartholomew, Exchange, is a conscientious opinion and conviction arising from every circumstance which, after diligent inquiry, he has been able to learn concerning the said Richard Povah's conduct and ministry as a clergyman, that he cannot, consistently with his duty as Bishop of London, approve of him as a fit person for such B lectureship. That through the whole course of this transaction he has acted according to the best of his judgment, merely from a sense of the duty imposed upon him by his office to approve of no one whom he did not in his conscience think to be a fit person."

In his subsequent affidavit, in answer to the additional affidavits that were last filed on the part of Dr. Povah, he has stated:

C "That the said Richard Povah had been repeatedly admitted before this deponent with a view to his being approved and licensed by this deponent to preach the Friday morning lecture at St. Bartholomew, Exchange, London, and that he has made diligent inquiry respecting the conduct and ministry of the said Richard Povah as a clergyman; and that being convinced from such D inquiry that the said Richard Povah is not a fit person to be permitted and allowed to preach the said lecture, he hath conscientiously, and according to the duty of his office as Bishop of London, and for no other motive or reason whatever, decided and determined, after the said Richard Povah had been so admitted before him as aforesaid, and after having heard him, that he cannot approve or license him thereunto. And this deponent saith, that such decision E was formed by him, and is still adhered to upon a full and deliberate consideration of all the circumstances he has been able to learn respecting the said Richard Povah; and that in forming such decision, and through the whole of this transaction, he has acted according to the best of his judgment, and from a conviction that the duty imposed upon him by his office requires that he shall not approve of or license anyone to a lectureship whom he does not F in his conscience believe to be a fit person to fill the office."

If, instead of these matters being disclosed as they are in the bishop's affidavits in answer to the rule, the court had granted the mandamus and the same matters had been returned to the writ, would not such a return have been conclusive upon the point? Unquestionably it would, unless the court were prepared to decide that the function of approbation is vested in them and not in the bishop, and G that notwithstanding the conscientious judgment which upon a full and deliberate consideration of the subject he has come to, and his declared conviction that he would be acting in a manner wholly inconsistent with the duties of his episcopal function, and the trust reposed in him by the legislature if he did license him, we should nevertheless grant a mandamus to the bishop to say—approve, though you do not approve; take our conscience to guide you, and not your own. There H is no instance of such an application for a mandamus to compel a bishop to approve; we can only compel him to inquire: we cannot divest him of that function which the legislature has for wise purposes vested in him, and transfer it to ourselves. All that the court can ever do is to see that that function is well exercised by him in whom it is so vested, and there never yet has been an instance of mandamus to compel a bishop to approve and license a lecturer, where the question I turned on the approbation or disapprobation of the bishop as to the fitness of the applicant.

The cases of mandamus which have been cited in this case (and I believe all were then cited that are to be found in the books) are for the most part such where the objection arose upon the part of the rector or vicar to the use of his pulpit, or where some other objection arose from another quarter than the bishop himself, and where the bishop was not, if I may so say, individually and per se the object of the application, nor a substantive party to it, but the applicants were obliged

to adopt the mode of moving for a mandamus to the bishop to license, in order to get at the question of right contested between them and others, and the bishop was obliged pro forma to be made a litigant party before the court for such purpose. But the court has never yet been called upon to act, nor in any instance hitherto has attempted to act authoritatively upon the conscience of the bishop, where his judgment appeared to them to be formed upon the personal qualification of the party, after full inquiry, and where his refusal stood upon the distinct and clearly exhibited ground of a conscience so informed.

It has been urged, however (and much stress was laid upon it in the argument), that it was the duty of the bishop to have instituted his inquiry upon the subject in the manner and by the means usually adopted in courts of law, that is, by the formal production of the charges made against the applicant in a judicial course and by a public and solemn hearing of the several parties, their proofs and witnesses. But, in the first place, what power has the bishop to compel the attendance of parties and witnesses? What power has he to administer an oath? What word is there in the Act of Parliament that prescribes the mode by which he shall attain a conscientious satisfaction on the subject? It only requires him first to approve, that is, before he licenses, and in so doing it virtually requires him to exercise his conscience duly informed upon the subject, to do which he must duly, impartially, and effectually inquire, examine, deliberate, and decide. If the court have reason to think that anything is defectively done in this respect, it will interpose its authoritative admonition. The mandamus to license, if the party shall be found to be a fit person, is a solemn and peremptory call upon the bishop to adopt the requisite means for duly informing his conscience, in order to the correct and effectual exercise of this most important duty.

A strict analogy does not hold between the means of obtaining a licence for a lectureship, and the other situations in the church to which it has been compared, nor is a lectureship in point of right like the case of a temporal inheritance in an advowson or the like where the patron is entitled to call upon the ordinary to institute his clerk and to enforce that right by quare impedit unless the bishop specifically states in his plea some reasonable cause wherefore the clerk presented is not fit. In the Statute of Articuli Cleri, which is not merely an enacting statute, but, as Lord Coke says, declaratory of the common law and custom of the realm, c. 13 runs thus:

> "Also it is desired that spiritual persons whom our lord the King doth present unto benefices of the church (if the bishop will not admit them, either for lack of learning, or for other reasonable cause) may not be under the examination of lay persons in the cases aforesaid, as it is in these times in fact attempted, contrary to canonical decrees; but that they may sue to an ecclesiastical judge, to whom it of right belongs, for the obtaining remedy as may be just."

The answer is, "of the fitness of a parson presented to an ecclesiastical benefice, the examination"—it will be recollected, that "examination" is not the term in the Act of Uniformity, but approved, and the word examination, taken strictly, may be understood to mean a personal oral examination such as usually takes place for the ascertaining a competence in literature—"the examination," it says, "belongs to the ecclesiastical judge; and so it has heretofore been used and shall be so in future."

This statute relates in express terms to the case of ecclesiastical benefices, properly so called, and there, I admit, that the bishop must, if questioned for refusing institution to a clerk presented to him in a suit of quare impedit in his plea state the cause of such his refusal. But is there anything in the Act of Uniformity which requires the bishop formally to examine the person nominated to a lectureship, either in the popular or any other sense of that word. Has any contemporary or subsequent practice put this interpretation upon the Act? Does any canon require it? Or, in the absence of all these, do public convenience and

natural justice require him, in the event of his not approving a particular person to fill the office of lecturer, to state the grounds upon which he is induced not to approve such person? The office of lecturer, let it be recollected, is always engrafted upon some already subsisting ecclesiastical establishment, and where (if I may so say) the spiritual wants of the parish are already in part, if not wholly, supplied, by there being antecedently some person appointed to perform the rites and service of the church. Indeed, where a new institution of this kind was to be superinduced upon the old and pre-existing foundations of the church, it became perhaps the wisdom, it certainly was congenial with the jealousy of the times in which this statute was passed, which were recently after the civil and political troubles and the contentions on matters of religion, by which the country had been agitated, to provide that where a lecturer was to be admitted into any church or chapel, the bishop should be satisfied that he was a person to whom the lecturing and teaching of the congregation could be safely committed. Therefore, the analogy does not hold to the cases I have put arising upon the Statute of Articuli Cleri, and the institution of clerks to regular benefices, as to which, and the degree of idoneity [aptitude] (if I may so call it) which may be required by the bishop, or non-idoneity which may excuse him in his refusal of a clerk presented, there has certainly been much legal controversy.

His Lordship referred to *Specot's Case* (1), *Hele* v. *Bishop of Exeter* (2), *Withnell* v. *Gartham* (3), *R.* v. *Archbishop of York* (4), *R.* v. *Marquis of Stafford* (5), and *R.* v. *Blooer* (6), and said that the rule would be discharged.

Rule discharged.

DAVIDSON *v.* GWYNNE

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Le Blanc and Bayley, JJ.), May 25, 1810]

[Reported 12 East, 381; 104 E.R. 149]

Contract—Charterparty—Condition precedent—Covenant—Non-performance not going to root of contract.

Unless the non-performance alleged as the breach of a contract goes to the whole root and consideration of it the covenant broken is to be considered, not as a condition precedent, but as a distinct covenant for the breach of which the party injured may be compensated.

A charterparty provided that the master of the chartered ship should, immediately after loading, join the first convoy that should sail thereafter for Spain or Portugal. The master failed to do so, but he joined the second convoy and the voyage was performed.

Held: the object of the charter was the performance of the voyage; that had been accomplished; accordingly, the breach of covenant did not go to the root of the contract and was to be considered, not as a condition precedent, but as a distinct covenant for the breach of which the charterer might be entitled to damages.

Shipping—Charterparty—Voyage—Change of destination by charterer—Recall of bills of lading or indemnity to master.

The charterer of a ship ordered the master to proceed to a port in Portugal, and in consequence the master took in goods and signed bills of lading for that port.

Held: the charterer could not afterwards countermand that order, and order the master to proceed to a port in another country without first recalling the bills of lading, or at least tendering sufficient indemnity to the master against the consequence of his liability thereon.

Shipping—Freight—Action for—Defence—Cargo delivered damaged—Delivery of number of containers loaded—Damage to contents on voyage.

By a charterparty the master of a ship undertook to load a cargo at a foreign port "and return therewith to London, and there make a right and true delivery of the whole of the homeward goods agreeably to the bills of lading." The master loaded a number of chests of fruit, which was then in good condition. The number of chests loaded were discharged at London, but when their contents was examined it was found to have been damaged on the voyage owing to the negligence of the master and crew.

Held: the right and true delivery of the goods according to the charterparty was satisfied by the delivery to the charterer of the entire number of chests loaded; therefore, the deteriorated state of their contents, while giving the charterer a right of acton for damages, did not affect the right of the master to freight.

Per BAYLEY, J.: If the like good condition of the cargo when delivered as when shipped were a condition precedent to the right to recover the freight, then, if the goods were damaged to the extent only of a farthing, the master would not be entitled to recover any freight, and that never could have been the intention of the contracting parties.

Shipping—Supercargo—Authority—Complete control over cargo—Change of destination of voyage.

A supercargo, unless his authority be expressly or impliedly restrained, must, from the nature of his employment, be invested with complete control over the cargo and everything which immediately concerns it, including the destination of the voyage.

Per LORD ELLENBOROUGH, C.J.: It is necessary from the nature of a supercargo's agency that he should have power to alter the destination of the cargo, particularly in time of war.

Per LE BLANC, J.: Where the supercargo is on board the ship and the freighter is absent the supercargo should have the same power in this respect as the freighter himself, for he is to take advantage of every circumstance as it arises to act for the benefit of his employer.

Notes. Distinguished: *Gladholm* v. *Hays* (1841), 2 Man. & G. 257. Applied: *Tarrabochia* v. *Hickie* (1856), 1 H. & N. 183; *Garrett* v. *Melhuish* (1858), 33 L.T.O.S. 25. Referred to: *Gibson* v. *Sturge* (1855), 10 Exch. 622; *Seeger* v. *Duthie* (1860), 8 C.B.N.S. 45; *Dakin* v. *Oxley* (1864), 15 C.B.N.S. 646; *MacAndrew* v. *Chapple* (1866), L.R. 1 C.P. 643; *Bradford* v. *Williams* (1872), 26 L.T. 641; *Universal Cargo Carriers Corpn.* v. *Citati*, [1957] 2 All E.R. 70; *Hong Kong Fir Shipping Co., Ltd.* v. *Kawasaki Kisen Kaisha, Ltd.* [1962] 1 All E.R. 474.

As to the carriage of goods by sea and charterparties, see 35 HALSBURY'S LAWS (3rd Edn.) 247 et seq.; and for cases see 41 DIGEST (Repl.) 153 et seq.

Cases referred to:

(1) *Boone* v. *Eyre* (1779), 1 Hy. Bl. 273, n.; 1 Wms. Saund. 320c; 2 Wm. Bl. 1312; 126 E.R. 160; 12 Digest (Repl.) 472, *3526*.

(2) *Hall* v. *Cazenove* (1804), 4 East, 477; 1 Smith, K.B. 272; 102 E.R. 913; 41 Digest (Repl.) 193, *282*.

(3) *Constable* v. *Cloberie* (1625), Palm. 397; Poph. 161; Lat. 49; 81 E.R. 1141; sub nom. *Conustable* v. *Clowbury*, Noy, 75; 41 Digest (Repl.) 157, *37*.

(4) *Havelock* v. *Geddes* (1809), 10 East, 555; 103 E.R. 886; 41 Digest (Repl.) 180, *214*.

(5) *Ritchie* v. *Atkinson* (1808), 10 East, 295; 103 E.R. 787; 41 Digest (Repl.) 569, *3473*.

Action for freight.

The plaintiff declared in debt on a charterparty of affreightment, made at London on Oct. 17, 1808, between himself, as master, and the defendant, as freighter, of the brig *Pomona*, then in the river Thames, whereby the master covenanted with the freighter that the brig being tight, etc., and properly fitted, victualled, and manned for the voyage hereinafter named, should be at the disposal and direction of the freighter, his agents and assigns for three calendar months certain, and longer if required for the voyage, under the following covenants, viz., that the master should immediately load at London such goods as the freighter thought fit, and, being dispatched, should immediately (wind and weather permitting) proceed and join the first convoy that should sail after she should be so loaded from England for Spain and Portugal or either, and should therewith proceed to any port or ports in Spain and Portugal, or either, as he should be ordered by the said freighter, his agents or assigns, and at any or either of such port or ports as he should be ordered as aforesaid should make a right and true delivery of the whole of the said outward goods, agreeably to bills of lading that should have been signed for the same, and having completed such delivery, should load at any port or ports in Spain and Portugal, or either, as he should be directed by the freighter, his agents or assigns, such goods as the freighter, his agents or assigns, should think fit, and return therewith to London, and there make a right and true delivery of the whole of the homeward goods, agreeably to the bills of lading, the act of God, the King's enemies, restraint of princes, fire, and the dangers of the seas, etc., excepted. Also, the master agreed to receive on board the brig at London two supercargoes to be appointed by the freighter, and to convey them as cabin passengers to Spain and Portugal, or either, and back to London, free of passage-money. In consideration whereof, and of everything mentioned, the freighter covenanted that he, his executors, etc., agents or assigns, would employ the brig under the conditions aforesaid, and would load the outward cargo and discharge the same in Spain and Portugal, or either, and would in Spain and Portugal, or either, load the homeward cargo and discharge the same at London, and would pay to the commander in full for the freight of the vessel for the voyage at the rate of £1 10s. per ton per month from Oct. 5, 1808, until the delivery of the homeward cargo at London, part of the freight to be paid before the brig left London, and the remainder on the right and true delivery of the homeward cargo at London. To the true performance of all and every the foregoing covenants on the part and behalf of the parties respectively, they bound themselves, their heirs, executors, etc., each to the other in the penal sum of £1,000. By a memorandum at the foot of the charterparty it was agreed that in case the freighter or his assigns should think proper to remove the brig to any other port than that in which she should have first arrived for the purpose of discharging her cargo, then he should pay all port charges and pilotage arising therefrom.

The plaintiff then averred that he was ordered by the freighter to proceed with the brig to Lisbon in Portugal, and thereupon he immediately received on board her at London such goods as the freighter thought fit to load, and being dispatched, sailed with convoy (not saying with the first convoy) from England to Lisbon, and there made a right and true delivery of the whole of the outward cargo agreeably to the bills of lading that had been signed for the same. Having completed such delivery, he took on board the brig at Lisbon such goods as the freighter thought fit and returned therewith direct to London, where he made a right and true delivery of the whole of the homeward cargo agreeably to the bills of lading signed for the same. He averred that the freight amounted, at the rate agreed upon by the charterparty, £1,050, and that amount he claimed from the defendant.

The defendant pleaded (i) that after making the charterparty, the plaintiff as

master took on board the brig at London a cargo loaded by the defendant, and was therewith dispatched and ordered immediately to proceed and join the first convoy that should sail from England for Portugal, and to make a delivery of the whole of the outward cargo at Lisbon. After the brig was loaded, the first convoy sailed from England for Portugal, to wit, from Portsmouth to Lisbon, whereof the plaintiff had notice, yet, though neither wind nor weather prevented the same, the plaintiff did not join such first convoy, but neglected so to do; (ii) after the brig had sailed from London and before her arrival at Lisbon, the defendant countermanded the order so by him given to the plaintiff to proceed in the brig to Lisbon, and ordered him not to proceed to Lisbon, but to proceed to Gibraltar in Spain, and there to make delivery of the cargo, yet the plaintiff, though wind and weather permitted, did not proceed to Gibraltar, but refused so to do; (iii) in these circumstances there was a breach of the last-mentioned order; (iv) though the plaintiff took on board the brig at Lisbon the goods mentioned in the first count and returned therewith to London, yet the plaintiff did not then make a right and true delivery of the whole of the homeward cargo agreeably to the bills of lading signed for the same; (v) though the plaintiff took on board the brig at Lisbon the said goods and though the goods were shipped on board her in good order and well conditioned, and though the plaintiff signed bills of lading in respect of the goods and thereby undertook to deliver them to the defendant or his assigns in like good order and well conditioned at London, the dangers of the seas only excepted, and though the plaintiff did return with the goods to London and delivered the same there to the defendant, yet the plaintiff did not deliver the goods in like good order and well conditioned as the same were in when shipped on board the brig, but in a much worse order and condition, and in a damaged and injured state, occasioned by the negligence of the plaintiff and his servants in the course of the voyage while the goods were on board the brig, and not by the dangers of the seas.

To the first and third pleas the plaintiff demurred generally. To the second he replied that after the defendant had countermanded the order given by him to the plaintiff to proceed with the brig to Lisbon, and had ordered the plaintiff not to proceed to Lisbon, the defendant again ordered the plaintiff to proceed with the brig so loaded to Lisbon, and there make delivery of the goods according to the charterparty. To this plea the defendant rejoined, traversing, that after he had countermanded the order to proceed in the brig to Lisbon, as in the second plea mentioned, he again ordered the plaintiff to proceed with her to Lisbon, and there make a delivery of the cargo, as stated in the replication, on which issue was joined. On the fourth plea issue was also joined. To the fifth the plaintiff replied, as before, that he did make a right and true delivery of the whole of the homeward goods.

At the trial of the issues certain questions arose which were brought in discussion before the court on a rule for a new trial moved for at the beginning of the term, and which was disposed of on this day after the argument on the demurrers.

Taddy, for the plaintiff, in support of the demurrer to the first plea, contended that the sailing with the first convoy was not a condition precedent to the plaintiff's right to recover freight, the voyage having been performed and the outward and homeward cargoes delivered to the freighter's orders. He referred to the rule laid down in *Boone* v. *Eyre* (1) and recognised in *Hall* v. *Cazenove* (2) that where mutual covenants go only to a part of the consideration on both sides, where a breach may be paid for in damages, there the defendant has a remedy on the plaintiff's covenant and shall not plead it as a condition precedent, and he likened this to *Constable* v. *Cloberie* (3), cited by LAWRENCE, J., in *Hall* v. *Cazenove* (2), where, the covenant being to sail with the next wind upon a certain voyage, the defendant traversed that the ship did sail with the next wind, which was overruled upon demurrer as immaterial against a demand for freight after the voyage performed. He also referred to *Havelock* v. *Geddes* (4), the last reported case on the subject of a condition precedent in a charterparty, to the same effect. Secondly, he contended upon

the demurrer to the third plea that such plea was clearly bad. It did not deny that the plaintiff was ordered by the defendant as freighter to proceed with the brig to Lisbon, as stated in the declaration, for a protestation of that fact is no denial of it, but it avers that he was ordered by the freighter to proceed to Gibraltar. The second order is not inconsistent with the first, nor any countermand of it, but as the pleadings stand the plaintiff might have been ordered to go to both places, and the breach of the last order is no answer to a demand of freight for the performance of the first.

Lawes, for the defendant, upon the second question, submitted that the latter order was incompatible with the first as it directed the brig to proceed to a different place which necessarily superseded the original destination. The captain was to go to such port or ports in Spain or Portugal as he should be ordered by the freighter. This resolves itself into a condition precedent, for, if the captain has disobeyed that order, he has not performed the voyage contracted for. The performance of part only may have frustrated the whole intention of the voyage. The delivery was substantially different from that contracted for by the charterparty, and, therefore, though the plaintiff might sue for freight in another action, he cannot recover upon this charterparty. He might have a remedy against the freighter, who by his act subjected him to such a responsibility for a loss thereby occasioned, but, if after that the freighter thought proper to alter the destination of the voyage, the captain was bound by his charterparty to comply with the subsequent order. Upon the other point, he argued from the terms of the contract and the apparent intention of the parties that the sailing with the first convoy was a condition precedent and not an independent covenant. It might be an object of the first consequence to the success of the adventure, and the freight was to be regulated by time, and, therefore, it was material that the voyage should be performed as speedily as required by the contract. The freight is covenanted to be paid in consideration of everything before mentioned, of which the sailing with the first convoy is one.

LORD ELLENBOROUGH, C.J.—The sailing with the first convoy is not a condition precedent. The object of the contract was the performance of the voyage, and here it has been performed. The principle laid down in *Boone* v. *Eyre* (1) has been recognised in all the subsequent cases, that unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is to be considered, not as a condition precedent, but as a distinct covenant for the breach of which the party injured may be compensated in damages. On the other plea, the question is whether, the ship having been first ordered to proceed to Lisbon and goods loaded and bills of lading signed by the plaintiff for that port, a subsequent order given by the freighter to go to Gibraltar be a bar to the plaintiff's claim for the freight out to Lisbon and back again to London. After the freighter's order to the captain to go to Lisbon, and after the captain had received on board goods and executed bills of lading for that place, it was not competent for the freighter to countermand that order. He could not capriciously change the destination of the vessel without recalling the bills of lading, or at least offering sufficient indemnity to the captain against them. But nothing of that sort is stated. The case, then, stands thus, that the freighter, after giving an order to the captain to go to Lisbon and suffering him to bind himself by signing bills of lading to deliver goods there, gives him another order to go elsewhere, and make himself liable to actions for the breach of engagement upon all those bills of lading. This the freighter had no right to do, and, therefore, the breach of that subsequent order affords no bar to the plaintiff's claim for freight for the voyage which he prosecuted under the first order and to the prosecution of which he had bound himself by the bills of lading before he received such second order.

GROSE, J.—*Boone* v. *Eyre* (1), *Ritchie* v. *Atkinson* (5), and all the other cases which have been mentioned determine the first question, that the sailing with the first convoy was not a condition precedent, but one of several mutual covenants,

and, if either of the parties broke his covenant, the other might bring his action for it, but the plaintiff's right to freight was not to depend upon that. As to the other question, after the first order given to go to Lisbon, under which goods had been received on board and bills of lading signed, and by which the master made himself liable to answer in damages to the owners of the goods if he did not carry them according to his undertaking, it cannot be permitted to the freighter to countermand the voyage and make the master liable to actions by those to whom he had so bound himself.

LE BLANC, J., and **BAYLEY, J.**, agreed in awarding judgment for the plaintiff on the demurrers.

The report of the evidence on the rule for a new trial was afterwards read, and it appeared that after the *Pomona* was chartered, she took in her cargo for Lisbon by order of the defendant, and the plaintiff signed bills of lading accordingly for that port. She cleared and left the river Thames on Oct. 31, 1808, and arrived at Portsmouth to join a convoy on Nov. 1, and on Nov. 7 she received sailing instructions from the convoy. The fleet afterwards waited at Spithead for a wind till Nov. 29, when they sailed, but the *Pomona* missed the convoy and was obliged to bring up again in Lymington Road on Dec. 1. While she was lying there the defendant came from London, and told the plaintiff that instead of going to Lisbon he should go to Gibraltar. The plaintiff objected that he was bound by the charterparty, by his bills of lading which he had signed, and by his clearance, to go first to Lisbon, and he had also three cabin passengers for Lisbon. After the defendant's return to London, the plaintiff repeated his objections to Stout, the defendant's agent and supercargo, who urged the plaintiff to go to Gibraltar. The plaintiff declared that he would not go to Gibraltar without a written order from Stout, which the latter then gave him, but a few days afterwards Stout required the written order to be returned to him, which he tore in pieces, not choosing to take a personal responsibility on himself. There was other evidence on the part of the plaintiff, of Stout's having finally agreed that the plaintiff should proceed to Lisbon. But Stout himself swore that, though he had no objection personally to the plaintiff's going to Lisbon, yet he had never given the plaintiff to understand that it was Gwynne's order, but the contrary. The *Pomona* afterwards sailed with another convoy and fleet on Dec. 17, and arrived in the Tagus on Dec. 22. After discharging the outward cargo at Lisbon, and taking in there a homeward cargo, for which bills of lading were signed by the plaintiff, she sailed on her return to London, arrived there on Mar. 29, and delivered her homeward cargo. The cargo, consisting of chests of oranges, was in good condition when shipped at Lisbon, but on the *Pomona's* arrival at London, it was found when unpacked to be much heated and damaged, and this was made out in evidence to have been occasioned by the negligence of the master and crew in not having given it sufficient ventilation during the voyage. The deterioration was from 10s. to 20s. a chest.

It was contended that the plaintiff was not entitled to recover upon this charterparty, first, because the destination of the vessel was altered from Lisbon to Gibraltar by the freighter before her sailing, which was a countermand of the first order, and, therefore, the voyage to Lisbon was not performed under the charterparty. Further, that what passed between the master and Stout, after the departure of the defendant from Lymington Road, was no authority for resuming the original destination to Lisbon even if a supercargo had authority, especially while the ship remained at home under the control of the freighter himself, to issue any order in contradiction to the express order of the freighter himself, which authority was strenuously denied. To this it was answered that supposing the freighter himself had authority to alter the destination of the ship after bills of lading signed by the master to deliver under the first order, which was denied, yet the supercargo in the absence of his principal had authority to revoke that order, in the same manner as the principal freighter himself and that the circumstances stated amounted to

such revocation. Secondly, it was objected that, the homeward cargo having been damaged and in part spoilt, while on board by the negligence of the master and crew, the plaintiff had not made a right and true delivery of the whole of the goods as stipulated by the charterparty, agreeably to the bills of lading, by which he undertook to deliver the same in like good order and well conditioned as when shipped on board, and, therefore, that the defendant was entitled to a verdict on that issue.

To this it was answered, and LORD ELLENBOROUGH, C.J., ruled accordingly that the allegation of having made a right and true delivery of the cargo was satisfied by the delivery made of the number of chests of fruit shipped on board, and that, if the contents of any of them turned out to have been damaged by the negligent stowing or subsequent want of care and proper ventilation by the master and crew, the defendant had a cross-action to recover damages, but that it was no answer to an action for the freight. HIS LORDSHIP, however, intimated further at the trial that, if there had been any special provision in the bills of lading for the care or against the negligence of the master and crew, the issue on the fourth special plea might have let the defendant into the proof of the negligence, but, the issue being general on the fact of a right and true delivery of the goods according to the bills of lading, it was to be taken in a narrow and restrained sense, such as in his own experience it had always received, as meaning a right and true delivery of the entire number of chests or packages shipped on board as specified in the bills of lading. Upon the other point his Lordship left it to the jury whether in point of fact Stout, the supercargo, had ultimately concurred with the master in the original destination of the vessel to Lisbon, reserving for future consideration whether he had authority so to do, supposing, which was a question for the opinion of the court in banc upon another part of the record, that the freighter himself had authority to change the original destination of the voyage at that period and under the circumstances of the case. The jury upon the whole found a verdict for the plaintiff.

Garrow moved for a new trial upon both the points, which had been made at the trial.

The court, however, only granted him a rule upon the question of the authority of the supercargo to alter the destination of the vessel in the absence of his principal, **LORD ELLENBOROUGH, C.J.,** saying that, if such authority did reside in Stout as supercargo, the jury found that he had exercised it. Upon the other point, all the court were satisfied that the right and true delivery of the goods according to the bills of lading was satisfied for the purpose of this action by the delivery of the entire number of chests which had been received by the owners, and that the deteriorated state of their contents, owing to the negligence of the master in not giving them a sufficient ventilation, was no answer to the action. **BAYLEY, J.,** added that, if the like good condition of the cargo when delivered as when shipped were a condition precedent to the right to recover the freight, then, if the goods were damaged to the extent only of a farthing the master would not be entitled to recover any freight, and that never could have been the intention of the contracting parties.

Sir Vicary Gibbs, *Park*, and *Taddy*, showed cause against the rule, and insisted upon the authority of the supercargo to countermand, in the absence of his principal, the order to go to Gibraltar and to order the master to go to Lisbon to which he was originally destined. They observed upon the provisions in the charterparty, whereby the master expressly covenanted to receive the supercargo on board and to proceed to Spain or Portugal as he should be ordered by the freighter, his agents or assigns. They contended for such an authority upon the general nature of a supercargo's appointment when not obviously restrained by the contract of his principal, the nature of the voyage, or other special circumstances, and maintained that at all events the fact of his having given an order

to proceed to Lisbon, which was found by the jury, decided the issue in question.

Garrow, *Marryat* and *Lawes*, supporting the rule, contended that the order given to the master by the supercargo to go to Lisbon was not binding on the defendant, and, therefore, he did not give such order in the terms of the issue. A supercargo had no authority to give an order in express contradiction to a recent order given by his principal, without any change of circumstances, and while the ship remained at home, and immediate reference could be made to the principal himself. The general nature of a supercargo's authority arose from necessity when he was absent with the ship in foreign parts, out of the reach of immediate communication with his principal and obliged often to act on the spur of the occasion for the benefit of the adventure which he superintended. The immediate object of his appointment was to control the sale of the cargo when it arrived at its port of destination, but not to alter the destination itself, and still less while the ship remained in a port at home within reach of the personal control of the principal.

LORD ELLENBOROUGH, C.J.—The charterparty imports that the freighter might, by himself or his agent, order the destination of the ship and cargo to any port in Spain or Portugal. Stout is found to have in fact given a final order in this case to proceed to Lisbon, and the question is whether he be such an agent as will bind the defendant for this purpose. It was proved that he was appointed by the defendant his supercargo. A supercargo, unless his authority be expressly or impliedly restrained, must, from the nature of his employment, be invested with a complete control over the cargo and everything which immediately concerns it. That must embrace its destination. Unless the supercargo's general power was restrained by anything in this case from varying the voyage within the limits agreed within the charterparty, he must be taken to have had it, and in fact he exercised it. The only question is whether, as the defendant himself had recently before come down to Lymington and had directed the defendant to go to Gibraltar, that restrained the supercargo's general authority? I do not see how that circumstance could restrain it. It is necessary from the nature of his agency that he should have power to alter the destination of the cargo, particularly in time of war. He may receive recent intelligence that the port of destination last fixed by his principal is blockaded, or other circumstances not less important to the success of the adventure may intervene. If he had such a power from the nature of his employment, and there was no special restraint of his authority in this case, and he did in fact change the destination from Gibraltar to Lisbon, cadet quaestio.

GROSE, J., was of the same opinion.

LE BLANC, J.—From the nature of the appointment of a supercargo, where he is on board the ship and the freighter is absent, it follows that he should have the same power in this respect as the freighter himself, for he is to take advantage of every circumstance as it arises to act for the benefit of his employer in the adventure. If, indeed, the charterparty had been made for a certain voyage, that would be a very different consideration, but I understand this charterparty as giving the freighter authority (unless restrained by circumstances) from time to time, by himself or his agents, to alter the destination of the vessel and cargo within the limits assigned.

BAYLEY, J.—The power of a supercargo will depend much on the nature of the voyage. Here the destination was not fixed at the time the charterparty was executed, but it was afterwards to be fixed by the freighter or his agents. That shows that some alteration of the destination was looked to in the course of the voyage. The parties seem to have contemplated that circumstances might afterwards occur to make it prudent to alter the destination. Circumstances did occur

which first induced the defendant to alter the destination from Lisbon to Gibraltar, and he altered it accordingly; then his agent, who was, as supercargo, entrusted by him with the control of the cargo, had, in his absence, the same power as his principal to alter it again, and he ordered the master to go to Lisbon as originally intended.

Rule discharged.

LOVEDEN *v.* LOVEDEN

[CONSISTORY COURT OF LONDON (Sir William Scott), July 13, 1810]

[Reported 2 Hag. Con. 1; 161 E.R. 648]

Divorce—Adultery—Evidence—Sufficiency of circumstantial evidence—Opinion of reasonable and just man.

It is not necessary to prove the direct fact of adultery. If it were otherwise there is not one case in a hundred in which that proof would be attainable. It is very rarely indeed that parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion. The only general rule that can be laid down is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion [that adultery had been committed]. It is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations, neither is it a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man: per SIR WILLIAM SCOTT.

Notes. Considered: *Ginesi* v. *Ginesi*, [1948] 1 All E.R. 373; *Davis* v. *Davis*, [1950] 1 All E.R. 40. Referred to: *Dillon* v. *Dillon* (1842), 1 Notes of Cases, 415; *Allen* v. *Allen*, [1894] P. 248; *Gibbs* v. *Gibbs and Heathcote* (1920), 123 L.T. 206; *Woolf* v. *Woolf*, [1931] All E.R. Rep. 196; *Bater* v. *Bater*, [1950] 2 All E.R. 458.

As to adultery as ground of divorce, see 12 HALSBURY'S LAWS (3rd Edn.) 235–241; and for cases see 27 DIGEST (Repl.) 311 et seq.

Cases referred to:

(1) *Lord Cadogan* v. *Lady Cadogan* (1796), 2 Hag. Con. 4, n.; 161 E.R. 649; 27 Digest (Repl.) 315, *2631.*

(2) *Rutton* v. *Rutton* (1796), 2 Hag. Con. 6, n.; 161 E.R. 649; 27 Digest (Repl.) 315, *2629.*

Suit by husband for divorce on the ground of the adultery of the wife.

SIR WILLIAM SCOTT delivered a judgment in which he said: This is a proceeding by Edward Loveden Loveden against Ann his wife, praying for separation, by reason of adultery. Nothing arises upon the proceedings. They have been conducted, as far as they go, in the usual manner. The articles, which are many in number, plead a marriage to have taken place on Nov. 15, 1794. This marriage is admitted, and is likewise fully proved by many witnesses. Cohabitation continued between the parties till Mar. 15, 1809, when, upon the discovery of an adulterous intercourse, as alleged, with Mr. Raymond Barker, son of a neighbouring gentleman in the country, who is described as a lay-fellow of Merton College,

Oxford, she was ordered to withdraw from her husband's house, and the cohabitation has never been renewed. She has offered no plea of any kind, but rests her defence, so far as it is preferred by her counsel, on the insufficiency of his proofs and upon the answers to the interrogatories which she has addressed to several of his witnesses. These witnesses are twenty in number, including the person who formally proves the public documents relative to the licence and marriage, and they are stated to be supported by letters written and sent by herself to Mr. Barker, but intercepted by a servant and communicated to Mr. Loveden by the agency of that servant.

It is not necessary for me to state much at large the rules of evidence which this court holds upon subjects of this nature, or the principles upon which those rules are constructed. They are principles so consonant to reason and to the exigencies of justice, and so often called for by the cases which occur in these courts, that it is on all accounts sufficient to advert to them briefly. It is a fundamental rule that it is not necessary to prove the direct fact of adultery, because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable. It is very rarely indeed that parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion, and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights.

What are the circumstances which lead to such a conclusion cannot be laid down universally, though many of them, of a more obvious nature and of more frequent occurrence, are to be found in the ancient books. At the same time it is impossible to indicate them universally because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case. The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion, for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations, neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature. They are facts determinable upon common grounds of reason, and courts of justice would wander very much from their proper office of giving protection to the rights of mankind if they let themselves loose to subtleties and remote and artificial reasonings upon such subjects. Upon such subjects the rational and the legal interpretation must be the same.

It is the consequence of this rule that it is not necessary to prove a fact of adultery in time and place. Circumstances need not be so specially proved as to produce the conclusion that the fact of adultery was committed at that particular hour or in that particular room. General cohabitation has been deemed enough. Parties living for months and for years together, and hoping by that means to insult the feelings of a husband and to elude the justice of the tribunals which have to decide upon such matters, have by such contrivances supposed that they were sufficiently protected, but the courts of justice have held that that is an evasion which was perfectly insufficient for such a purpose, and the parties have been concluded by general cohabitation. This has been laid down repeatedly and acted upon in this court, in cases such as *Lord Cadogan* v. *Lady Cadogan* (1), *Rutton* v. *Rutton* (2), and other cases have been confirmed by the Court of Delegates and is the established principle of this court. Such are the general rules and such the general principles established here, and it is with reference to those general rules the present case must be examined. It is possible that the case may not require the application of the more extended rules, because it is possible that

there may be such direct proof of the fact of adultery as not to stand in need of such an application.

[HIS LORDSHIP examined at great length the evidence adduced in the present case and expressed himself as clearly of opinion that the adultery charged had been proved, a decision which was confirmed on appeal.]

HESSE *v.* STEVENSON

[COURT OF COMMON PLEAS (Lord Alvanley, C.J., Heath, Rooke and Chambre, JJ.), November 28, 1803]

[Reported 3 Bos. & P. 565; Dav. Pat. Cas. 244; 2 Smith, K.B. 39; 127 E.R. 305]

Deed—Construction—General words—Limitation by reference to other covenants in same deed.

However general the words of a covenant may be if standing alone, if, from other covenants in the same deed it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the court will limit the operation of the general words.

The assignor of shares in a patent covenanted that he had "good right, full power, and absolute and lawful authority to assign and convey" the shares "and that I have not, by any means, directly or indirectly, forfeited any right or authority I ever had " over the shares.

Held: the generality of the earlier words in the covenant were not restrained by the more limited words of the later part of the covenant.

Bankruptcy—Property available for distribution—Beneficial interest capable of assignment acquired by bankrupt—Large sum of money—Bankrupt's earnings needed for support of family—Interest in patent.

The trustee in a bankruptcy [formerly assignees of the bankrupt] is not entitled to take the profits of the bankrupt's daily labour which is necessary for the support of himself and his family, but if the bankrupt avails himself of his knowledge and skill and thereby acquires a beneficial interest which may be the subject of assignment, or if he accumulates any large sum, the trustee is entitled to that interest or sum of money. Until the trustee claims the property it does not lie in the mouth of a stranger to defeat an action at the suit of the bankrupt in respect of such property by setting up his bankruptcy.

An interest in a letters patent is an interest capable of being the subject of assignment, and so passes to the trustee.

Notes. Approved: *Re Roberts*, [1900] 1 Q.B. 122. Considered: *Saward* v. *Anstey* (1825), 2 Bing. 519. Referred to: *Nias* v. *Adamson* (1819), 3 B. & Ald. 225; *Bloxam* v. *Elsee* (1825), 1 C. & P. 558; *Smith* v. *Compton* (1832), 3 B. & Ad. 189; *Line* v. *Stephenson* (1838), 4 Bing. N.C. 678.

As to the construction of deeds see 11 HALSBURY'S LAWS (3rd Edn.) 381 et seq., and for cases see 17 DIGEST (Repl.) 253 et seq. As to property available for distribution in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 404 et seq., and for cases see 5 DIGEST (Repl.) 679 et seq.

Cases referred to:

(1) *Browning* v. *Wright* (1799), 3 Bos. & P. 13; 126 E.R. 1128; 17 Digest (Repl.) 406, *2116*.

(2) *Feilder* v. *Studley* (1673), Cas. temp. Finch, 90; 23 E.R. 48; 17 Digest (Repl.) 406, *2112*.

Also referred to in argument:

Anon. (1773), Lofft, 194; 98 E.R. 606; sub nom. *Kingston* v. *Preston*, cited in 2 Doug. K.B. at p. 689; 12 Digest (Repl.) 471, *3518*.

Nervin v. *Munns* (1682), 3 Lev. 46; 83 E.R. 569; 17 Digest (Repl.) 406, *2115*.

Gainsford v. *Griffith* (1667), 2 Keb. 76, 201, 213; 1 Saund. 51, 58; 84 E.R. 49, 125, 133; sub nom. *Gamsford* v. *Griffith*, 1 Sid. 328; 17 Digest (Repl.) 407, *2123*.

Evans v. *Mann* (1777), 2 Cowp. 569.

Chippendall v. *Tomlinson* (1785), 4 Doug. K.B. 318; Cooke's Bankrupt Laws, 8th Edn., p. 428; 99 E.R. 900; 5 Digest (Repl.) 1069 *8621*.

Laroche v. *Wakeman* (1792), Peake, 190; 5 Digest (Repl.) 789, *6687*.

Webb v. *Fox* (1797), 7 Term Rep. 391; 101 E.R. 1037; 5 Digest (Repl.) 1070, *8628*.

Fowler v. *Down* (1797), 1 Bos. & P. 44; 126 E.R. 769; 5 Digest (Repl.) 1070, *8629*

Action of Covenant tried before Lord Alvanley, C.J., at the sittings after Easter Term, 1803.

The declaration stated that by deed poll made by the defendant on Jan. 5, 1802, it was recited that certain letters patent had been granted by the Crown to one Matthias Koops bearing date respectively Feb. 17 and May 18, 1801, granting unto the said Koops, his executors, administrators, and assigns, the sole privilege of making paper from straw, hay, thistles, waste and refuse of hemp and flax, and different kinds of wood and bark for the term of fourteen years from the respective dates of the letters patent and for the places in the letters patent particularly mentioned. It was also recited that Koops, by deed of assignment of Feb. 26, 1801, assigned over certain shares of the letters patent unto James Stevenson, the defendant, John Forbes, John Hunter, and William Tate, their executors, administrators, and assigns; and that by an Act of Parliament passed in 1801 it was enacted that it should be lawful for Koops, his executors, administrators, and assigns, to transfer or assign the letters patent or either of them, or any part or share, parts or shares thereof, or any benefit or advantage to arise therefrom, to any number of persons not exceeding sixty. James Stevenson had agreed to sell and dispose of ten 1,000th parts or shares of the letters patent to the plaintiff in consideration of the sum of £1,800, and he assigned the same accordingly. Stevenson did by deed poll covenant, promise and agree to and with O. L. Hesse, his executors, administrators, and assigns, that he, Stevenson, had good right, full power, and absolute lawful authority to assign and convey the said ten 1,000th parts or shares of and in the letters patent and concern for making paper from straw and other base materials. The plaintiff alleged by way of breach that Stevenson had not good right, full power, or absolute lawful authority to assign and convey the said ten 1,000th parts or shares of and in the letters patent and concern, according to the tenor and effect, intent and meaning of the said deed poll.

The defendant by his plea craved oyer of the deed, and the covenant was stated in these words:

"That I, the said James Stevenson, have good right, full power, and absolute and lawful authority to assign and convey the said ten 1,000th parts or shares of and in the said letters patent and concern for making paper, etc., and that I have not, by any means, directly or indirectly, forfeited any right or authority I ever had, or might have had, over the same ten 1,000th parts or shares."

The defendant pleaded that he had good right, full power, and absolute and lawful authority to assign and convey the parts or shares of and in the letters patent and concern according to the tenor, effect, intent and meaning of the deed

poll and of his covenant made as aforesaid. The jury found a verdict for the plaintiff for £1,800, subject to the opinion of the court upon the following Case.

On June 30, 1790, a commission of bankruptcy issued against Koops, whereupon he was duly declared a bankrupt, and William Chapman and Thomas Hill were chosen assignees under the same. From that time to the date of the present case Koops had not obtained his certificate. On Feb. 17 and May 18, 1801, Koops obtained the letters patent as stated in the declaration. An Act of Parliament, passed in 1801, recited in the deed and in the declaration, enabled Koops, his executors, administrators, and assigns, to assign the benefit of the invention to any number of persons not exceeding sixty, etc., which Act was declared to be a public Act. On Sept. 9, 1801, the creditors of Koops executed a deed which, after reciting the commission of bankruptcy, and the several proceedings under it, and that Koops had, by advertisement in the London Gazette, called a meeting of his creditors on June 12 at which he proposed to pay all his creditors who had proved their debts under the commission as much as then remained due to them, namely, five shillings in the pound, within one month, and the remainder by three instalments, to be secured by Koops in such manner as his assignees should think proper, but that such instalments of the foreign debts should be deposited in the hands of bankers to be approved of by his assignees or paid into the Court of Chancery to abide the event of an application to that court to be made within twelve months, and that Koops should indemnify the assignees against all the costs of such application, and the carrying the agreement after mentioned into effect. Thereupon, by a memorandum in writing, signed by the creditors of Koops and dated June 12, 1801, after reciting the said proposal, it was unanimously agreed by the several creditors that the proposal should be acceded to, that the assignees should take such measures as might be necessary to carry the same into effect, and that, on receipt of the first instalment, and such security being given for the payment of such respective debts, and depositing the first dividends on the foreign debts by Koops, the several creditors did thereby undertake, so far as concerned themselves, to execute good and sufficient releases in the law to Koops, and to give him such assistance in superseding the commission of bankruptcy as the assignees should think proper.

It was further stated that Koops had, in pursuance of the aforesaid agreement, paid to the assignees and such other of his creditors as were resident in England, five shillings in the pound upon the amount of their respective debts proved, that, on the day of the date of the deed, he paid into the banking-house of Baron Dimsdale & Co., to the account of the assignees, five shillings in the pound on the foreign debts, and that in pursuance thereof he had given to the assignees a warrant of attorney for £20,000 to secure the remaining fifteen shillings in the pound. It was witnessed, that in consideration of the premises Koops did undertake to pay William Chapman and Thomas Hill, their executors, administrators, or assigns, the remaining fifteen shillings in the pound in trust to pay themselves and the rest of the creditors resident within this kingdom the remaining fifteen shillings in the pound on their debts, by three instalments, and also to pay into the said banking house, in the name of the assignees, the remaining fifteen shillings in the pound upon the foreign debts, and in case of any surplus after payment of such debts and all costs and expenses to pay the same to Koops, his executors or administrators, or otherwise as he or they should direct. It was further witnessed that in pursuance of the aforesaid agreement and in consideration of the premises, they, William Chapman and Thomas Hill, and the other creditors of Koops, did remise, release, and quit claim unto Koops, his heirs, executors, and administrators, all actions, suits, claims, and demands whatsoever which they or any or either of them then had or thereafter should have, challenge, claim or demand, against Koops, his heirs, executors, administrators, or his or their estate or effects on account of the debts to them or any or either of them then due and owing from Koops, or of any other cause, matter, or thing whatsoever, save and

except such actions, suits, claims, or demands as might arise under or by virtue of the said deed or of the said bond or judgment thereinbefore recited. Further, that until default in payment of the instalments the said William Chapman and Thomas Hill should not take out execution on the judgment or proceed on the bond or otherwise molest Koops, and that upon payment of the said instalments satisfaction should be acknowledged on the roll.

Three of the creditors of Koops who had proved debts under his commission to the amount of about £600 never executed such deed. Koops paid the first instalment, but failing to pay the subsequent instalments, he lodged certain securities in the hands of the solicitor to the assignees, amounting to £1,690 11s. 6d., the produce of which had been received by the assignees for the benefit of the creditors. He also lodged certain securities from a Mr. Richard Twiss in the same hands, to the amount of £3,500 which has since been proved by William Chapman and Thomas Hill under a commission of bankruptcy against Richard Twiss, and, the remainder of the fifteen shillings in the pound not having been satisfied by Koops, William Chapman and Thomas Hill entered up judgment against Koops on the warrant of attorney given by him on Mar. 31, 1802, and on Oct. 14, 1802, issued a fi. fa. thereon against the effects of Koops, entered his dwelling-house, sold his furniture and other effects therein amounting to a considerable sum of money, and also entered upon the premises where the manufactory under the letters patent and Act of Parliament was carried on and took possession of the same and the effects therein under the execution.

Serjeant Onslow for the defendant.
Serjeant Bayley for the plaintiff.

Cur. adv. vult.

Nov. 28, 1803. **LORD ALVANLEY, C.J.,** delivered the following judgment of the court.—The question in this case arises upon a deed poll bearing date Jan. 5, 1802, by which the defendant gives and grants to the plaintiff a share in his patent-right. The deed is not stated at length upon the record, but we consider the case as if the whole deed were now before us, because the covenants contained in that deed which are not set forth are not at variance with the covenant upon which the breach is assigned. The covenant upon which the question immediately arises is that the defendant had good right, full power and absolute and lawful authority to convey, and that he had not by any means, directly or indirectly, forfeited any right or authority he ever had, or might have had, over the property in question. This action arises upon the first part of the covenant, and the breach assigned is that the defendant had not good right, full power, and absolute and lawful authority to convey.

We are called upon to decide upon the true construction of this covenant. It has been contended, upon the authority chiefly of *Browning* v. *Wright* (1), that this does not amount to an absolute covenant for good title, but must be confined to the acts of the party himself. We have looked with great attention into that case, and after the very able manner in which the principles which govern the construction of covenants were then laid down by Lord Eldon and the other judges, it is unnecessary for me to enter at any length into the subject. Almost every case which bears upon the point is there cited, and indeed I find more of them there stated than I expected, for I did not think that the courts had formerly been so liberal in the construction of covenants as it appears that they have been. I have examined all these cases, but I do not think it necessary to state them, for we not only agree with the principles laid down in *Browning* v. *Wright* (1), but we think that the case might have been decided as it was upon the very words of the covenant which was restrained to the acts of the party himself by the introductory words "notwithstanding anything by him done to the contrary," and so Lord Eldon thought, though he adds that if such were not the construction of the covenant itself, yet being coupled with the other covenant which was so

A restrained, it must be construed in the same manner. The defendant having covenanted that "for and notwithstanding anything by him done to the contrary" he was seised in fee, and that he had good right to convey, the latter part of the covenant, coupled as it was with the former part, by the words "and that," must necessarily be overriden by the introductory words "for and notwithstanding anything by him done to the contrary." This appears to have been the opinion B of the whole court, but, taking the latter covenant not to be restrained in terms, they proceeded to consider the rules by which covenants of this description are to be construed.

From all the cases upon this subject it appears to be determined that, however general the words of a covenant may be if standing alone, yet if, from other covenants in the same deed it is plainly and irresistibly to be inferred that the party C could not have intended to use the words in the general sense which they import, the court will limit the operation of the general words. The question, therefore, always has been whether such an irresistible inference does arise, for, if such an inference does arise from concomitant covenants, they will control the general words of an independent covenant in the same deed.

In LORD ELDON'S judgment one case is mentioned which I think deserves some D notice, because his Lordship seemed to suppose that the judgment of the court proceeded upon the mere legal construction of the deed without regard to any circumstances dehors the deed. The case to which I allude is *Feilder* v. *Studley* (2) which appears to me to be an extremely strong case in favour of the present plaintiff if the general covenant which was restrained by the other special covenants be considered as an independent covenant. LORD ELDON observes that the court E must have proceeded

> "on the ground of the intent of the parties appearing on the instrument, since that intent and the consequent legal effect of the instrument could only be collected from the instrument itself, and not from anything dehors."

F It must be remembered, however, that the application there was made to the Court of Chancery upon equitable as well as legal grounds, for, on looking into the case, I find that the defendant's father in 1657 had sold lands belonging to the dean and chapter of Sarum, which had been dissolved during the commonwealth. It was not very likely, therefore, that a party selling under these circumstances would covenant for anything more than his own acts. It appearing that the general covenant was manifestly contrary to the true intent of the parties, application G was made to the Court of Chancery to correct the mistake in the same manner as applications are made to that court to correct mistakes in marriage articles where clauses are inserted contrary to the intent of the parties. The decision, therefore, did not merely proceed upon the construction of a legal instrument, but the circumstances entitled the party to have the covenant rectified as having gone beyond the intention of the parties.

H Supposing that case to have been decided as a question at law, the question here is whether the principle I have here stated, applied to this case, requires the court to restrain the general words of the covenant sued upon. If the inference be irresistible that the parties could not intend to make a general covenant, we are bound to give the defendant the benefit of that inference. The property assigned is a share in a patent-right, and it could not be unknown to the defendant I that Koops, the original proprietor, had been a bankrupt, though possibly the plaintiff might be ignorant of that circumstance. I have looked anxiously through all the concomitant covenants in order to ascertain whether they afforded any inference of an intention to restrain the covenant in question, but I find none. The deed, after reciting the manner in which the property came to Koops ten years before and the assignment to Stevenson, contains a conveyance of his interest to the plaintiff, and then follows the warranty in question which, instead of being framed in the usual and almost daily words where parties intend to be bound by

their own acts only, viz., "for and notwithstanding any act by him done to the contrary," omits them altogether besides which, the defendant covenants that the assignee shall enjoy the property assigned in as ample a manner as the assignor. The omission of these words is almost of itself decisive. The attention of the purchaser is not called by any words to the intent of the vendor to confine his covenant to his own acts. The covenant that the defendant has paid all the calls is certainly personal, but the covenant for title is general, and the court ought not to indulge parties in leaving out words which are ordinarily introduced and by which the real meaning of the parties might be plainly understood.

The argument on the part of the defendant arises from the latter part of the covenant in question. If the party meant to covenant for an absolute right to convey, why, it is asked, does he covenant that he has not forfeited such right? To this it may be answered that the latter stipulation, though unnecessary, is not inconsistent with the former. The rule of construction adopted in *Browning* v. *Wright* (1) has never been carried to such a length as to decide that because some clauses are introduced into a deed which do not add to the security provided by the other clauses the security so provided is to be restrained. We are, therefore, of opinion, that the covenant for absolute right to convey is not restrained by the other parts of the deed.

It is contended, however, that the defendant has conveyed a good title to the plaintiff. First, it is said that, admitting the interest in the patent-right to have passed under the assignment of the commissioners, yet the assignees have re-conveyed to the bankrupt the whole of their interest therein by the deed of Sept. 9, 1801. It must be remembered, however, that nothing short of an actual conveyance by the assignees can sustain that argument and that a mere release will not be sufficient, and it was, therefore, insisted that the deed amounted to a conveyance. But I have no hesitation in saying that the deed alluded to was neither intended to convey, nor did it operate in law as a conveyance. By that deed the two persons who were the assignees of Koops, together with his several other creditors, parties thereto, in consideration of his having agreed to pay them fifteen shillings in the pound and to secure the debts of the foreign creditors after the same rate, did remise, release, and quit claim to him, all actions, suits, claims, and demands whatsoever. But it is to be observed that the persons who were assignees did not convey as such. Indeed, if they acted as assignees, why was it necessary that the other creditors should join? And they do not pretend to bind the other creditors, who were not parties to the deed. This is the deed which is said to convey to Koops as a purchaser all the interest of the assignees, and to make him a new man. But the words are not sufficient for that purpose. It could not have been the intention of the parties. The assignees do not affect to convey for any persons not parties to the deed, and the instalments have not been paid according to the agreement. We are, therefore, clearly of opinion that it is impossible to construe this deed to be such a conveyance as has been contended for on the part of the defendant. With respect to the supposed power of the assignees to make such a compromise with the bankrupt as that stated in the case and the attempt to show that it amounts to a sale of the property to him, it was not competent to assignees to make such compromise unless the other creditors had consented, nor could the transaction be deemed a sale under the usual powers.

Next it is contended that the nature of the property in this patent was such that it did not pass under the assignment, and several cases were cited in support of this proposition. It is said that, although by the assignment every right and interest and every right of action, as well as right of possession and possibility of interest, is taken out of the bankrupt and vested in the assignees, yet that the fruits of a man's own invention do not pass. It is true that the schemes which a man may have in his own head before he obtains his certificate, or the fruits which he may make of such schemes do not pass, nor could the assignees require him to assign them over, provided he does not carry his schemes into effect until after he has obtained his

A certificate. But if he avail himself of his knowledge and skill and thereby acquire a beneficial interest which may be the subject of assignment, I cannot frame to myself an argument why that interest should not pass in the same manner as any other property acquired by his personal industry. Can there be any doubt that, if a bankrupt acquire a large sum of money, and lay it out in land, the assignees may claim it? They cannot indeed take the profits of his daily labour. He must live. B But if he accumulate any large sum, it cannot be denied that the assignees are at liberty to demand it, though, until they do so, it does not lie in the mouth of strangers to defeat an action at his suit in respect of such property by setting up his bankruptcy. We are, therefore, clearly of opinion, that the interest in the letters patent was an interest of such a nature as to be the subject of assignment by the commissioners.

C Lastly, it is contended that the Act of Parliament stated in the Case vested a legal interest in Koops for that he must be taken against all the world to have that interest which the Act recites to be vested in him, that Act being a public Act. But though the Act be public it is of a private nature; the only object of the proviso for making it a public Act is that it may be judicially taken notice of instead of being specially pleaded, and to save the expense of proving an attested copy. But D it never has been held that an Act of a private nature derives any additional weight or authority from such a proviso; it only affects Koops and those claiming under him, and authorises him to do certain acts, which by the letters patent he could not have done. It recites the letters patent containing a clause which prevents him from assigning to more than five persons, and then enables him to assign to any number of persons not exceeding sixty. It is not possible then to consider this E Act as giving any title to Koops which he had not at the time when it passed. Such has been the construction which has always been put upon Acts of Parliament of this nature. We are, therefore, of opinion that no aid is to be derived to the defendant from that Act of Parliament.

Judgment for plaintiff.

DYER *v.* HARGRAVE

[ROLLS COURT (Sir William Grant, M.R.), March 7, 11, 13, 1805]

[Reported 10 Ves. 505; 32 E.R. 941]

Specific Performance—Sale of land—Misdescription—Compensation—House described as in good repair and farm as in high state of cultivation and within ring-fence—Defects in house—Land in impoverished state—No ring-fence.

A leasehold farm was sold by auction to the defendant. The particulars described the house as being in good repair and the farm as consisting of 150 acres, part arable and part marsh land, and being in a high state of cultivation, all within a ring-fence. The purchaser, who had lived in the neighbourhood all his life and had seen the farm before he purchased, objected that the house was not in good repair, that the land was in a very impoverished state, and that the farm was not in a ring-fence. In an action for specific performance,

Held: specific performance must be decreed because the purchaser had got substantially that for which he had bargained; he was, however, entitled to compensation for the defects in the house and cultivation of the land even though a minute examination might have discovered the defects, but not for the fact that the farm did not lie within a ring-fence because in the circumstances he must have known whether or not a ring-fence existed.

Notes. Considered: *Knatchbull* v. *Grueber*, [1814–23] All E.R. Rep. 198; *Jennings* v. *Broughton* (1854), 5 De G.M. & G. 126; *Re Fawcett and Holmes' Contract* (1889), 42 Ch.D. 150. Referred to: *Aberaman Ironworks* v. *Wickens* (1868), L.R. 5 Eq. 485.

As to misrepresentation as a bar to a specific performance, see 36 HALSBURY'S LAWS (3rd Edn.) 303 et seq.; and for cases see 44 DIGEST (Repl.) 58 et seq. As to specific performance with compensation, see 36 HALSBURY'S LAWS (3rd Edn.) 345 et seq.; and for cases see 44 DIGEST (Repl.) 158 et seq.

Case referred to:

(1) *Drewe* v. *Hanson* (1802), 6 Ves. 675; 31 E.R. 1253, L.C.; 44 Digest (Repl.) 158, *1377*.

Also referred to in argument:

Hick v. *Phillips* (1721), Prec. Ch. 575; 24 E.R. 258; 44 Digest (Repl.) 49, *351*.

Howard v. *Hopkyns* (1742), 2 Atk. 371; 26 E.R. 624, L.C.; 44 Digest (Repl.) 27, *183*.

Shirley v. *Stratton* (1785); 1 Bro. C.C. 440; 28 E.R. 1226, L.C.; 40 Digest (Repl.) 47, *290*.

Pincke v. *Curteis* (1793), 4 Bro. C.C. 329; 29 E.R. 918; 44 Digest (Repl.) 114, *937*.

Fordyce v. *Ford* (1794), 4 Bro. C.C. 494; 29 E.R. 1007; 44 Digest (Repl.) 162, *1411*.

Calcraft v. *Roebuck* (1790), 1 Ves. 221; 30 E.R. 311, L.C.; 44 Digest (Repl.) 162, *1410*.

Drewe v. *Corp* (1804), 9 Ves. 368; 32 E.R. 644; 44 Digest (Repl.) 162, *1412*.

Action for Specific Performance.

On Feb. 23, 1802, a leasehold farm was sold by auction to the defendant, the plaintiff selling as executor. The particulars described the house as being in good repair, and the farm as consisting of 150 acres, part arable and part marsh land in a high state of cultivation; all within a ring-fence. The defendant objected that the house was not in good repair; that the lands, instead of answering the description of a high state of cultivation, were in a very impoverished state from neglecting to manure and drain; and that the farm was not in a ring-fence but was intersected by other lands. The plaintiff brought an action for specific performance

of the contract. The defendant applied to have the agreement delivered up to be cancelled.

Richards, *Trower* and *Wetherell* for the plaintiff in the original bill.
Romilly and *Bell* for the defendant.

SIR WILLIAM GRANT, M.R., having during the argument said that it was held at law that a warranty is not binding where the defect is obvious, and put the case of a horse with a visible defect, a house without a roof or windows, warranted as in perfect repair, delivered the following judgment: It is impossible to refuse a performance of this contract. It is much too late to contend that every variance from the description will enable a man to resist the performance. The principle is that, if he gets substantially that for which he bargains, he must take a compensation for a deficiency in the value. Whether the court has not in many cases gone beyond the spirit of that rule is another consideration.

Whether the court ought to compel a purchaser to take compensation for that which can hardly be estimated by pecuniary value may admit of doubt. In this case there can be no doubt, except as to the objection that the premises are not in a ring-fence, whether the whole is not the subject of pecuniary compensation. As to the repairs, unless it could be shown that the defendant wanted possession of the house to live in at a given period it is mere matter of pecuniary estimation. The same observation applies to the situation of the marsh land; the defendant loses nothing but money by finding that in a worse state of cultivation than it was represented. That admits a certain estimation. It is not quite so certain that a precise pecuniary value could be set on the difference between a farm, compact, in a ring-fence, and one scattered and dispersed with other lands. But in this instance the purchaser is nearly excluded from insisting on that as an objection to complete the contract. He saw the farm before he purchased. He was willing to purchase it by private contract. He had lived in the neighbourhood all his life. This variance is the object of sense. He must have known whether the farm did lie in a ring-fence or not. It is sworn by one witness that it was distinctly pointed out to him that there were fields belonging to other persons lying intermixed. But, independent of that, he could not conceive himself purchasing anything in a ring-fence, for the evidence of his own witnesses shows that there are thirty or forty acres of others intermixed, above his 150 acres, and he does not pretend that he thought the farm larger than it turns out to be. He had repeated opportunities of going over the farm. If he acquiesces in the situation of what he purchased and goes on with the treaty, he cannot afterwards get rid of the contract.

Whether compensation is to be made is a different consideration. On the same ground that the defendant cannot get rid of the contract on account of the difference in the description of the farm, he cannot be entitled to compensation, for it was an object of sense. He could not be deceived. He could not have an imperfect knowledge, for, if he had any knowledge that anything was mixed with the subject of his purchase, that puts an end to the description, and, if I give him compensation, having that knowledge, he gets a double allowance, for, if he has knowledge that what he proposes to purchase does not answer the description, it must be taken that he bids so much the less. The two other objections admit a different consideration for they are such as a man may have an indistinct knowledge of; and he may have some apprehension that, in those respects, the premises do not completely correspond with the description; and yet the description may not be so completely destroyed as to produce any great difference in his offer. As to the marsh land, it is very uncertain whether by any view it was possible for him to judge of that. It is stated by many witnesses that the season of the year was just at the breaking up of a frost, and represented that no man could at that time say whether the land was well or ill cultivated. So, he may have seen some trifling defects in the house; and might not intend to make the objection if they turned out to be nothing more than they appeared on the surface. He might

consider them too trivial and not mean to claim compensation for an object so insignificant. But afterwards, when he came to examine, according to this evidence, he discovered that the house was materially defective, very much out of repair. Admitting that he might by minute examination make that discovery, he was not driven to that examination; the other party having taken on him to make a representation; otherwise he would be exonerated from the consequence of that in every case where, by minute examination, the discovery could be made. The purchaser is induced to make a less accurate examination by the representation which he had a right to believe. The purchaser, therefore, is entitled to compensation for the defects of the house and the cultivation of the marsh land; but not for the other subject of objection.

The cross bill must be dismissed with costs. Under the original bill a specific performance must be decreed, but I shall not give costs to the plaintiff. As to the time, it does not follow necessarily that the defendant must have been apprised and have slept on the defects. In *Drewe* v. *Hanson* (1) there was a longer time, but Lord Eldon, L.C., did not think that sufficient.

Order accordingly.

ROBERTSON AND ANOTHER *v.* FRENCH

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), June 27, 1803.

[Reported 4 East, 130; 102 E.R. 779]

Insurance—Policy—Construction—Plain, ordinary and popular meaning of words —Cases where special meaning applied—Effect of written words greater than printed words.

The same rule of construction which applies to all other instruments applies equally to a policy of insurance, viz., that it is to be construed according to its sense and meaning as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary and popular sense unless they have generally in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. The only difference between policies of assurance and other instruments in this respect is that the greater part of the printed language of them, being invariable and uniform, has acquired from use and practice a known and definite meaning, and that the words superadded in writing (subject always to be governed in point of construction by the language and terms with which they are accompanied) are entitled, nevertheless, if there should be any reasonable doubt on the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning and the printed words are a general formula adapted equally to their case and that of all other contracting parties on similar occasions and subjects.

Notes. Considered: *Hunter* v. *Leathley* (1830), 10 B. & C. 858; *Carr* v. *Montefiore* (1864), 5 B. & S. 408; *Gumm* v. *Tyrie* (1864), 4 B. & S. 680; *Hart* v.

Standard Marine Insurance (1889), 22 Q.B.D. 499. Applied: *Glynn* v. *Margetson*, [1891–4] All E.R. Rep. 693. Considered: *Sanday* v. *British and Foreign Marine Insurance Co.*, [1915] 2 K.B. 781; *Re Sutro and Heilbut Symons*, [1917] 2 K.B. 348. Referred to: *Lang* v. *Anderdon* (1824), 3 B. & C. 495; *Alsager* v. *St. Katherine's Dock Co.* (1845), 14 M. & W. 794; *Great Western Rail. Co.* v. *Carralla United China Clay Co.*, [1909] 1 Ch. 218; *Cave* v. *Horsell*, [1912] 3 K.B. 533; *North and South Insurance Corpn., Ltd.* v. *National Provincial Bank, Ltd.*, [1935] All E.R. Rep. 640; *Reardon Smith Lines, Ltd.* v. *Black Sea and Baltic General Insurance Co., Ltd.*, [1938] 2 All E.R. 706; *Rapp, Ltd.* v. *McClure*, [1955] 1 Lloyd's Rep. 292.

As to general rules of interpretation of a written instrument, see 11 HALSBURY'S LAWS (3rd Edn.) 381 et seq.; and for cases see 17 DIGEST (Repl.) 258 et seq.

Case referred to in argument:

Hodgson v. *Richardson* (1764), 1 Wm. Bl. 463; 96 E.R. 268; 29 Digest (Repl.) 200, *1406*.

Rule Nisi obtained by the defendant to set aside a verdict for the plaintiffs and enter a nonsuit in an action on a policy of insurance.

The plaintiffs, as agents of Robertson and Walker, effected a policy of insurance*

"lost or not lost, at and from *all, any or every port and place where and whatsoever on the coast of* Brazil, *and after* Sept. 17, *to* the Cape of Good Hope, upon any kind of goods and merchandises, and also upon the body, etc., of the ship *Chesterfield*, etc.; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship, *at all, any or every port and place where and whatsoever on the coast of* Brazil, *and from* Sept. 17, 1800, *and* upon the said ship, etc., *in the same manner*; and so shall continue and endure during her abode there upon the said ship, etc., and further until the said ship, etc., and goods, etc., shall be arrived at Simon's Bay *or* Table Bay, *both or either, with liberty to call at* St. Helena *or elsewhere*, upon the said ship, etc., and upon the goods, etc., until the same be there discharged, etc. And it shall be lawful for the said ship, etc., in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever, *particularly backwards and forwards and to and from those under the* Portuguese *government, or any port, place, island or elsewhere on the coast of* South America, *without being deemed any deviation, and without prejudice* to this insurance. The said ship, etc., goods, etc., valued at £15,680, *being upon goods, ship and freight separately valued as under. And in case of capture, detention or seizure, by any power whatever, to pay a total loss upon receiving documents of her being carried into port, and without inquiry into the regularity or irregularity of her proceedings; and with liberty to sell, barter, exchange, load or unload the interest in part or whole at the island* St. Catharine *or elsewhere, where and whatsoever.* Touching the adventures and perils, etc. [This part of the policy was in the common form.] At the rate of *four guineas per cent., to return three pounds and ten shillings should the ship have arrived, or this risk otherwise have ceased, on or before* Sept. 17. In witness, etc."

At the bottom of the policy the goods were valued at £13,316, ship at £1,550, and freight at £814. The plaintiffs declared as agents of Robertson and Walker on a loss by the arrest and restraint of the King's ships. It was admitted that the goods were of the value insured, and had been put on board the ship *Chesterfield* at the Cape of Good Hope. After the cargo had been taken in at the Cape of Good Hope, the ship went from thence, on Feb. 7, 1800, to Benguela on the coast of Africa, and afterwards to St. Catharine's on the coast of Brazil, on May 30; then to Rio Janeiro on July 27; stayed there upwards of two months, and remained on the

* The words in italics were written, the rest of the policy set out was in the usual printed form.

coast till the latter end of November, when, on suspicion of illicit trading with the Spanish enemy, she was taken possession of by some of His Majesty's ships of war and carried again to the Cape, with the original cargo on board, where she was libelled by the captors in the vice-admiralty court, on which the assured abandoned to the underwriters. The ship after being liberated by the sentence of the court was sold there, and had since arrived in England about October, 1802.

On the part of the plaintiffs, another policy subscribed by this defendant was offered in evidence as being on the same subject-matter, between the same parties and on the same continued risk, for the purpose of showing that, in point of fact, the defendant had contracted with the plaintiffs to insure the same subject from Mar. 17 to Sept. 17, 1800, being the period of the commencement of the present policy as to time. This was objected to on the part of the defendant on the ground that the one policy could not be read in explanation of the other and at the trial LORD ELLENBOROUGH, C.J., only admitted it as evidence of the fact of such a policy having been effected.

With respect to the plaintiffs' title to the ship, the evidence on which the objection was founded by the defendant's counsel was that of Captain Brooks, the commander of the ship *Chesterfield*, who proved that at the Cape of Good Hope he had sold her to Robertson and Walker, the two persons in whom the interest was averred to be; that he (Brooks) and Mortlock, the supercargo, had also shares in the ship, and that he was put in possession by one Lawrence Williams; and that the power which he (Brooks) had to dispose of the ship was in writing. It was objected at the trial that no interest was shown in the parties interested in the insurance, for Brooks proved that they claimed by sale from him, which must be in writing by the Register Acts, and, therefore, the bill of sale should be produced. The defendant afterwards gave in evidence for another purpose the answer of the plaintiffs to a bill filed in Chancery, in which it appeared that Lawrence Williams was the owner of the ship when she left England. He also read in evidence the sentence of the vice-admiralty court at the Cape of Good Hope by which the property in the ship was adjudged to be in the person claiming, to whom, in the declaration it averred to belong, and was directed to be restored to them; but that there was just cause of seizure at the time. It also appeared from the register-book of the Customs House that, up to April, 1799, L. Williams was the registered owner, that in August, 1802, there was a subsequent register to the same person as sole owner, and that the ship was sold at the Cape under a decree of the vice-admiralty court there.

The plaintiffs recovered a verdict, and the defendant obtained a rule nisi for setting it aside and entering a nonsuit on two objections: first with respect to the interest of the assured, and secondly, that neither the ship nor the goods on board were covered by the policy in question.

Erskine, *Garrow*, *Park* and *Giles* for the plaintiffs.
Gibbs, *Adam* and *Marryatt* for the defendant.

Cur. adv. vult.

LORD ELLENBOROUGH, C.J., delivered the following judgment of the court. —This rule was moved for on the part of the defendant on two grounds: first, that the plaintiffs had not given sufficient proof that the interest in the ship was in Robertson and Walker, in whom such interest is by the declaration averred to be; and secondly, that the policy on this ship and cargo never attached, the adventure on the cargo being by the terms of the policy made to commence from the loading of the goods aboard the ship on the coast of Brazil, an event which, as it was contended by the defendant, never happened, inasmuch as the goods were not loaded there but at the Cape of Good Hope. It was also contended on the part of the defendant that the adventure on the ship being by the terms of the policy made to begin in the same manner with that on the goods could of course have no commencement if that on the goods never attached. [HIS LORDSHIP read the

policy, and continued:] In the course of the argument it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of insurance which are not equally applicable to the terms of other instruments and in all other cases; it is, therefore, proper to state on this head that the same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, viz., that it is to be construed according to its sense and meaning as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary and popular sense unless they have generally in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. The only difference between policies of assurance and other instruments in this respect is that the greater part of the printed language of them, being invariable and uniform, has acquired from use and practice a known and definite meaning, and that the words superadded in writing (subject always to be governed in point of construction by the language and terms with which they are accompanied) are entitled, nevertheless, if there should be any reasonable doubt on the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning and the printed words are a general formula adapted equally to their case and that of all other contracting parties on similar occasions and subjects.

As to the first point made in this case on the part of the defendant, viz., that the ownership alleged was not sufficiently proved, it was proved by the captain in the ordinary way that the owners by whom, as such, he was appointed and employed were the persons in whom the ownership is by the declaration averred to be. And though it afterwards appeared by his answers on cross-examination that the ownership was derived to those persons under a bill of sale executed by himself as attorney to one Lawrence Williams, the former owner, it did not on that account become necessary for the plaintiffs to produce that bill of sale, or the ship's register, or to give any further proof of such their property; the mere fact of their possession as owners being sufficient prima facie evidence of ownership without the aid of any documentary proof or title deeds on the subject until such further evidence should be rendered necessary in support of the prima facie case of ownership which they made, in consequence of the adduction of some contrary proof on the other side. No such contrary proof was, however, in this case given on the part of the defendant. For the prior register in the name of Lawrence Williams as owner in 1799, and a subsequent register to the same person on a sale at the Cape in 1802 under a decree of the Court of Vice-Admiralty, and which were given in evidence by the defendant, were perfectly consistent with a title in other persons in the meantime, agreeable to the averment in the declaration.

As to the second point made in this case, viz., that the policy on the ship and goods never attached, it is asserted on the part of the defendant that the adventure in question as to its commencement, according to the natural and obvious meaning of the language and terms of the policy, depends on and is limited by the co-existence and concurrence of three several circumstances, viz., one of place, one of time and one of event or fact. First of place, that it is to attach on the coast of Brazil; secondly of time, that it should attach there after Sept. 17; and thirdly of event, that the goods should have been then loaded at some port or place on the coast of Brazil. The adventure on the ship is in terms declared to begin "in the same manner," i.e., at the time and place and after the happening of the events before described and specified in respect to the cargo. But it is argued on the part of the plaintiffs that the latter circumstance of event, or fact,

as I have termed it, does not affect the commencement of this adventure; and that the words "from the loading thereof aboard the said ship" are either to be rejected wholly, in which case the policy will stand thus: "beginning the adventure upon the said goods and merchandises at all, any or every port and place where and whatsoever on the coast of Brazil," without regard to the place at which such goods may have been in fact antecedently laden; or that the words "from the loading thereof aboard the said ship at," are to be understood from the time of the ship's being with the goods loaded on board her, or having such her cargo on board her, at the place mentioned in the policy, i.e., in this case at the coast of Brazil. The objection to the first of these constructions (besides the difficulty of wholly rejecting words having an apparently significant meaning and referring distinctly to an act to be done at a given place) is stated to be this, that if the cargo insured be understood to be generally a cargo at, or a cargo on board on, the coast and not one actually and originally taken in on the coast, the policy would in that case cover the risk on two successive cargoes, i.e., on the outward cargo with which the ship should be in a loaded state on the coast after Sept. 17, and the homeward, or that which it should take in there; and that it would not be just towards the underwriter so to construe the words as to cover thereby at his risk two successive cargoes, when one original cargo only, according to all the ordinary usages of trade and practice of insurance as applied to such form of words must be understood to be meant, in addition to the liberty of sale, barter and exchange given by a subsequent part of the policy; and further to reject emphatical words in order to accomplish a construction so much to the apparent disadvantage of the underwriter. Indeed, if only one original cargo were meant to be covered, a Brazil cargo appears to have the best claim to be considered as that one, for it would be preposterous to consider the policy as meant, in preference to any other one cargo, to cover a cargo taken in at the Cape of Good Hope and which should remain unprotected, as far as this policy is concerned, wherever it should be till Sept. 17, and from that day, if it were then on the coast of Brazil, should be protected there, and during the course of its barter, sale and exchange at the island of St. Catharine and elsewhere, and during its re-conveyance afterwards back to the Cape from which it had originally proceeded. The same objection in a great measure applies to the second construction, which, without wholly rejecting the words "from the loading thereof aboard the said ship," considers the goods as the subject of insurance when, after Sept. 17 they should be in a loaded state at the coast of Brazil; for this construction would equally exclude the possibility of covering by this policy an homeward cargo taken in at the coast of Brazil to be carried to the Cape, provided the ship should have arrived on the coast of Brazil with an original cargo on board; unless indeed two successive cargoes could be covered by a policy conceived in these terms.

The most natural construction of the words, if the immediate letter of them were less directly applicable to a cargo taken in on the coast, seems to be to make them apply to a cargo to be carried to the terminus ad quem, on and within the immediate limits of the voyage described in the policy, rather than to a cargo conveyed, as it should seem, in a course of useless circuity from the place from which the ship originally proceeded before the voyage in question had commenced; continuing, except inasmuch as it might be altered by barter, sale and exchange, on board during the voyage and to be delivered at the place at which the voyage is at last appointed to terminate. But the question naturally occurs: Is there anything to be found in the policy which assigns to these words a sense thus apparently different from the ordinary grammatical sense of them? Looking as we are obliged to do to the policy, and to the policy alone, in order to collect the intention of the parties as to the commencement and duration of the adventure thereby protected, we cannot feel ourselves at liberty to disjoin in point of effect and construction the words "at all, any or every port and place . . . on the coast of Brazil" from the words, "from the loading thereof aboard of the said

ship," by which they are immediately preceded and with which by immediate context they appear to us to be necessarily united. If the same words had not been thus incorporated with the body of the text of the printed words and made to form therewith one entire and continued chain of words and one unbroken sentence of intelligible expressions all applicable to the same subject-matter, it might perhaps have been open to us to have given them a different meaning and to have considered them as words written in the margin of the policy (and applying, therefore, indefinitely to the whole of the policy, and not to any particular part of it) are usually considered; that is, as controlling the sense of such parts of the printed policy to which, in sound construction and by reasonable reference, they may appear to apply. As, for instance, where the word ship is written in the margin of the policy, or freight, or goods; in such case the general terms of the policy applicable to other subjects besides the particular one mentioned in the margin are thereby considered as narrowed in point of construction to that one. This is done in cases where the subject meant to be insured is still more remote from ship "and goods," the only subjects of insurance in the printed policy; viz., where the object of the insurance as declared by the marginal memorandum is money lent on bottomry or respondentia, or the like, the meaning of which marginal memorandum may be translated thus: We mean to insure the subject so named, "freight" for instance, arising and accruing during the limits of the voyage within described from the carriage of goods on board the ship within mentioned against the perils within enumerated and on the premium herein specified. In other words, we adopt the general language of the policy as far as it may serve to effectuate this object, and no further. Had, indeed, the subject-matter of the insurance itself, or the character, situation and description of the persons making it, or any other circumstance attending the insurance pointed out and required a narrower rule of construction, the ordinary effect of these words might, perhaps, have been in such case controlled; but can any such restrictive rule of construction be applied to the words "at all, any or every port and place . . . on the coast of Brazil" as they occur here, without shaking the fundamental rules of construction as applicable to all deeds and instruments whatsoever?"

Feeling, therefore, the impossibility of assigning to these words any other place in or with reference to this contract than what the parties themselves have done, and feeling the impossibility of assigning to them in that place, and with the context which attends them, any other meaning than what they obviously and in their plain grammatical sense import, we are obliged to say that the adventure could only attach on goods and ship after a loading of goods had taken place on the coast of Brazil; and as that circumstance or event never took place in the present instance, that the policy of course never attached at all. It certainly was in the contemplation of the parties that the risk meant to be insured might have ceased before Sept. 17, 1800, and a return of premium is provided in that event; but I do not think that the construction of the rest of the policy is so materially affected by this stipulation as to require any particular observations on it. On the whole, we are of opinion that this rule which calls on the plaintiffs to show cause why the verdict should not be set aside and a nonsuit entered must be made absolute.

Rule absolute.

LUPTON *v.* WHITE AND OTHERS

[Lord Chancellor's Court (Lord Eldon, L.C.), August 8, December 19, 1808]

[Reported 15 Ves. 432; 33 E.R. 817]

Equity—Mixture of funds—Breach of undertaking to keep separate accounts—Right of plaintiff to all money in the account.

If a man, having undertaken to keep the property of another distinct, mixes it with his own, the whole must, both at law and in equity, be taken to be the property of the other until the former so deals with the property that the rights of the parties can be distinguished as satisfactorily as they might have been before the unauthorised mixture on his part.

Notes. Followed: *Skipworth* v. *Skipworth* (1840), 9 L.J.Ch. 182. Applied: *Gray* v. *Haig*, *Haig* v. *Gray* (1855), 20 Beav. 219. Distinguished: *Walsh* v. *Secretary of State for India* (1863), 10 H.L. Cas. 367. Applied: *Cook* v. *Addison* (1869), L.R. 7 Eq. 466; *Re Oatway*, *Hertslet* v. *Oatway* (1903), 72 L.J.Ch. 575. Referred to: *Spence* v. *Union Marine Insurance Co.* (1868), L.R. 3 C.P. 427.

As to effect of intermixture of chattels, see 2 Halsbury's Laws (3rd Edn.) 113; and for cases see 3 Digest (Repl.) 74–76. As to the effect of intermixture of money, see 38 Halsbury's Laws (3rd Edn.) 444; and for cases see 47 Digest (Repl.) 537–539.

Cases referred to:

(1) *Armory* v. *Delamirie* (1722), 1 Stra. 505; 93 E.R. 664; 3 Digest (Repl.) 67, *83.*

(2) *Panton* v. *Panton* (undated), cited 15 Ves. at pp. 435, 440; 33 E.R. 818, 820; 3 Digest (Repl.) 74, *136.*

(3) *White* v. *Lady Lincoln*, *Duke of Newcastle* v. *Kinderley* (1803), 8 Ves. 363; 32 E.R. 395; 1 Digest (Repl.) 497, *1350.*

(4) *Lord Chedworth* v. *Edwards* (1802), 8 Ves. 46; 32 E.R. 268; 1 Digest (Repl.) 497, *1349.*

(5) *Newman* v. *Payne* (1793), 2 Ves. 199; 4 Bro. C.C. 350; 30 E.R. 593; 1 Digest (Repl.) 506, *1426.*

Action for an account.

The plaintiff, Lupton, claimed to be the owner of premises of some four or five acres known as the Little Ing, Beverley, Yorkshire, and asked for an account of lead ore mined thereunder by the defendants and for an injunction to restrain them from continuing to work the mine. The defendants were the owner and lessees of adjoining lead mines, and claimed that the Little Ing was included in their leases. An injunction was obtained, but on the defendants' undertaking to keep separate accounts of the ore mined under the Little Ing the injunction was discharged and a question of title was directed to be tried between the same parties before a jury. In those proceedings the plaintiff was successful, and an account was ordered of the lead ore mined by the defendants under the Little Ing.

The first defendant, White, deposed that the other defendants were lessees under him or otherwise solely concerned with the management of the Prosperous Mine, Beverley, at their own risk and expense, paying him a duty in lead, and that they had custody of the books of the mine. Another defendant, Findlay, produced two account books and deposed that they were the only books kept for all the accounts of the mines, including the Little Ing, and that all the ore mined in 1802, 1803, and 1804 in those mines and under the Little Ing was brought up through the shafts and levels of the Prosperous Mine and smelted and sold as the produce of that mine. Two of the defendants stated that they had stopped their workings under the Little Ing when the plaintiff obtained his injunction, and on resuming after the injunction was discharged, they instructed their agent to put the minerals from under the Little Ing into separate piles, to keep a separate account of it,

and to inform the smelters which ore came from that part so that they could keep it separate.

The Master in his report stated that the defendants had not rendered a true account of the lead from the Little Ing, and that an account of sales of lead in a book called "The accounts of Little Ing" and other books produced had been so kept or contrived as to conceal the amount of ore mined under the Little Ing by the defendants Wood & Co. and of the lead produced from it; that they caused the ore from the Little Ing to be mixed with the ore from their adjoining mine, smelted together at the same hearth and marked with the same mark and letter; that duty was paid indiscriminately on lead from either source; and that to prevent proper examination of the workings under the Little Ing the defendants had allowed some of the workings to fall in, had filled up other parts with rubbish, and flooded the lower part so that it was impossible to estimate the quantity of ore mined under the Little Ing. Accordingly, the Master stated that he found it impossible to take an account with any degree of accuracy. The plaintiff objected to the report on the ground that in the circumstances mentioned the Master should have charged the defendants with the full amount of £23,986 9s. 6d. received by them as the value of lead smelted from the whole of the ore produced in the mines.

Sir Samuel Romilly and *Bell* for the plaintiff.

Sir Arthur Piggott, *Richards*, *Wear* and *White* for the defendants.

LORD ELDON, L.C.—The Master's report stating that he cannot take the account which has been directed, is the subject of further directions rather than of exception. The account was directed upon a familiar principle of equity, though the object might have been obtained in an action for mesne profits or trover. An inquiry before a jury having ascertained satisfactorily that the plaintiff is entitled to what was under these premises, the court was bound to enjoin the defendants from proceeding, or permitting them, with reference to the convenience of both mines, to proceed, that could be allowed only upon their undertaking to keep an account and then they cannot be heard to say they could not keep it. If the account does not satisfy the object and intention of that undertaking, it is not a compliance with the condition in that rational sense in which it must be understood. If the result is that the Master cannot take the account, it is clearly not for him, without a further direction, to apply the great principle familiar both at law and in equity, that if a man, having undertaken to keep the property of another distinct, mixes it with his own, the whole must both at law and in equity, be taken to be the property of the other, until the former puts the subject under such circumstances that it may be distinguished as satisfactorily, as it might have been before that unauthorised mixture upon his part. There may be cases in which the Master may charge parties upon that principle, but it must be under the direction of the court, who will judge whether the case is proper. I agree entirely with the Master that under these circumstances he cannot take such an account as this decree calls for. The consequence is that upon further directions it must either be referred back to the Master, with a direction to guide him as to the mode of charging the defendants where he cannot take the account satisfactorily, or an issue must be directed, taking care not to overlook the principle I have mentioned which throws the proof upon the defendants.

Therefore, I shall not allow these exceptions, but without prejudice to what the court may think proper to do upon further directions.

The cause being heard for further directions, the same question was again argued, the defendants pressing for a special direction to the Master to receive the books in evidence.

LORD ELDON, L.C.—This case comes before me under circumstances, in some respects different from any which the court has hitherto had to deal with in cases of a similar nature. The defendant White, as far as he is concerned, is

involved in it simply in consequence of his own undertaking. No misconduct, no fraud are imputed to him. He is culpable, not morally, but only for having applied too little attention to his own interest. With regard to the other defendants, this is a case of great and serious importance, especially with reference to the example which the court is to furnish; and in my view of transactions of this nature a court of equity ought to go to the extent of all that is just (and beyond that no court ought to go) to restrain persons from dealing with the property of others, as these defendants have dealt with the property of this plaintiff.

An injunction having been obtained, the court refused to relieve the defendants against it, unless they would lay themselves under an obligation which would prevent those difficulties that had obstructed the administration of justice between these parties. With that view, upon an application to dissolve the injunction, the court refused to interfere, except upon terms. Accordingly, the defendant White, who seems to have placed more confidence in his lessees and agents than they deserved, and the other defendants, agreed to the terms proposed—that as it would be inconvenient to their concerns entangled as they had been with the working of the mines claimed by the plaintiff as his inheritance, to discontinue working as they had done, if the court would permit them to work under the Little Ing, they would account fully for all they should take from it, if it should appear that the soil and the mines under it were the inheritance of the plaintiff. They stand before the court upon the faith of that undertaking, which they were bound to make good as if a receiver had been appointed or the injunction continued; and these parties are to be considered not as man acting towards man, but with reference to an undertaking by one man to leave the other as safe, as if the protecting hand of this court had been over him.

A verdict has determined that the Little Ing is the close of the plaintiff, and it is now, therefore, established that after the injunction issued these defendants had taken the plaintiff's property. The necessary consequence is that all which has been taken has been taken by wrong; that of all which has been taken since the injunction was dissolved a clear account ought to be rendered: an account free from difficulty. The account was prayed and granted accordingly, with the proper directions as to allowance and costs, which justice between parties under such circumstances prescribed; and that has produced this report, establishing the facts that the defendant White imprudently considering himself as having no concern with it, taking no care that what had been wrongfully obtained was made good, but placing a most unwarranted confidence in his agents and lessees, the thing proceeds in such a way that books were fabricated, the produce of the different mines mixed, no distinct accounts kept, workings allowed to fall in and cavities filled up; so that I have no means of charging the defendants with the fair amount of what they have taken; and the Master, speaking of the evidence, represents that by contrivance it has become impossible to discover what would be the result of a fair and just account of the produce of the Little Ing.

What then is the conclusion? If a man by his own tortious act makes it impossible for another to ascertain the value of his property, and that in a transaction in which the former was not merely under an implied moral obligation, but pledged by a solemn undertaking in a court of justice that such should not be the state of things between them, by those means preventing the guard which the court would have effectually interposed, is the argument to be endured that, as the party so injured cannot distinguish his property, therefore, he shall have nothing? That is not the law of this country as administered in courts either of law or equity. The case of the diamond ring found by a poor boy (*Armory* v. *Delamirie* (1)) proves the contrary. He had not the means of showing the value. The person who took it from him by wrong prevented the jury from ascertaining the value by production of the ring or other evidence. Therefore, as it was proved that the plaintiff's evidence had been destroyed by the act of that person, who ought to have refrained from placing the transaction in that state, the Lord Chief

A Justice directed the jury to find that the stone was of the utmost value they could find, upon this principle, that it was the defendant's own fault, by his own dishonest act, that the jury could not find the real value.

Panton v. *Panton* (2) applies to this. A clerk in a banking-house at Chester remitted his own money, with that of his employer, to an agent in London to be laid out upon security, and by management the securities were so changed that B the property could not be distinguished. The Court of Exchequer held that the confusion being occasioned by him who so dealt with the property, the distinction lay upon him, and if he could not distinguish what was his own the whole must be considered as belonging to the other.

A principle not dissimilar though not precisely the same governed me in the case of Mr. Jackson's executors (*White* v. *Lady Lincoln*, *Duke of Newcastle* v. C *Kindersley* (3)). There was no more duty imposed upon him than upon these individuals. He had kept the account, and as it appeared to me, not incorrectly, upon his own side, but, having kept it only upon his own though bound to keep it upon the other side, it was held that he could not maintain a demand, to which under other circumstances he would have been fairly entitled. The decision was made not upon the notion that strict justice was done, but upon this, that it was D the only justice that could be done; and that no more could be done was the fault of Jackson himself, who, if he did not enable those parties to know what demand they had upon him, could not be heard to say he had any demand upon them.

Upon a principle of the same sort I ventured to go in the case of the late Lord Chedworth (*Lord Chedworth* v. *Edwards* (4)). Some part of the property clearly belonged to Edwards, the steward; and I thought myself entitled in the first E instance to lay an injunction upon the whole fund. I do not advert to the case of the horse before LORD LOUGHBOROUGH (*Newman* v. *Payne* (5)), or to that of the dog before me in the Court of Common Pleas, as it is perhaps doubtful where the law declares distinctly that the value of the animal shall be given, whether a judge is justified in directing a jury to give a sum far exceeding the real value. Those cases, however, do not interfere with the others.

F This report presents to the court a case of violation of property previous to the injunction giving the right to an account upon ordinary principles. After the injunction was dissolved the defendants were permitted to use this mine upon a pledge of good faith to this court that a clear account should be produced, and that the plaintiff should have no difficulty in ascertaining his property. If at the hearing it had been stated to me that there would be any difficulty, I should probably G have said at once that it should be not on him, but on the defendants; and that if they did not distinguish what was his all should be taken to be his. What are the cases in the old law of a mixture of corn or flour? If one man mixes his corn or flour with that of another, and they were of equal value, the latter must have the given quantity, but if articles of different value are mixed, producing a third value, the aggregate of both, and through the fault of the person mixing them H the other party cannot tell what was the original value of his property, he must have the whole; and the principle goes to the full extent of what is now contended. Regretting the consequences in this instance to one of the parties, who is made answerable only for inattention to his own interest, I believe there is no greater violation of property in this country than of property of this nature.

I It is said if the whole is to be understood to be the produce of the Little Ing, except so far as any part can be shown to be the produce of the Prosperous Mine, the effect is to determine that the whole must be considered as the produce of the former, unless a special direction is given that these books are to be received in evidence before the Master. There are, I admit, many cases in which this court, giving an account, directs it to be taken with the admission of certain documents or testimonies, not having the character of legal evidence. If parties have been permitted for a long course of years to deal with property as their own, considering themselves under no obligation to keep accounts, as if there was any adverse

interest, having no reason to believe the property belonged to another, though it would not follow that being unable to give an accurate account they should keep the property, yet the account would be directed, not according to the strict course, but in such a manner as under all the circumstances would be fit. The case, however, is widely different where both parties knew that the property was the subject of adverse claim; and those who desire to have the rules of evidence relaxed had undertaken that there should be no occasion for deviating from the strict rule; that there should be clear accounts; that the other party should have his property without hazard of loss from the want or complication of accounts. In a case of this nature a previcus direction to the Master to receive such evidence would introduce a most dangerous principle. The utmost length I can go in such a case is to give liberty to either party, if the Master in taking the account of the produce of the Prosperous Mine shall find difficulty as to receiving any evidence, to apply to the court for directions upon that particular point. It is perfectly clear that such a reservation will be necessary as to these books, even not considering the imputation, which is cast upon them by the Master's report: but the fact that better evidence will be wanting is not sufficiently clear to warrant a prospective direction to the Master to receive them.

The circumstance that this difficulty cast upon the plaintiff in recovering his right is the consequence of the breach of an engagement with this court, binds me to give even this relief at the cost of the defendants. I do not mean that if anything culpable should arise before the Master upon the other side that those costs should be included: but with that exception this relief should be given with costs, as it is proper to mark such a case upon the contract of individuals with the court itself.

Decree directing the account as prayed, charging the defendant with the whole net produce except what they should prove to have been taken from the Prosperous mine.

WELD *v.* HORNBY

[Court of King's Bench (Lord Ellenborough, C.J., Lawrence, Grose and Le Blanc, JJ.), February 10, 1806]

[Reported 7 East, 195; 3 Smith, K.B. 244; 103 E.R. 75]

Fishing—Weir for taking fish—Right to prevent fish entering water of other riparian owner—Conversion of brushwood weir to stone weir.

Document—Construction—Ancient deeds—Evidence of user of subject-matter of deeds.

Ancient deeds recognised a right in the owner of an estate, of which the defendant was the present owner, to have a weir across a river for taking fish, which right was expressed in general terms not limited as to the height or restricted as to the materials of the weir. The weir had hitherto been made of brushwood through which it was possible for the fish to escape into the upper part of the river to the fishery of which the plaintiff was now the owner.

Held: the defendant could not convert the weir into a stone weir through which the fish could not escape, though in times of flood they might still overleap it.

Per Lord Ellenborough, C.J.: However general the words of ancient deeds may be they are to be construed, as Lord Coke says, by evidence of the manner in which the thing has been always possessed and used.

Notes. Considered: *Duke of Beaufort* v. *Swansea Corpn.* (1849), 3 Exch. 413; *Lord Waterpark* v. *Fennell*, [1843–60] All E.R. Rep. 567; *Leconfield* v. *Lonsdale* (1870), L.R. 5 C.P. 657. Referred to: *Rolle* v. *Whyte* (1868), L.R. 3 Q.B. 286; *Barker* v. *Faulkner* (1898), 79 L.T. 24.

As to rights and duties in relation to fisheries, see 17 HALSBURY'S LAWS (3rd Edn.) 314, 315; and for cases see 25 DIGEST (Repl.) 32, 33. As to construction of ancient documents, see 11 HALSBURY'S LAWS (3rd Edn.) 410; and for cases see 17 DIGEST (Repl.) 337, 338.

Rule Nisi obtained by the plaintiff to set aside the verdict in an action for wrongfully continuing a weir or dam across a certain river lower down the stream than the plaintiff's fisheries so that salmon and other fish were prevented from coming to the plaintiff's fisheries and spawning there.

At the trial before SUTTON, B., at Lancaster it appeared that the plaintiff, who had been in possession of his estate about twenty-nine years, was entitled to a right of fishery in the river Ribble above the defendant's weir. The defendants continued a weir across the Ribble, lower down the stream than the plaintiff's fisheries, so that salmon and other fish were prevented from coming to the plaintiff's fisheries and spawning there. Before the obstruction the plaintiff had taken plenty of salmon and other fish within the limits of his fishery, but after the alteration in the defendant's weir few fish and sometimes none were caught. Until about forty years before the action the defendant and the prior owners of Brockhole's mill had always had a brushwood weir across the river Ribble near the mill, and he showed by old deeds for two centuries back that they had had a right to have a weir across the river for the use and convenience of their fishery. The right was expressed in general terms, not limited as to height or restricted as to the materials of the weir, but none of the witnesses could remember any other than a brushwood weir prior to the year 1766. At that period the then owner of Brockhole's mill erected a solid stone weir two-thirds across the river in lieu of the former brushwood, leaving the other third composed of the same materials as before, to which it did not appear that any objection was made; and in 1784, the remaining third of brushwood was removed, and the stone weir carried quite across the river. This weir was a solid piece of masonry (having three locks in it, as the former wooden weir had for the purpose of catching fish) about ten feet broad, and nearly level at top, with a straight perpendicular side towards the fall of the river. There was a conflict of evidence as to the relative height of the new to the old weir, but in the result it did not appear that the present stone weir was either broader or higher than the former brushwood weir, making reasonable allowance for the sinking of the latter after a time. The present action was brought within three months before the expiration of twenty years from the last alteration.

The judge directed the jury to consider, first, whether the alteration of the weir made in 1784 were injurious to the plaintiff's fishery in the stream above and if it were, then secondly, whether such alteration were made by the defendant in the exercise of his own right, as evidenced by the several deeds, showing that the defendant and those under whom he claimed had a right to erect and preserve a weir at Brockholes; or whether there were any encroachment on the plaintiff's right by the alteration made forty years ago, when a stone weir was erected two-thirds across the river, which had been acquiesced in without complaint, and by the completion of the weir with stone nearly twenty years before this action brought. He told the jury that if there had been an uninterrupted enjoyment of the weir in its present state for twenty years, the action could not be maintained: but that though less than twenty years did not of itself afford a conclusive presumption of right, yet that such a length of possession as had been shown by the defendant, and of acquiescence on the part of the plaintiff, was certainly evidence of title, and connected with the other circumstances was evidence for them to say whether or not such a possession had a legal commencement, or were an encroachment on the

plaintiff's right. The jury on this returned a verdict for the defendant, stating at the same time that they thought the alteration of the weir in 1874 was prejudicial to the plaintiff's fishery, but that the defendant's right was by length of possession and other evidence of title well established.

The plaintiff moved to set aside the verdict, as contrary to the evidence of the actual injury sustained by the plaintiff from the alteration of the weir in 1784, and not warranted by any legal inference to be drawn in favour of the defendant's right from the ancient deeds explained as they were by the description of the weir which had been always in use before 1766, or from the partial encroachment which had been then made, but which still left such a passage for the fish over the remaining brushwood weir as made it not material for the plaintiff to assert his right. A rule nisi was accordingly granted.

Topping, *Scarlet* and *Holroyd* for the defendant, showed cause against the rule.

Serjeant Cockell, *Park*, *Wood* and *Raine* for the plaintiff, were not called on to support the rule.

LORD ELLENBOROUGH, C.J.—It is impossible to sustain this verdict. The right set up by the defendant to have a stone weir is plainly founded upon encroachment. The erection of weirs across rivers was reprobated in the earliest periods of our law. They were considered as public nuisances. The words of Magna Carta (1297) (chapter 23) are:

> "All weirs from henceforth shall be utterly pulled down by Thames and Medway, and through all England," etc.

This was followed up by subsequent Acts (see 12 Edw. 4, c. 7) treating them as public nuisances, forbidding the erection of new ones, and the enhancing, straitening or enlarging of those which had aforetime existed. I remember that the stells erected in the river Eden by the late Lord Lonsdale and the corporation of Carlisle, whereby all the fish were stopped in their passage up the river, were pronounced in this court, upon a motion for a new trial, to be illegal and a public nuisance.

Here it appears that previous to the erection of this complete stone weir, there had always been an escape for the fish through and over the old brushwood weir, in which those in the stream above had a right, and it was not competent for the defendant to debar them of it by making an impervious wall of stone through which the fish could not insinuate themselves, as it is well known they will through a brushwood weir, and over which it is in evidence that the fish could not pass, except in extraordinary times of flood. However, twenty years acquiescence may bind parties whose private rights only are affected, yet the public have an interest in the suppression of public nuisances, though of longer standing. No objection, however, of this sort can apply to the present case, where the action was commenced within twenty years after the complete extension of the stone weir across the river, by which it is proved that the plaintiff has been injured. Then, however general the words of the ancient deeds may be they are to be construed, as Lord Coke says [2 Co. Inst. 282], by evidence of the manner in which the thing has been always possessed and used.

LAWRENCE, J.—The jury themselves have found the fact that the plaintiff's fishery is injured by the stone weir, and, therefore, the verdict is against the evidence: and there is no bar to the action from any length of possession in the defendant.

GROSE and **LE BLANC, JJ.**, concurred.

Rule absolute.

REID *v.* SHERGOLD

[Lord Chancellor's Court (Lord Eldon, L.C.), February 1, 1805]

[Reported 10 Ves. 370; 32 E.R. 888]

Power of Appointment—Exercise—Defective exercise—Power to appoint by will—Exercise by irrevocable deed.

A court of equity, in exercising its jurisdiction to give relief in the case of the defective exercise of a power, will not aid an appointment by an irrevocable deed which is made under a power to appoint only by will.

Notes. Applied: *Re Parkin, Hill* v. *Schwarz*, [1892] 3 Ch. 510; *Re Lawley, Zaiser* v. *Lawley*, [1902] 2 Ch. 799.

As to exercise of a power by the instrument specified, see 30 Halsbury's Laws (3rd Edn.) 233, 269; and for cases see 37 Digest (Repl.) 274 et seq.

Case referred to:

(1) *Anon.* (1578), 3 Leon. 71; 74 E.R. 548; 37 Digest (Repl.) 251, *139*.

Bill raising questions regarding the construction of a will.

John Gale, being seised of copyhold estates to him and his heirs according to the custom of the manor of Isleworth, by his will dated May 4, 1767, gave and bequeathed the estates, with household furniture and other articles, to Samuel Barnesley and William Hargrave, and to the survivor of them, and to the executors or administrators of such survivor, in trust for the sole use and benefit of his niece Henrietta Maria, the wife of Henry Stables, during her life; and he directed Barnesley and Hargrave or the survivor, his executors, etc., to pay to his niece for her own use, notwithstanding her coverture, all the rents, issues and profits arising from the premises, or to suffer her to receive all such rents arising or to arise. After the decease of his niece he gave the premises and household goods to Barnesley and Hargrave, or the survivor, in trust for the sole use and benefit of Mary Gale Stables, daughter of his said niece, for her maintenance and when she reached twenty-one years, or immediately after the death of her mother, Barnesley and Hargrave, or the survivor, were to assign the aforesaid premises and pay all the money they might happen to have in their hands to Mary Gale Stables; but if she should happen to die under twenty-one years, he gave the premises to such person or persons and in such proportions as his niece by her last will and testament should give and dispose thereof. If his niece should choose to have the premises and household goods sold, he gave full power to Barnesley and Hargrave, with her consent, to sell and surrender and to invest the proceeds in government or other securities in the name of them or the survivor, and to pay the interest to his niece for her own use during her life. After her decease, the money was to remain invested in the name of Barnesley and Hargrave, or the survivor of them, until her daughter Mary Gale Stables reached twenty-one, and after the death of her mother, the trustees were to transfer to Mary Gale Stables all the securities and money in their hands in the same manner as if the estate had not been sold. In order that Henrietta Maria Stables might have a comfortable maintenance the testator gave Barnesley and Hargrave £20 a year, to be paid them by his executor but for the sole use of his niece during her life out of any part of his personal or freehold estate, her receipt to be a sufficient discharge.

The testator also gave and bequeathed to Barnesley and Hargrave £400 stock in the 3½ per cent. annuities, 1758, for the sole use and benefit of Mary Gale Stables, the interest to be paid from time to time to his niece until her daughter reached twenty-one years, when the trustees were to transefer to Mary Gale Stables, if living, the £400 stock, but if she died before attaining twenty-one years, the interest was to be paid to his niece during her life, and after her decease he gave the £400 stock to such person or persons as his niece by her last will and testament should dispose thereof, and in default of such will to his executor after named. He gave

his nephew William Gale his gold watch and seal, and gave several other legacies. He gave and bequeathed the residue of his estate to his nephew William Gale, appointing him sole executor.

After the death of the testator Mary Gale Stables died under the age of twenty-one in the lifetime of her mother. In 1769 Hargrave was admitted tenant, Barnesley attending and declining to act in the trust. By surrender dated May 7, 1781, taking notice that Mary Gale Stables had died under the age of twenty-one without issue, Hargrave by the direction and appointment of Henrietta Maria Stables surrendered the copyhold estate to the use of Henrietta Maria Stables, her heirs and assigns, and on May 11 she was admitted and afterwards surrendered to the use of her will. By her will dated Feb. 12, 1786, reciting that by the will of her uncle she was entitled to copyhold estates and legacies with power to dispose thereof by her will, she gave and devised to Mary Spyers all her copyhold estate devised to her by her uncle and surrendered to the use of her will, as also all other her estate and effects, and appointed her sole executrix. At a Court Baron held on April 27, 1791, the testatrix surrendered the copyhold premises to the use of Thomas Harben and his heirs and he was admitted. At the same court Harben surrendered the premises to the use of Henrietta Maria Stables to secure to her an annuity of £150 during her life, which annuity was the consideration of the purchase by him from her. She died on Mar. 25, 1799.

The residuary devisee and legatee of William Gale brought this action against persons claiming under Harben and under the devisee of Mrs. Stables and against a lessee, the plaintiff insisting that the surrender to Harben by Henrietta Maria Stables was a revocation of her will as to the copyhold estate and was void except as to her life state, and that she had no right to dispose after her decease otherwise than by will.

Romilly for the plaintiff.
Richards, *Benyon* and *Maddock* for the defendants.

LORD ELDON, L.C.—This in effect is a devise by Gale of these copyhold premises to the separate use of his niece. The variation of expression cannot raise a question whether the legal estate was to be in her or the trustees for the purpose of devoting the rents and profits to her separate use would require it to be in them. The £20 a year also was to be for her separate use. The effect of the will is that, if both the trustees had accepted the trust, the copyhold estate would have passed to the sole and separate use of the niece for life, with remainder in trust for her daughter absolutely, if she should attain the age of twenty-one and, if she should die under that age, her mother, surviving, would be tenant for life in equity of the estate, with such an interest or authority as the law would give her to dispose of the inheritance. He also intended to give a power, in the mode in which it is expressed, in certain circumstances to sell, but that power is expressly given to the trustees and to make sale with her consent. A due execution of that power, therefore, required the sale to be made by them, authorised by her consent. As to the £400 stock the ultimate trust is for such person as his niece should by her will appoint, if her daughter should die under the age of twenty-one. There is the difference that the daughter, attaining that age in the lifetime of the mother, would take that absolutely; if she died under that age, the personal property is expressly given to the mother for life, with an interest or authority to dispose of it by will.

The last clause without any question gives every interest in the freehold and personal estate, which either is not expressly given before, or which, by events defeating express disposition, should happen not to be disposed of, and the single question upon that clause is whether, regard being had to the context, he meant to dispose, in case his niece under the power should have made no disposition or her daughter should not live to take the absolute interest in the copyhold estate, which in such an event would not be disposed of, or in the money arising from the sale. The defendants can go no further than an implication that the testator did not

intend the interest in the copyhold estate, as supposing the case of default of appointment of the £400 stock, he expressly makes a disposition as to that. But if that express disposition had not been made, that must have passed to the residuary legatee of necessity. The question is only whether copyhold estate is well described by the expression "real estate;" and there is no doubt he meant to pass whatever interest was undisposed of in the copyhold estate.

The next point is whether by the true effect of the will, the niece's daughter dying under twenty-one, the niece herself had a seisin to her and her heirs in equity, if not at law, in the copyhold estate. It is perfectly clear upon the authorities she had no such interest, and that, attending to the scope and object of the testator, such interest was not intended, and not intended for her own sake. It is well settled in the case alluded to by counsel for the plaintiff [*Anon.* (1)], and many others that where there is an express limitation for life with a power to dispose by will, the interest is equivalent only to an estate for life, and the power is to be executed prima facie at least by will. If the party dies, the interest ceases with the life, and no one can take by transmission of interest from that person, though they might take by the power if executed. In the present case the meaning of the testator was this. He was providing anxiously in every part of his will that his niece should have the power of receiving the rents and profits from time to time for her separate use, tying up her hands from indulging her inclination against herself. He studiously confines her power of giving the premises to a power of giving by will, in its nature revocable in every period of life, the power given in that way to protect her against her own act. This is the more strong as the bequest of the £20 a year and the dividends of the £400 stock are expressly given for the niece for life, and after her death nothing was to take effect in her or anyone but by her authority. She had nothing, therefore, in point of interest but for her life. In point of authority she might by her will have made a disposition to take effect after her death.

It is then said: If the sale is not good as a sale, it shall be taken to be either something in the nature of a contract, with reference to which a purchaser for valuable consideration is to be aided, or an attempt, an act done, in or towards the execution, in respect of which this court will aid him. I do not stay to determine whether it appears that she meant to execute the power, or conceiving, and I am clearly of opinion, misconceiving, that she had the absolute interest to convey, she meant to convey that interest and that this surrender should not be anything done in execution of her power to dispose by will. The testator did not mean that she should so execute her power. He intended that she should give by will or not at all; and it is impossible to hold that the execution of an instrument or deed which, it it availed to any purpose, must avail to the destruction of that power the testator meant to remain capable of execution to the moment of her death, can be considered in equity an attempt in or towards the execution of the power: That, therefore, will not do.

The last question is whether the will is revoked? She meant to give all she could in the copyhold estate. To prove that she has not revoked that, the exact state of the title has been examined. With reference to that, the legal interest is given to two trustees. One would not accept the trust. He attended at the court and refused to accept it, and the other was admitted to the whole interest. The effect of that is that he was owner of the entire legal estate in trust for the niece for her separate use for life; and for her daughter surviving her if she should attain twenty-one and, if she died under that age, for the residuary devisee. The trustee afterwards surrenders to her the whole he could by that surrender pass to her. The effect of that is that she became entitled to the legal estate upon the same trusts after her death at least for all the other persons, as he was. Then she makes a will, observing that she has an interest and an authority, and stating her intention to be that this estate after her death shall go by virtue of her power. Afterwards, having

the whole legal estate, she surrenders the whole to the use of a person, who according to the meaning expressed is to take an interest, not only inconsistent with, but directly contrary to, the intention expressed. The question is whether that is not an effectual instrument to denote an intention that the will shall not stand. Under the circumstances I think that surrender was a revocation. The consequence is that the person who has the legal estate is a trustee for the person who would have taken if that will had not been made.

On the whole, therefore, this purchase and the lease made under it cannot stand. Another objection to the purchase is that the consideration being an annuity, it was an act which could not either in law or equity be said to be within the intention of that power.

Judgment for plaintiff.

RIDER *v.* KIDDER

[Lord Chancellor's Court (Lord Eldon, L.C.), January 25, 1805]

[Reported 10 Ves. 360; 32 E.R. 884]

Trust—Resulting trust—Property put into name of another—Presumption—Rebuttal.

If one person buys an annuity in the name of another who cannot prove that it was meant as a provision for him, a court of equity, in view of the fact of the advancement of the purchase-money between persons standing in no relation of natural affection to each other that would meet the presumption, raises a trust in the person vested with the money for the benefit of the person who paid it. The presumption may be met by circumstances tending to show that that which is prima facie a trust was intended as a gift.

Notes. The statute against fraudulent conveyances (1571) (13 Eliz. 1, c. 5) has been replaced by s. 172 of the Law of Property Act, 1925 (20 Halsbury's Statutes (2nd Edn.) 785).

Distinguished: *George* v. *Howard and Bank of England* (1819), 7 Price, 646. Considered: *Barrack* v. *McCullock*, [1843–60] All E.R. Rep. 906; *Ayerst* v. *Jenkins* (1873), L.R. 16 Eq. 275; *Re Policy No. 6402 of the Scottish Equitable Assurance Society*, [1900–3] All E.R. Rep. 316. Referred to: *Dummer* v. *Pitcher*, *Pitcher* v. *Dummer* (1833), 2 My. & K. 262; *Sims.* v. *Thomas* (1840), 12 Ad. & El. 536; *Freeman* v. *Tatham* (1846), 5 Hare, 329; *Phillips* v. *Probyn* (1899), 68 L.J.Ch. 401.

As to purchase in the name of another, see 38 Halsbury's Laws (3rd Edn.) 867, 868; and for cases see 47 Digest (Repl.) 122.

Case referred to:

(1) *Mortimer* v. *Davies* (circa 1805), cited in 10 Ves. at pp. 363, 365.

Bill by the testator's widow for an order that certain stock which had been transferred into the joint names of the testator and the defendant might be declared to have been made in trust for the testator, and other relief.

By indentures of settlement, dated Aug. 7, 1769, previous to the marriage of John Rider and Catherine Gray, John Rider covenanted with the trustees that if Catharine Gray should survive him, within twelve months next after his decease to pay her £3,000 with £4 per cent. interest for her own use, and, if there should be any issue, to pay to the trustees within the time aforesaid £2,000 with the same interest, upon trust to place it out at interest and pay the interest to Catharine Gray

for life, and after her decease as to the principal in trust for the child or children of the marriage. John Rider in 1797 purchased the sum of £2,000 consolidated 3 per cent. annuities by his general agents, and gave them a letter of attorney to receive the dividends, having transferred the stock into the joint names of himself and Anne Kidder, with whom he had an improper intercourse, and from that time until 1803 the dividends were paid by the agents to her, Rider generally residing in the East Indies till his death. He left his wife surviving him and one child by her.

The widow, having taken out administration to him, filed a bill against Anne Kidder praying that the transfer of the stock by Rider into the joint names of himself and the defendant might be declared to have been made in trust for himself, or otherwise that it might be declared to have been voluntary and fraudulent as against his creditors, and that the defendant might be decreed to transfer the fund to the plaintiff as his legal personal representative. The defendant by her answer stated that Rider informed her that he had made the purchase in contemplation of leaving England, meaning it to be a provision for her and that he thought it would be more secure in their joint names as it could not be sold or transferred without his knowledge in his life; and he requested her to join in a letter of attorney to his agents to receive the dividends, and she received the dividends always from that time. She denied that she prevailed upon him to make the transfer or that it was a trust for him.

The letters of the intestate were offered in evidence by the defendant but the plaintiff's counsel objected to them being read. One letter stated his wish that he could do more for her, but expressed his satisfaction to know that he left her independent. Another letter spoke of her £60 a year as a permanent income, with reference to the income tax. The Lord Chancellor said that the trust arose by mere presumption of law upon the advancement of the money. The letters might be read to rebut that presumption, but they amounted to no proof of anything.

Romilly and *Hart* for the plaintiff.
Richards and *Phillimore* for the defendant.

LORD ELDON, L.C.—It is said first, this is a trust; if not, secondly, that the transaction is fraudulent against creditors and that the objection upon the fraud is competent to the personal representative as such, supposing the estate is insolvent. On the first point I suspect that there is something of the nature of a trust in the transaction, to what extent it is difficult to say without some further inquiry. If the case at the Rolls [*Mortimer* v. *Davies* (1)] was purely that A. bought an annuity in the name of B., A. paying for it, and B. had no proof that it was meant as a provision for her, in this court the fact of the advancement of the purchase-money as between these persons, standing in no relation to each other that would meet the presumption, raises a trust in the person vested with the interest for the benefit of the person who paid the money. This doctrine admits some exceptions that were fully discussed in the Court of Exchequer in the case of a copyhold estate in the west of England which was bought for successive lives. The habit was to insert as feoffees the children of the purchaser. It was settled in that case that prima facie the relation will give the child an interest, and perhaps that would prevail also in favour of a wife. But the case of a child was distinguished from that of a stranger, in which there is not that natural affection that would beat down the presumption arising from the advance of the money.

If, therefore, this case depended upon the mere naked circumstance of the purchase of stock in both their names, and Rider had died immediately without any dealing or transaction upon it, I should have thought the defendant would have been a trustee for his personal representative, as she would have been for himself. But the presumption may undoubtedly be met by circumstances of enjoyment, tending to show that which prima facie is a trust was intended as a gift, and then the circumstances and the weight of each are to be examined. This

case is under very peculiar circumstances. What would have been said upon the question of trust if this lady had died first and left a personal representative? If it was an absolute trust for her it would make no difference as to the equitable interest which survived. If, therefore, there was a trust for her from the beginning, they must contend not that she took by mere survivorship, which is only as to the legal interest, but that whether she survived or not she took the whole equitable interest. A B

Are the circumstances of this case sufficient to meet the prima facie presumption? Unquestionably they are not, even as they now stand, little explained as they are, though certainly capable of explanation. It is clear that Rider, purchasing this fund in the names both of himself and the defendant, might by revoking at any time the power of attorney have prevented her from receiving the dividends, and if she had filed a bill to compel him to execute a power of attorney, suggesting that he was a trustee and attempting to prove it by the receipt of the dividends, the question would have been, why was the joint power of attorney given to his bankers, and in what manner had she been permitted to receive the whole dividends. Very slight explanation would have proved whether it was a gift from him from time to time, as long as the power should be permitted to remain, or whether her receipt of the dividends flowed from an equitable interest she was to have ab origine. So upon such a bill after her death, if she had died leaving him surviving, it would have been competent to him to show by evidence on what footing she received the dividends. On the evidence the utmost intended was to secure to her an income, and, if that only was intended, it by no means destroys the existence of trust, for, if the intention was to give her an estate for life not depending upon his will, still the capital would be his. It might turn out upon inquiry that she had enjoyed the income from it in this sense; that it was nothing more than income of his gift from time to time, as being revocable under the power of attorney; and the manner in which the banker's accounts were kept may prove that. It will be proper, therefore, to direct inquiries as to all the circumstances. C D E

Inquiries directed.

MILNES *v.* GERY

[Rolls Court (Sir William Grant, M.R.), November 24, 26, December 1, 8, 14, 1807]

[Reported 14 Ves. 400; 33 E.R. 574]

Sale of Land—Price—Essential term of concluded contract—Absence of fixed price—Power of court to grant specific performance.

A fixed price is an essential ingredient to a concluded contract for the sale of land. Without it the court cannot order the contract to be enforced by one party against the other.

Sale of Land—Price—Valuation in specified manner—Enforcement by court.

Where a contract for the sale of land contains a term that the price is to be fixed in a particular manner the court will only enforce the contract where the price has been fixed in that manner.

Sale of Land—Price—Fair valuation—Enforcement by court.

Where under the contract the sale of land is to be at a fair valuation and no particular means are prescribed, the court will adopt such means as are suitable for that purpose.

Notes. Distinguished: *Pritchard* v. *Ovey* (1820), 1 Jac. & W. 396. Explained: *Morgan* v. *Milman* (1853), 3 De G.M. & G. 24; *Clarke* v. *Westrope* (1856), 18 C.B. 765. Considered: *Tillett* v. *Charing Cross Bridge Co.* (1859), 26 Beav. 419. Applied: *Vickers* v. *Vickers* (1867), L.R. 4 Eq. 529. Distinguished: *Richardson* v. *Smith* (1870), 5 Ch. App. 648. Considered: *Hart* v. *Hart* (1881), 18 Ch.D. 670. Referred to: *Blundell* v. *Brettargh* (1810), 17 Ves. 232; *Scott* v. *Avery* (1856), 5 H.L. Cas. 811; *Collins* v. *Collins* (1858), 26 Beav. 306; *Loftus* v. *Roberts* (1902), 18 T.L.R. 532; *County Hotel and Wine Co.* v. *London and North Western Rail. Co.*, [1918] 2 K.B. 251.

As to specific performance in cases where there is uncertainty as to the price, see 36 Halsbury's Laws (3rd Edn.) 287, 288; and as to the scope of the court's jurisdiction to direct a valuation, see ibid. vol. 34, p. 235; and for cases see 40 Digest (Repl.) 16, 17.

Cases referred to:

(1) *Cooth* v. *Jackson* (1801), 6 Ves. 12; 31 E.R. 913; 2 Digest (Repl.) 552, *872*.

(2) *Hall* v. *Warren* (1804), 9 Ves. 605; 32 E.R. 738; 44 Digest (Repl.) 39, *274*.

Also referred to in argument:

Gaskarth v. *Lord Lowther* (1805), 12 Ves. 107; 33 E.R. 41, L.C.; 40 Digest (Repl) 221, *1801*.

Bill for specific performance of an agreement for the sale of land.

By indentures of lease and release, previous to the marriage of John Milnes and Mary Selina Gery, one-third part of certain estates was settled after the respective deaths of William Gery, the father of Mary Selina, and of his mother Eleanor Gery, on the husband and wife for life, and thereafter on the children of the marriage in the usual manner. The settlement contained the following proviso:

"Provided nevertheless that notwithstanding any of the uses or estates hereby created it shall and may be lawful to and for the trustees or the survivor of them, etc., at any time or times during the joint lives of the said John Milnes and Mary Selina Gery, his intended wife, or during the life of the survivor, with the consent and approbation of them, or the survivor of them, testified in writing for that purpose, by good and sufficient conveyances and assurances in the law to sell, convey and dispose of the same undivided third part of and in all and every the said manor and messuages, lands, etc., hereinbefore conveyed to the Rev. Hugh Wade Gery, for one-third part or share of such price as the entirety of the same hereditaments shall be valued at by two

independent persons, the one to be named by the said John Milnes and Mary Selina Gery during their joint lives or by the survivor of them during his or her life, and the other by the said Hugh Wade Gery; and that, if such persons so nominated should happen to disagree, then those two shall choose a third person, whose determination therein shall be final, according to the condition of a certain bond, bearing even date with the said settlement, and made from the said John Milnes to the said Hugh Wade Gery in the penal sum of £12,000, in case the said Hugh Wade Gery should choose to become the purchaser thereof; and should declare such his intention in writing six months next after the several deceases of the said William and Eleanor Gery; with a power, in case of the refusal of Hugh Wade Gery to sell to other persons."

Notice was served accordingly in due time after the decease of William and Eleanor Gery by Hugh Wade Gery upon Mr. Milnes; and the parties appointed each a person to set a value on the said estates. The persons appointed measured the premises, and held several meetings in order to determine the value, but they differed greatly in their respective estimates: the valuer of Milnes estimating the property very considerably higher than the valuer of the other party; nor were they able to agree upon any third person, who should make a final determination. The plaintiff, therefore, filed this bill to have the agreement carried into execution, praying that the notice by the defendant might be considered binding; and that a proper person or persons might be appointed by the court to make a valuation of the entirety of the said premises; or that a valuation thereof should be ascertained in such other manner as the court should direct. The defendant by his answer relied upon the incomplete state of the agreement when it broke off and also upon a waiver on the part of the plaintiff, insisting also, that no consent had been given by Mrs. Milnes.

After the argument which turned chiefly upon the circumstances insisted upon by the answer, SIR WILLIAM GRANT, M.R., desired that the case should be argued upon a point to which there had not been much reference, i.e., whether this court had any jurisdiction to do what was prayed by the bill; observing that the parties having agreed upon a particular mode of settling the price, if that mode failed by any means, it seemed that this court could not substitute another mode and no action could be maintained. That doubt occurred in *Cooth* v. *Jackson* (1), and both LORD ROSSLYN and LORD ELDON thought that the failure of the arbitration put an end to the agreement; and in *Hall* v. *Warren* (2), the point in favour of such a jurisdiction was assumed but not argued.

Alexander and *Johnson* for the plaintiff.

Sir Samuel Romilly, *Leach* and *Wingfield* for the defendant.

Dec. 14, 1807. **SIR WILLIAM GRANT, M.R.**—The more I have considered this case, the more I am satisfied that independently of all other objections there is no such agreement between the parties as can be carried into execution. The only agreement into which the defendant entered was to purchase at a price to be ascertained in a specified mode. No price having ever been fixed in that mode, the parties have not agreed upon any price. Where, then, is the complete and concluded contract which this court is called upon to execute? The price is of the essence of a contract of sale. In this instance the parties have agreed upon a particular mode of ascertaining the price. The agreement that the price shall be fixed in one specific manner, certainly does not afford an inference that it is wholly indifferent in what manner it is to be fixed. The court declaring, that the one shall take, and the other shall give a price, fixed in any other manner does not execute any agreement of their's, but makes an agreement for them upon a notion that it may be as advantageous as that which they made for themselves. How can a man be forced to transfer to a stranger that confidence, which upon a subject materially interesting to him, he has reposed in an individual of his own selection?

No substantial difference arises from the circumstance that in this case the decision may ultimately fall to an umpire, not directly nominated by the parties, as through the medium of the original nominees they had an influence upon the choice. No one could be chosen without the concurrence of the persons in whose judgment they reciprocally confided.

The case of an agreement to sell at a fair valuation is essentially different. In that case no particular means of ascertaining the value are pointed out. There is nothing, therefore, precluding the court from adopting any means, adapted to that purpose. The case in which the court has modified particular subordinate parts of an agreement falls far short of the decree that is now demanded. Perhaps some of those cases may be thought rather to require defence for the length to which they have gone, than to furnish a justification for still further extending the discretionary power of which they are instances. The court never professes to bind a man to any agreement, except that which he has made; but sometimes holds the agreement which it executes and that which he has made to be substantially the same; when to common understandings there is a very perceptible difference between them. The court, however, has never gone the length of compelling a party to buy or sell the whole subject of his agreement at a price that he has never fixed, and that was never fixed in any mode to which he has given his consent.

In *Hall* v. *Warren* (2) it was rather assumed than proved that, if Warren was competent to enter into the agreement, some means might be found to carry it into execution. That was so little discussed that the attention of the court was not drawn to the point; and the doubt recently thrown upon that point in *Cooth* v. *Jackson* (1) was not at all adverted to. I state it as a doubt only, as the decision was ultimately upon a different ground; but neither LORD ROSSLYN nor LORD ELDON conceived that the court could be substituted for the arbitrators to make a division of the estate. The division of an estate does not imply more personal confidence, or which other persons will be less capable of executing, than the ascertainment of value; and the admission there was that the defendant was instrumental in preventing the award by private instructions to the arbitrator. On the principle that a fixed price was an essential ingredient in a contract of sale, the ancient Roman lawyers doubted, whether an agreement that did not settle the price was at all binding. JUSTINIAN'S INSTITUTES and the CODE state that doubt; and resolve it by declaring that such an agreement should be valid and complete when and if the party to whom it was referred should fix the price: otherwise it should be totally inoperative: "quasi nullo pretio statuto;" and such clearly is the law of England.

I do not know that upon this point there can be any difference between decisions at law and in equity. If you go into a court of law for damages, you must be able to state some valid legal contract which the other party wrongfully refuses to perform: if you come to a court of equity for a specific performance, you must also be able to state some contract, legal or equitable, concluded between the parties, which the one refuses to execute. In this case the plaintiff seeks to compel the defendant to take this estate at such price as a Master of this court shall find it to be worth, admitting that the defendant never made that agreement. My opinion is that the agreement he has made is not substantially or in any fair sense the same with that; and it could only be by an arbitrary discretion that the court could substitute the one in the place of the other.

This bill must, therefore, be dismissed without costs.

Bill dismissed.

BLAGDEN *v.* BRADBEAR

[ROLLS COURT (Sir William Grant, M.R.), July 11, 26, 1806]

[Reported 12 Ves. 466; 33 E.R. 176]

Auction — Sale of land — Memorandum of contract — Auctioneer's receipt for deposit—Need to contain terms of contract—Inclusion of price.

Section 4 of the Statute of Frauds (replaced by s. 40 (1) of the Law of Property Act, 1925) **held** to apply to sales of land by auction (other than sales by decree of the court). The auctioneer's receipt for the deposit can be a note or memorandum of the agreement for sale within the statute, but it must contain in itself, or by reference to something else must show, what the agreement is. The price payable for the property is a very material term of the agreement to be stated in the receipt.

Notes. Applied: *Wood* v. *Midgley* (1854), 2 Sm. & G. 115. Referred to: *Shardlow* v. *Cotterill* (1881), 51 L.J.Ch. 353.

As to the omission of material terms from a memorandum, see 36 HALSBURY'S LAWS (3rd Edn.) 288, 289; and for cases see 44 DIGEST (Repl.) 40, 41. As to the requirements of contracts entered into by auctioneers, see 2 HALSBURY'S LAWS (3rd Edn.) 23; and for cases see 3 DIGEST (Repl.) 7 et seq. As to exceptions to requirement of memorandum, see 34 HALSBURY'S LAWS (3rd Edn.) 208, 209; and for cases see 40 DIGEST (Repl.) 44, 45.

Cases referred to:

(1) *Simon* v. *Motivos* (1766), 3 Burr. 1921; 97 E.R. 1170; sub nom. *Simon* v. *Metivier or Motivos*, 1 Wm. Bl. 599; 3 Digest (Repl.) 7, *48*.

(2) *A.-G.* v. *Day* (1749), 1 Ves. Sen. 218; 27 E.R. 992, L.C.; 44 Digest (Repl.) 105, *848*.

Also referred to in argument:

Mortlock v. *Buller* (1804), 10 Ves. 292; 32 E.R. 857, L.C.; 44 Digest (Repl.) 7, *19*.

Buckmaster v. *Harrop* (1807), 13 Ves. 456; 33 E.R. 365, L.C.; 3 Digest (Repl.) 8, *58*.

Coles v. *Trecothick* (1804), ante p. 14; 9 Ves. 234; 1 Smith, K.B. 233; 32 E.R. 592; 3 Digest (Repl.) 10, *76*.

Bill for specific performance.

This bill prayed specific performance of an agreement for the purchase of a freehold estate belonging to the defendant which was sold by auction, and knocked down to the plaintiff, who was the highest bidder at the price of £805. Among other usual conditions of sale, it was stipulated that the purchaser should pay a deposit of £15 per cent., and sign an agreement for payment of the remainder of the purchase-money on or before Oct. 10, 1805; and that half the duty should be paid by the purchaser, and half by the seller.

The answer, admitting the conditions of sale, denied that the auctioneer was authorised by the defendant to sign any memorandum or note in writing concerning the estate or any receipt for money; and stated that, so far from having given such authority, the defendant immediately before the sale told the auctioneer that £1,000 was the lowest price at which he would suffer it to be sold; that the auctioneer took down that sum; and as soon as the estate was knocked down to the plaintiff for £805, the defendant publicly in the sale-room objected and informed the plaintiff of the instructions he had given; and that the auctioneer must have been under some mistake in knocking it down at £805.

The auctioneer by his depositions stated that on June 15, 1805, he, by order of the defendant, put up the estate to sale by auction. About two hours before the sale the defendant told the deponent that the premises should not be sold for less than 1,000 guineas. The deponent replied that the defendant should appoint

somebody to bid for him. The defendant said that he should not appoint anybody, for he should be there himself. About an hour before the sale the defendant told the deponent that if £1,000 could be got for the premises they should go, of which sum the deponent made a memorandum. The deponent procured a person to bid for the defendant: but he again said that, as he should be there himself, he should not want anyone. At the sale the defendant bid £800, and had full opportunity to make a further bidding: the deponent declaring, after the bidding of £805 by the plaintiff, that he should count ten (according to the usual mode) and if no one should bid higher in that interval, the plaintiff would be declared the real purchaser; which the deponent did accordingly; and, no person having bid, knocked down the lot. As soon as it was knocked down the defendant objected to the sale publicly in the sale-room, saying the premises should not go for that money; that they were not to go for less than £1,000; and he would not complete the sale. The deponent had no authority from the defendant to sign any agreement: but it is customary for auctioneers to do so on the part of the person for whom they are employed. Immediately after the sale the plaintiff offered to pay the deposit; which the deponent refused to take as he then had money in his hands of the plaintiff's to a greater amount. The plaintiff, after the sale, in the sale-room signed a note, endorsed on the conditions of sale. About a month or two after the sale the plaintiff paid the deponent a deposit of £15 per cent. and half the auction duty, amounting together to £134 8s. 4d., for which the deponent gave a receipt.

Several other witnesses stated what passed at the sale to the same effect; that the defendant immediately remonstrated, insisting that it was no sale; that there was a mistake and no advantage should be taken of it.

Alexander and *Leach* for the plaintiff.
Richards and *Trollop* for the defendant.

SIR WILLIAM GRANT, M.R.—In opposition to the specific performance prayed by this bill, the Statute of Frauds is insisted on. The plaintiff endeavours to repel that defence by contending in the alternative either that the auctioneer's receipt is a sufficient agreement in writing, or that an agreement in writing is not necessary as the provisions of the statute do not affect sales by auction. The proposition that the auctioneer's receipt may be a note or memorandum of an agreement within the statute is not denied, but for that purpose the receipt must contain in itself, or by reference to something else must show, what the agreement is.

In the present instance one very material particular, the price to be paid for this estate, does not appear upon the receipt, for the amount of the deposit, unless we know the proportion it bears to the price, does not show what the price is, and the receipt contains no reference to the conditions of sale, to entitle us to look at them for the terms. The plaintiff says that the defendant admits the terms, but according to the modern, and I think the correct, doctrine, it is immaterial what admissions are made by a defendant insisting on the benefit of the statute, for he throws it upon the plaintiff to show a complete written agreement, and it can no more be thrown upon the defendant to supply defects in the agreement than to supply the want of an agreement.

As to the doctrine that the Statute of Frauds does not apply to sales by auction, there is no decision; for though in *Simon* v. *Metivier* (1) the judges did express their opinion, the ground of their decision was that the memorandum of the auctioneer answered the requisitions of the statute. The words of the statute are large enough to comprehend every contract by whatsoever preliminary means, whether verbal communication or bidding at an auction, it may have been brought about; and it is not clear to me that sales by auction are out of the mischief against which the statute meant to guard.

From the public nature of a sale by auction it does not follow that what passes

there must be matter of certainty: so far from it, that I never saw more contradictory swearing than in these cases, where attempts were made to introduce evidence of what was said or done during the course of the sale. Though ordinarily the terms and conditions are reduced to certainty by a written or printed particular, yet, if it is true that the statute does not affect any sales by auction, the whole of the terms might be left to parol evidence, at the hazard of all the uncertainty of perjury, which the statute intended to exclude. I should, therefore, hesitate to say the policy of the statute does not extend to such sales. Still more should I hesitate to say that the words of the statute according to the true construction do not include sales by auction. In *A.-G.* v. *Day* (2) LORD HARDWICKE takes occasion to state the grounds upon which sales of a particular description, viz., under a decree of the court, are necessarily excepted. It seems that LORD HARDWICKE had no idea that sales by auction generally are excepted; for the grounds upon which his Lordship states the exemption of judicial sales are not applicable to other sales by auction. I am not warranted, therefore, to say that an agreement in writing is not necessary in this case; and I have already said that there is not a sufficient agreement in writing.

The consequence is that this bill must be dismissed, but without costs.

Bill dismissed.

CAMPBELL *v.* WILSON

[COURT OF KING'S BENCH (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), February 4, 1803]

[Reported 3 East, 294; 102 E.R. 610]

Easement—Right of way—User—User under mistaken view of rights of parties.

Where the enjoyment of a right of way is shown to have originated by reason of a mistaken view of their rights held by the parties there is no enjoyment as of right on which a prescriptive claim to the easement can be based.

Notes. Applied: *Gray* v. *Bond* (1821), 2 Brod. & Bing. 667. Considered: *Rivers* v. *Adams* (1878), 3 Ex. D. 361; *London Corpn.* v. *Low* (1879), 49 L.J.Q.B. 144; *Public Works Commissioners* v. *Angus & Co.*, *Dalton* v. *Angus & Co.*, [1881-5] All E.R. Rep. 1; *Simpson* v. *Godmanchester Corpn.* (1895), 64 L.J.Ch. 837; *Gardner* v. *Hodgson's Kingston Brewery Co.* (1903), 72 L.J.Ch. 558; *A.-G.* v. *Horner* (*No. 2*), [1913] 2 Ch. 140. Referred to: *Dewhurst* v. *Wrigley* (1834), Coop. Pr. Cas. 329; *Benjamin* v. *Andrews* (1858), 5 C.B.N.S. 299; *Palmer* v. *Guadagni* (1906), 95 L.T. 258; *R.P.C. Holdings, Ltd.* v. *Rogers*, [1953] 1 All E.R. 1029.

As to prescription at common law, see 12 HALSBURY'S LAWS (3rd Edn.) 546 et seq.; and for cases see 19 DIGEST (Repl.) 62 et seq. As to presumption of a right of way after public use for twenty years, see Highways Act, 1959, s. 34 (39 HALSBURY'S STATUTES (2nd Edn.) 450-452).

Case referred to:

(1) *Holcroft* v. *Heel* (1799), 1 Bos. & P. 400; 126 E.R. 976; 33 Digest (Repl.) 451, *29*.

Also referred to in argument:

Lewis v. *Price* (1761), 2 Wms. Saund. 175 a; 85 E.R. 926; 19 Digest (Repl.) 71, *393*.

Dougal v. *Wilson* (1769), 2 Wms. Saund. 175 a; 85 E.R. 926; 19 Digest (Repl.) 71, *394*.

Darwin v. *Upton* (1786), 2 Wms. Saund. 175 c; 85 E.R. 927; 19 Digest (Repl.) 63, *351*.

Griffith v. *Matthews* (1793), 5 Term Rep. 296; 101 E.R. 166; 19 Digest (Repl.) 503, *3396*.

Rule Nisi obtained by the plaintiff to set aside a verdict for the defendant on the ground that the trial judge misdirected the jury in telling them that they might presume a grant of a right of way from an adverse user of it for above twenty years, though originating in mistake.

In an action of trespass charging the defendant with breaking and entering the plaintiff's close, Bryan Grey's Moss Dale, Warton, Lancashire, the defendant pleaded, inter alia, first, a prescriptive occupation-way from a lane called Storr's Lane over the locus in quo to a moss dale of the defendant's at all times and with carriages, etc., which prescription was traversed by the replication, and issue taken on it; and secondly, that Bryan Grey was seised in fee of the locus in quo, and that one Joseph Wilson (under whom the defendant made title by devise) was at the same time seised in fee of an adjoining Moss Dale, and that by deed (lost by time and accident) Bryan Grey, in consideration of a competent sum, granted to Joseph Wilson and his heirs a way from Storr's Lane into, through and over the locus in quo to Joseph Wilson's moss dale at all times, etc., for the occupation of the same moss dale. The replication traversed the grant, on which issue was taken; and also made a new assignment, to which the defendant pleaded not guilty. At the trial before Chambre, J., the only question arose on the right of way, the plaintiff contending that the defendant's right depended solely on an award made under an Inclosure Act of 17 Geo. 3, c. 79, and that the way into Storr's Lane allotted to him under that award was over an adjoining piece of ground, formerly belonging to one Whinray, and not over the locus in quo. A printed copy of the Act was given in evidence by the plaintiff, whereby it appeared that certain commissioners were appointed for dividing and inclosing the commons, wastes and two mosses within the manor of Ycalands in the parish of Warton. The commissioners were to set out all proper public highways, and also private ways, over the inclosures; and it was provided that, after the making such public and private ways, it should not be lawful for any person to use other public or private ways than such as should be so set out. By another clause, the commissioners were required to make an award in writing, specifying the several allotments made, and the public and private ways set out; which award was to be conclusive on all parties. And by another clause, after such award made, all former rights, interests, easements, claims and demands whatsoever on any of the commons, mosses, etc., were for ever barred and extinguished. The award made under the Act, dated Dec. 18, 1778, and enrolled Jan. 12, 1779, was then proved, in which were described five moss dales (or inclosures out of one of the mosses), one of which was the locus in quo, running parallel to each other, and bounded on the north by Storr Lane, and on the south by certain other inclosures, in respect of which so many respective occupation-ways were claimed over the five moss dales. Over one of the five, namely, Thomas Whinray's Moss Dale, an occupation-road was assigned to John Wilson (by mistake for Joseph Wilson, the person under whom the defendant claimed) to go to and from Storr Lane to his the said John Wilson's Moss Dale; and over the locus in quo therein called Bryan Grey's Moss Dale was assigned another similar occupation-way to Joseph Wilson (by mistake for John), in right of another close to the south adjoining and parallel to the defendant's close.

The rest of the evidence on either side consisted principally of user of the several occupation-ways by this or that occupier of one or other of the closes which lay to the south of the five moss dales first mentioned in order to communicate with Storr

Lane. But the result clearly was that the occupiers of the defendant's close had always used the occupation-way over the locus in quo for upwards of twenty years, and indeed before the making of the award; and that they had not used the way which had been set out for the defendant's estate by the award, and which led over Whinray's Moss Dale. Except for a period of about a year or two (which happened about eighteen or nineteen years ago) when there was a union of occupation of the plaintiff's and defendant's close, the evidence went to show that that user of the way over the plaintiff's close by the occupiers of the defendant's close was adverse. For when, about fourteen years ago, a ditch was cut between the plaintiff's and defendant's close, a piece was left uncut for the defendant's tenant to pass over into the plaintiff's moss dale, and when the latter was ploughed, room enough was left for a road to communicate with the defendant's close; and, when some turf was set in the way, it was twice removed by the defendant's servants. No leave was proved to have been at any time asked by them, nor was any interruption insisted on till about two years ago. That evidence was insisted on by counsel for the defendant as establishing an uninterrupted adverse enjoyment of the way for twenty years and upwards before the action brought, which they relied on as a ground for the jury to presume the grant pleaded by the defendant in his last justification.

CHAMBRE, J., in summing-up the evidence, observed to the jury that it seemed probable that the defendant's enjoyment of the way over the plaintiff's moss dale after the award might originate in mistake; but that, however that might be, if they were satisfied that the enjoyment was adverse and that it had continued twenty years and upwards before the action, it was a sufficient ground for their presuming the grant pleaded by the defendant. The use of a road as a matter of right by those who claimed it and submitted to as a matter of right by the possessor of the land over which it was used was to be considered as an adverse enjoyment. If they believed the defendant's witnesses, the possession was adverse, not having been interrupted, and being attended with other circumstances to show how the parties themselves understood it, particularly in the instances of the defendant's servants removing the turf which obstructed the way and leaving in the ditch which was cut between the plaintiff's and the defendant's close a solid piece of ground uncut, for no other use than to admit of the passage for the defendant's carts into the locus in quo. As another circumstance, the non-user of the defendant's right of way over Whinray's close under the award. However, if the jury were satisfied from the whole of the evidence that the defendant's enjoyment had been only by leave or favour, or otherwise than as under a claim or assertion of right, it would repel the presumption of a grant, and in that case, or if they thought that it had not been enjoyed adversely for twenty years, they must find for the plaintiff. The jury found for the defendant. The plaintiff obtained a rule nisi to set it aside.

Serjeant Cockell and *Wood* for the defendant, showed cause against the rule.
Park and *Holroyd* for the plaintiff, in support of the rule.

LORD ELLENBOROUGH, C.J.—We must govern our opinion by the evidence which was given in the cause, and on the learned judge's direction with reference to the evidence. Though by possibility the parties might in fact have acted on a mistake of the award, yet on the evidence given nothing appears to show that they referred their acts to the award; and, therefore, it comes to the common case of adverse enjoyment of a way for upwards of twenty years without anything to qualify that adverse enjoyment. On looking into the award, we might possibly suppose that the use of the way originated by mistake, but no evidence was given of any fact accompanying the enjoyment to show that the parties acted on such a mistake. There was, therefore, no reason why the jury should not make the presumption, as in other cases, that the defendant acted by right; and that was in substance the direction of the learned judge. It might indeed be too much to say, in *Holcraft* v. *Heel* (1), that the adverse user of the neighbouring market for

twenty years was a bar to the action by the grantee of the crown. In strictness it was not; because even after that period the Attorney-General might have filed an information against the party for usurping the franchise. But certainly the evidence in this case was sufficient to warrant the jury in presuming a grant of the right of way.

GROSE, J.—The motion for a new trial was grounded on the supposed misdirection of the learned judge. But it appears that, in substance, he left the question to the jury on the evidence whether the enjoyment originated under a grant or in any other manner, and, therefore, I cannot say that, on this evidence, the jury might not make the presumption which they have done; though, had I been one of them, I do not know that I should have dared to do so. They have, however, found the fact of the grant. As to the question of law, I agree with *Holcroft* v. *Heel* (1), as it has been explained by LE BLANC, J., but no further.

LAWRENCE, J.—No doubt but that adverse enjoyment of a right of way for twenty years unexplained is evidence sufficient for the jury to found a presumption that it was a legal enjoyment; and such in effect was the opinion of the learned judge in his direction to them. But it has been said that, if the enjoyment were shown to have originated in mistake, however adverse it may have been, that is against the presumption and that the learned judge misled the jury in this respect; but no facts appear to warrant this objection, otherwise it might be very material to be considered. For if in exercising the right of way from time to time it had appeared that the party had asserted his right to be grounded on the award, though it were exercised ever so adversely, I do not know how the jury would be warranted in referring it to any other ground than what the party himself insisted on at the time. The weak part of the plaintiff's case is that it does not appear by the evidence that the enjoyment of the way did arise from mistake. Then if there were an adverse possession for above twenty years, and not explained by any evidence, why might not the jury presume a grant? The parties interested might have found the way in question more convenient than that allotted under the award. On the whole of the evidence it appears that for above twenty years the defendant has been using a road which he could have had no right to use but by grant; and the case having been properly left to the jury on that evidence, I cannot say that they have done wrong in finding with the enjoyment for so long a period.

LE BLANC, J.—Unless the jury could, in the words of the report, refer the the enjoyment for so long a time to leave or favour, or otherwise than as under a claim or assertion of right, and indeed unless it could be referred to something else than adverse possession, I think that such length of enjoyment is so strong evidence of a right that the jury should not be directed to consider small circumstances as founding a presumption that it arose otherwise than by grant. In *Holcroft* v. *Heel* (1), the Court of Common Pleas thought the adverse possession for above twenty years so strong evidence that EYRE, C.J., ought to have left it to the jury to find a grant of the market from the Crown. Therefore, if the possession be adverse, the jury are to take it as a strong ground whereon to found the presumption of a grant. In this case, it is only from suspicion that we are called on to refer it to the award and to suppose that the parties themselves by mistake considered it to originate from thence; but no evidence was given to show that they referred the use of the way to the award and, therefore, there was no reason why the jury should not have presumed as they have done.

Rule discharged.

GRAHAM *v.* TATE

[Court of King's Bench (Lord Ellenborough, C.J., Le Blanc and Bayley, JJ.), June 22, 1813]

[Reported 1 M. & S. 609; 105 E.R. 228]

Distress—For rent—Deductions from rent—Tenant's right to deduct landlord's property tax—Agreed sum for repairs.

The tenant of premises under a lease for a year and at a rent payable half-yearly agreed to pay all taxes except the landlord's property tax, which the landlord agreed to allow, and to pay out £20 in repairs, which the landlord also agreed to allow. The landlord distrained for half a year's rent and sold to the whole amount without any deduction either for repairs or for the property tax which he knew that the tenant had paid to the collector.

Held: the tenant was entitled to recover in respect of the property tax, but not of the repairs in an action against the landlord for money had and received.

Notes. Landlord's property tax has been abolished by the Finance Act, 1963, s. 14: 43 Halsbury's Statutes (2nd Edn.) 448.

Distinguished: *Spragg* v. *Hammond* (1820), 2 Brod. & Bing. 59. Considered: *Drughorn* v. *Moore*, [1924] A.C. 53. Referred to: *Cumming* v. *Bedborough* (1846), 10 J.P. 442; *Yates* v. *Eastwood* (1851), 6 Exch. 805.

As to for what amount distress may be made, see 12 Halsbury's Laws (3rd Edn.) 123 et seq.; and for cases see 18 Digest (Repl.) 306 et seq. As to deductions from rent, see 23 Halsbury's Laws (3rd Edn.) 547 et seq.; and for cases see 31 Digest (Repl.) 266 et seq.

Rule Nisi obtained by the plaintiff to set aside a nonsuit and have the verdict entered in his favour in an action of assumpsit for money paid, laid out, and expended, money had and received and on an account stated.

The plaintiff had been tenant to the defendant of a house and land under a lease for a year at a certain rent payable half-yearly, the tenant to pay all taxes except the landlord's property tax, which the defendant agreed to allow. The tenant agreed to lay out £20 in repairs, which the defendant also agreed to allow. The last half-year's rent having been in arrear, the defendant distrained, and sold to the whole amount without any deduction either for repairs or for the property tax which had before that time been paid by the plaintiff to the collector, and was known to the defendant to have been so paid. At the trial before Serjeant Clayton it was objected for the defendant that the money was not recoverable in that form of action. As to the property tax, the statute 46 Geo. 3, c. 65, Sched. A, No. 4, Rule 9 [Income Tax Act, 1806: repealed by S.L.R., 1872] had provided that it might be deducted out of the first payment thereafter to be made on account of rent; and if this action were maintainable, every landlord who had not allowed the property tax would be liable to an action by his tenant without notice. The learned serjeant nonsuited the plaintiff, giving liberty to move in order to bring the question before the court. The plaintiff obtained a rule nisi accordingly.

Hullock for the defendant, showed cause against the rule.

Barrow for the plaintiff, supported the rule.

LORD ELLENBOROUGH, C.J.—The tenant was obliged to pay the full amount of the rent under the distress if the landlord would not consent to make the deduction in respect of the property tax, and it does not appear to me that he has any remedy except by bringing an action. If so, the only question is as to the form of the action. It seems to me that he may wave the tort and bring an action for money had and received if, in the result, the landlord has got money into his pocket which does not belong to him. If any consequential injury had been sustained, damages for such injury must have been recovered in another form of action.

LE BLANC, J.—The landlord having distrained on the goods for rent, the tenant, in order to redeem them, was obliged to pay what he demanded. I should doubt whether the commissioners could have compelled the landlord to refund.

LORD ELLENBOROUGH, C.J., added that the court was of opinion in favour of the defendant on the question of repairs.

Rule absolute.

HILL *v.* BARCLAY

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), March 1, 2, 1810]

[Reported 16 Ves. 402; 33 E.R. 1037]

Specific Performance—Landlord and tenant—Covenant in lease—Breach of covenant to repair—Non-payment of rent.

An order for specific performance will not be granted for the failure to comply with a covenant to repair contained in a lease, the remedy for which lies in damages. The position with regard to non-payment of rent is different, and a tenant will be forced to comply with that covenant.

Notes. Referred to: *Belgravia Insurance Co., Ltd.* v. *Meah*, [1963] 3 All E.R. 828.

As to remedies for breach of covenant to repair, see 23 HALSBURY'S LAWS (3rd Edn.) 587 et seq., and as to breach of other covenants, see ibid. 598–601; and for cases see 31 DIGEST (Repl.) 366 et seq.

Cases referred to:

(1) *Wadman* v. *Calcraft* (1804), 10 Ves. 67; 32 E.R. 768; 31 Digest (Repl.) 535, *6595*.

(2) *Sanders* v. *Pope* (1806), 12 Ves. 282; 33 E.R. 108, L.C.; 20 Digest (Repl.) 549, *2572*.

(3) *Hack* v. *Leonard* (1724), 9 Mod. 91.

(4) *Webber* v. *Smith* (1689), 2 Vern. 103; 1 Eq. Cas. Abr. 115, pl. 14; 23 E.R. 676; 31 Digest (Repl.) 551, *6714*.

Motion for injunction.

The plaintiff was tenant for years under the defendant with covenants to lay out £150 within a given time, to keep the premises in repair; to leave them in repair at the end of the term; that it should be lawful for the defendant twice in the year to enter and survey the premises; and to require the necessary repairs to be done within three calendar months; and a right of entry was reserved upon breach of any of the covenants.

An ejectment being brought by the landlord assigning various breaches of the covenant to repair this motion was made for an injunction.

Sir Arthur Piggott, *Richards* and *William Agar*, in support of the motion.
Sir Samuel Romilly and *Wingfield* for the defendant.

LORD ELDON, L.C.—With regard to the case decided by LORD ERSKINE (*Sanders* v. *Pope* (2)), upon a covenant to lay out £200 in repairs within a given time, it would not become me at present to say more than that I am inclined to think considerable arguments may be urged against the relief given in that instance. The judgment delivered by LORD ERSKINE, which is the more valuable as he comments upon all the cases that were cited, goes a length (extra-judicial certainly, the circumstances not

calling for it) which would reach this case: a general covenant to repair. As to *Wadman* v. *Calcraft* (1), the particular circumstances did not require me or the Master of the Rolls to state the opinion that we did state in substance, though shortly, upon the doctrine which must be applied to the case now before me; that a court of equity would not relieve against a breach of a general covenant to do repairs; the relief being sought upon no other ground than an ejectment brought upon the clause as to non-payment of rent.

As to the circumstances of this case, besides the general covenant to keep the premises in repair and to leave them in repair at the end of the term, the landlord under the other distinct covenant had a right to enter upon any two days of the year he thought fit, whether the worst or the best time for doing repairs; to require the necessary repairs to be done within three calendar months; with a right of entry upon breach of either of those distinct covenants: the one, to repair generally: the other, according to requisition. That requisition might have been made in February, 1809, when the tenant was living: but the landlord was under no obligation to make it; as without taking that remedy, he might have maintained an ejectment, assigning as a breach the fact that the premises were out of repair. The particular delivered has no reference to requisition upon entry but goes upon the general want of repair, not adverting to that particular covenant; and the principle, upon which the motion is made admits that the landlord can recover at law.

The first difficulty upon the cases decided is that, the plaintiff proposing to give judgment at law without giving me more information, I shall not know, when the application may be made hereafter to stay execution, whether the recovery was for not mending a window or for the utter ruin of the premises; if all the breaches, stated in the particular should be proved. There is no ground for relieving a tenant, whose conduct with reference to his covenant has been gross and ruinous, that the landlord may be placed in the same situation by afterwards putting the premises in sufficient repair. How can it be ascertained that the subsequent repairs do put the landlord in the same state? That sort of speculation, therefore, has never been considered as affording a ground for relief. The object of such a covenant is that the landlord shall have that species of security, which is the result of keeping the premises from time to time in that state which the covenant requires. Before I interfere, therefore, to stay the execution, I must have an admission of the state of the property; which forms the right of the landlord under this instrument to recover the possession of the premises.

The next consideration is what is to be done, supposing that I knew the facts; disposing of this upon a mere motion; and finding this case of *Sanders* v. *Pope* (2); and I confess I entertain great doubt upon the subject. See how it stood before that decision. The Landlord and Tenant Act, 1730, determines no case except that of rent; upon which relief is given at law, as well as in equity; and the statute expressly excludes any further relief in equity. The relief in that case of rent is given perhaps upon too loose a ground, viz., payment with interest, which by no means puts the party in exactly the same situation as if the rent had been paid at the time stipulated: that doctrine of a court of equity being contradicted by general experience. The situation of the landlord is, however, very different as to rent and as to these other covenants. He may bring an ejectment upon non-payment of rent: but he may also compel the tenant to pay the rent. He cannot have that specific relief with regard to repairs. He may bring an action for damages, but there is a wide distinction between damages and the actual expenditure upon repairs, specifically done. Even after damages recovered the landlord cannot compel the tenant to repair; but he may bring another action. The tenant, therefore, standing those actions, may keep the premises until the last year of the term; and from the reasoning of *Hack* v. *Leonard* (3) the conclusion is that the most beneficial course for the landlord would be that the tenant, refraining from doing the repairs until the last year of the term, should then be compelled to do them.

The difficulty upon this doctrine of a court of equity is that there is no mutuality

in it. The tenant cannot be compelled to repair. This court, according to Lord Thurlow's opinion, would not entertain a bill for that purpose; and is the tenant to have the option, against the will of the landlord, of keeping the lease upon those terms, from time to time breaking the covenant which he cannot be compelled to perform and avowing that he will not fulfil his obligations? Even with regard to a covenant to lay out a sum of money within five years, how can I estimate whether, if laid out in the sixth year, that will be equally beneficial to the landlord? As to the old cases, it is very difficult to know what to do with them. In *Webber* v. *Smith* (4) both reports represent the relief to be upon undertaking to do the repairs. How the relief was actually to be given, what became of it, we are not informed. Probably nothing more was done. This is a very dangerous jurisdiction. Very little information upon it is to be collected from ancient cases; and scarcely any in modern times. At least, I must, before I stay the execution, know the fact what was the state of these premises and their want of repair when the ejectment was brought. Taking it that all these breaches of covenant assigned were proved, there is no ground for relief. If, the premises having been suffered to fall much out of repair and the landlord making the requisition to repair, the tenant refused to comply, I cannot perceive any pretence for applying to a court of equity.

DUKE OF NORFOLK *v.* WORTHY

[Court of King's Bench (Lord Ellenborough, C.J.), June 2, 1808]

[Reported 1 Camp. 337]

Agent—Contract negotiated on behalf of undisclosed principal—Competency of principal to sue on contract—Purchase of land—Deposit paid by agent of purchaser—Breach of conditions of sale—Recovery of deposit by purchaser.

Where the money of a principal is paid through the medium of an agent and the contract under which it is paid is rescinded it may he recovered back by the principal.

The agent of the vendor, the owner of a landed estate, entered into an agreement for the sale of it with one H., who appeared to act on his own account, but in fact was the agent of the plaintiff. The vendor's agent and H. bound themselves in a penalty for the performance of the agreement, and H. paid to the agent part of the purchase money as a deposit.

Held: upon a breach of the conditions of sale on the part of the vendor, an action for money had and received lay at the suit of the plaintiff against the vendor to recover back the deposit without proof of the money being paid over to the vendor by his agent.

Sale of Land—Misdescription—Rescission of contract—Misstatement to increase value of premises—Condition that no error or misstatement in particulars shall vitiate sale, but shall be allowed for in purchase-money.

If it is provided by conditions of sale that any error or misstatement in the particulars shall not vitiate the sale, but that an allowance shall be made for it in the purchase-money, this will be extended only to any error or misstatement inserted through ignorance or inadvertence, and the sale will be vitiated by a misstatement introduced with a view to raise the apparent value of the premises: per Lord Ellenborough, C.J.

Notes. Distinguished: *Bickerton* v. *Burrell* (1816), 5 M. & S. 383. Considered: *Leach* v. *Mullett* (1827), 3 C. & P. 115; *Flight* v. *Booth*, [1824–34] All E.R. Rep.

43. Applied: *Taylor* v. *Bullen* (1850), 5 Exch. 779. Referred to: *Wright* v. *Wilson* (1832), 1 Mood. & R. 207; *Humble* v. *Hunter* (1848), 12 Q.B. 310; *Ellis* v. *Goulton*, [1893] 1 Q.B. 350.

As to contracts made by an agent, see 1 HALSBURY'S LAWS (3rd Edn.) 215–221, and as to misdescription of property see ibid., vol. 34, pp. 251–255. For cases see 1 DIGEST (Repl.) 658 et seq., 40 DIGEST (Repl.) 104 et seq.

Action for money had and received to recover back a deposit upon the sale of an estate. The defendant denied liability.

The estate in question, the property of the defendant, was advertised for sale as consisting of 486 acres of land, situate between London and Brighton, being about one mile from Horsham and four from Crawley. Among the conditions of sale was the following:

"If through any mistake the premises should be improperly described, or any error or misstatement be inserted in this particular, such error shall not vitiate the sale thereof, but the vendor or purchaser, as the case may happen, shall pay or allow a proportionate value according to the average of the whole purchase-money as a compensation either way."

The sale was to have taken place by auction on Dec. 21, 1807, but on Dec. 15 a written agreement was entered into between J. Richardson, on the behalf of the defendant, and J. Harting who then appeared as a principal, whereby the defendant was to convey the premises to Harting on or before Jan. 20, 1808, following, for £1,575 to be paid to Richardson on the execution of the conveyance. For the true performance of the agreement Richardson and Harting bound themselves to each other in the penalty of £500. A deposit was paid by Harting to Richardson of 300 guineas. The deposit being paid, Harting intimated for the first time, that he had not purchased the estate for himself, but for the Duke of Norfolk. Various steps were taken for carrying the agreement into execution, but on Jan. 19 Harting informed Richardson that the duke would not complete the purchase, as the estate, instead of being only one mile from Horsham was between three and four.

Garrow and *Gurney*, for the plaintiff, contended that it constituted a material variance from the particular so that the contract of sale was vitiated, and the deposit was recoverable as money had and received.

Serjeant Pell (*Comyn* with him) for the defendant, objected that the action ought to have been brought in the name of Harting. He alone appeared as purchaser on the face of the agreement, and until after it had been executed and the deposit paid, the Duke of Norfolk's name had not been mentioned. Harting, therefore, was to be considered as the principal. Against him only, and not against the Duke, an action to recover the penalty would have lain had a proper conveyance been tendered and refused.

LORD ELLENBOROUGH, C.J.—On the agreement Harting only may be liable, but the question here is whose money was paid as a deposit. If it was the money of a principal paid through the medium of an agent, it may be recovered back by the principal upon the contract under which it was paid being rescinded. I, therefore, think that the action is rightly brought in the name of the present plaintiff.

Serjeant Pell addressed himself to the merits of the cause, and insisted that the effect of the misdescription was saved by the condition which provided that no error or misstatement should vitiate the sale.

LORD ELLENBOROUGH, C.J., said that in cases of this sort, he should always require an ample and substantial performance of the particulars of sale unless they were specifically qualified. Here there was a clause inserted providing that an error in the description of the premises should not vitiate the sale, but

an allowance should be made for it. This he conceived was meant to guard against unintentional errors, not to compel the purchaser to complete the contract if he had been designedly misled. His Lordship, therefore, left it to the jury whether this was merely an erroneous misstatement or the mis-description was wilfully introduced to make the land appear more valuable from being in the near neighbourhood of a borough-town. In the former case the contract remained in force, but in the latter case the plaintiff was to be relieved from it, and was entitled to recover back his deposit.

The jury returned a verdict in favour of the plaintiff.

In the ensuing term *Serjeant Pell* moved for a new trial on the ground that the action should have been brought in the name of Harting and that it should have been brought against Richardson, but the judges were all of opinion, that the deposit was to be considered the money of the Duke of Norfolk, and that, being paid to the agent of the defendant, it was money had and received by the latter to the plaintiff's use. They, therefore, refused a rule to show cause.

Rule refused.

HENFREE *v.* BROMLEY

[COURT OF KING'S BENCH (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), May 2, 1805]

[Reported 6 East, 309; 2 Smith, K.B. 400; 102 E.R. 1305]

Arbitration—Award—Alteration—Change of sum awarded after completion of award—Avoidance of award as amended.

An arbitrator made and signed his award on the date provided in the agreement to refer. He placed the award in the hands of his attorney who notified the parties that the award was executed and ready for delivery. On the same day the arbitrator recovered the award from the attorney, struck through the figure which he had awarded that the defendant should pay to the plaintiff, and substituted another sum. The original figure was still legible, and after deleting it the arbitrator re-signed the award tracing his signature with a dry pen.

Held: the alteration was not the correction of a mere mistake, but was a new and distinct act of judgment; it had been made after the award had been completed and signed and the arbitrator's authority was at an end, and so was the same as an alteration made by a stranger; accordingly, it was void in its amended form, but it was still good as originally drawn.

Notes. By s. 17 of the Arbitration Act, 1950 (29 HALSBURY'S STATUTES (2nd Edn.) 151), unless a contrary intention is expressed in the arbitration agreement the arbitrator has a limited power to correct in an award "any clerical mistake or error arising from any accidental slip or omission."

Followed: *Irvine* v. *Elnon* (1806), 8 East, 54. Distinguished: *French* v. *Patton* (1808), 9 East, 351. Applied: *Brooke* v. *Mitchell* (1840), 6 M. & W. 473. Referred to: *Suffell* v. *Bank of England* (1882), 9 Q.B.D. 555; *Sutherland* v. *Hannevig*, [1921] 1 K.B. 336.

As to the alteration of an award, see 2 HALSBURY'S LAWS (3rd Edn.) 46; and for cases see 2 DIGEST (Repl.) 649 et seq.

Case referred to:

(1) *Pigot's Case* (1614), 11 Co. Rep. 26 b; 77 E.R. 1177; 17 Digest (Repl.) 248, *512*.

Rule Nisi for an order setting aside an award.

This cause was referred to arbitration, and the agreement to refer provided that the umpire should make his award under his hand ready to be delivered by a certain day. On this day he awarded the defendant to pay to the plaintiff £57, and signed the award, recommending to the parties at the same time by parol to pay the costs of the reference in equal moieties. He then put the written award in the hands of his own attorney, who sent notice immediately to the defendant that the award was executed and ready for delivery. But on the same day, the umpire, having been informed that the defendant refused to pay his share of the costs of the reference, took the award before it was delivered by his attorney, and struck his pen through the £57 (still, however, leaving it legible) and inserted the sum of £66 in order to include the defendant's moiety of the costs. After doing this he re-signed the award with a dry pen, and such his signature was attested by witnesses, and notice of the award so altered was given to the parties. An application was made for an attachment for non-performance of the award upon an affidavit of service of it, and a demand of the £66, and there was an adverse application to set aside the award as being vitiated by the aforementioned alteration. These rules came on together when the court, after hearing counsel, were of opinion that, the award having been once complete by the first signature of the umpire and being then ready for delivery, though not attested or delivered, which, by the terms of reference, were not necessary to perfect it, there was an end to the umpire's authority, and he could not afterwards alter the award, and, therefore, they refused the rule for an attachment for non-payment of the £66, which they thought there was no authority for demanding. Later, however, the other rule for setting aside the award was enlarged to consider, on the one hand, whether the award was not altogether vitiated by the alteration, and, on the other hand, to enable the plaintiff to make a new demand of the lesser sum originally awarded and apply for a new rule for an attachment in case of non-payment of it upon the supposition that the award was good for the original sum inserted in it notwithstanding the subsequent obliteration made by the umpire without authority.

Gurney was now heard in support of the award, and contended that, if the umpire had no authority to make the alteration, the award must be good for the original sum, the alteration having been made by mistake and not with any fraudulent purpose. Were it not for the opinion expressed by the court in the last term, he should have contended that the umpire might have corrected the mistake he had made in putting in a wrong sum at any time before the award was delivered out of his hands.

LORD ELLENBOROUGH, C.J.—This is not a mere mistake of the umpire in putting down one sum instead of another as in casting up an account wrong, or the like, but it was a new and distinct act of judgment formed by him after his authority was spent, and he was functus officio. Still, however, I see no objection to the award for the original sum of £57, for the alteration made by him afterwards was no more than a mere spoliation by a stranger which would not vacate the award. He only intended originally to give a recommendation to the parties to divide the costs of the reference between them, and not to make it part of his award. When he found that the defendant would not pay his share, he tried to resume his authority again, after he had laid it down; which he could not do.

Erskine and *Pooley* were to have supported the rule for setting aside the award, on the ground of the alteration having vitiated it altogether, and referred to *Pigot's Case* (1), where it was resolved "that when any deed is altered in a point

material by the plaintiff himself, or by any stranger without the privity of the obligee, be it by drawing of a pen through a line or any material word, etc., the deed thereby becomes void," to which is added, "although the first word be legible." But finding the opinion of the court decidedly against them on this point, they did not press the argument further.

LORD ELLENBOROUGH, C.J.—I consider the alteration of the award by the umpire after his authority was at an end, the same as if it had been made by a stranger, by a mere spoliator. I still read the award with the eyes of the law as if it were an award for £57, such as it originally was. If the alteration had been made by a person who was interested in the award, I should have felt myself pressed by the objection, but I can no more consider this as avoiding the instrument than if it had been obliterated or cancelled by accident.

GROSE, LAWRENCE and **LE BLANC, JJ.,** concurred.

Rule discharged.

LOWTHER AND OTHERS *v.* LORD LOWTHER AND ANOTHER

[Lord Chancellor's Court (Lord Erskine, L.C.), November 10, 11, 12, 14, 17, 1806]

[Reported 13 Ves. 95; 33 E.R. 230]

Agent—Agent for sale—Purchase of principal's property—Avoidance of purchase—Need to show principal given all information agent possessed—Inadequate consideration—Effect.

Where an agent for sale himself purchases the property in question the purchase will be set aside unless he can show that he furnished his principal with all the knowledge which he himself possessed.

In such a transaction inadequacy of consideration, though not of itself a sufficient ground for setting aside the contract, is, when gross, strong evidence of fraud.

Notes. Applied: *Dunne* v. *English* (1874), L.R. 18 Eq. 524. Referred to: *Bower* v. *Cooper* (1843), 2 Hare, 408.

As to disclosure by an agent, see 1 Halsbury's Laws (3rd Edn.) 190–192; and for cases see 1 Digest (Repl.) 534–539.

Cases referred to:

(1) *Coles* v. *Trecothick* (1804), ante p. 14; 9 Ves. 234; 1 Smith, K.B. 233; 32 E.R. 592, L.C.; 1 Digest (Repl.) 331, *156.*

(2) *Morse* v. *Royal* (1806), ante p. 232; 12 Ves. 355; 33 E.R. 134, L.C.; 12 Digest (Repl.) 125, *778.*

Bill filed by parties entitled under the will of Lord Lonsdale to his personal estate, for an order to have delivered up by the defendant, Bryan, a picture dealer, a picture which had been deposited with him as an agent, to be exchanged for other pictures by the other defendant Lord Lowther, the executor of Lord Lonsdale. Bryan claimed to retain the picture as purchased by him under the following circumstances.

The picture, the subject of which was Mars and Venus, having been cleaned was considered as a valuable original. On May 9 a conversation took place between Bryan and a friend of Lord Lowther. That gentleman, by his depositions, represented his proposal on the part of Lord Lowther, to which Bryan agreed, that

Bryan should immediately allow the value of 300 guineas in pictures and account for whatever more the picture might produce. Bryan, by his answer, denied that, and stated that, upon his declining to set a value upon the picture and desiring the witness on the part of Lord Lowther to do so, the witness set the value of 300 guineas upon it; Bryan then did offer to give Lord Lowther an engagement to account in pictures for any further produce above 300 guineas; and, this being on the part of Lord Lowther declined, the defendant considered it as sold to him. He afterwards allowed the further value of 100 guineas, assigning as a reason, that the picture turned out better than he had expected, and he made a subsequent offer of 400 guineas more by a letter to the witness, who by the direction of Lord Lowther applied to him to return it. The picture, however, having excited much attention, was pronounced to be a Titian, of great value, Bryan admitting it to be worth £5,000.

Sir Samuel Romilly, *Fonblanque*, and *Thomson* for the plaintiffs.

Sir Arthur Piggott and *Wingfield* for the defendant, Lord Lowther: The question is whether the defendant Bryan can be considered a purchaser for valuable consideration without notice. The first objection is that he was an agent, bound as a trustee to make the most of this picture and to account for the produce. As an agent and trustee he could not purchase from his principal without giving him the benefit of all the information possessed by the agent. The object of this defendant in giving the additional sum of 100 guineas afterwards could be no other than to throw off the character of agent and convert himself into a purchaser when he had discovered the value of this picture; and the further offer of 400 guineas more was from the same motive. As agent for Lord Lowther, he was bound to exert his skill to make the most of this picture and to give to his principal the benefit of all his information, especially in this case, he being a professed dealer in pictures and the other party a nobleman, ignorant of art and supposing this a picture of inconsiderable value which on account of the subject he wished to exchange. To give validity to the new contract, Bryan should have communicated that this was a most valuable picture by Titian.

Perceval and *Trower* for the defendant Bryan: As to the question whether this picture was deposited with Bryan for sale and he was to advance 300 guineas upon it in the first instance and to account for any produce beyond that sum, the alleged agreement for that is distinctly denied by the answer, and the evidence cannot prevail against that denial. The conclusion is clear that Lord Lowther intended to sell this picture altogether; not to incur the risk of cleaning, etc., taking upon himself a speculation so uncertain as to the result. If, however, Bryan can be considered as an agent, certainly this transaction cannot stand as a sale.

Sir Samuel Romily in reply: The admission that, if Bryan was an agent, this cannot stand as a sale, reduces the case to a very short question of fact. It appears by the answer that Bryan knew that the value of this picture was £5,000 immediately after he had cleaned it. He represents that he formed his opinion upon his own examination of the picture after it was cleaned, not upon the judgment of any other person. He was bound to sell this picture. This court would have compelled him to sell it if he had delayed for any length of time. He must be considered a trustee for sale in every respect. If he had put it up to auction, purchased it himself in another name, and afterwards sold it at a profit, he would have been a trustee as to that. He admits that he was not to make profit by that picture. His profit was to be only upon the pictures he was to give in exchange. The clear result is that he must be considered as an agent. How can the addition or 100 or 400 guineas be reconciled with fair dealing, if at that time he had any idea of the value?

LORD ERSKINE, L.C.—Considering the defendant Bryan as an agent, the principle upon which a court of equity acts in cases of this kind is very properly

admitted, it having been settled in many instances, particularly in the time of Lord Eldon [in *Coles* v. *Trecothick* (1); *Morse* v. *Royal* (2)], resting upon grounds connected with the clearest principles of equity and the general security of contracts, viz., that an agent to sell shall not convert himself into a purchaser unless he can make it perfectly clear that he furnished his employer with all the knowledge which he himself possessed. The admission of that principle reduces this case, except as to the right of an executor to deal in this way, to the question, whether on May 9, Bryan became the purchaser of this picture at the price of 300 guineas, for the additional sum, afterwards advanced, must be considered as gratuitous upon his part, as a man who, having by a bargain which the law would support obtained an article much more valuable than he supposed, might be induced by his own spontaneous honour to throw in some further consideration. If Bryan had himself set the value of 300 guineas upon this picture, the decision must have been against him immediately, the condition of the parties being so unequal, and though inadequacy of consideration is not of itself a sufficient ground for setting aside a contract, it is, when gross, strong evidence of fraud.

But this circumstance exists in the case upon which alone my mind has balanced, and I continue to doubt whether this defendant, if he insists upon it, is not entitled to an issue as to that. On May 9, Bryan refusing to put a price upon the picture, the friend of Lord Lowther set the price of 300 guineas. I cannot attribute fraud to Bryan by his closing with that proposition coming from the friend of the seller, and a person not ignorant upon the subject. I cannot attribute more knowledge to Bryan at that time before the picture had undergone that process by which its pristine beauty was restored. Whether on May 9 a specific contract took place depends upon the evidence of these witnesses whose cross-examination in a court of law may give the case a different shape.

[His Lordship *directed an issue to determine whether it was agreed on May 9 that Bryan should purchase this picture absolutely for 300 guineas, to be estimated in pictures, or whether he was to be accountable for any further produce.*]

COLCHESTER CORPORATION *v.* LOWTEN

[Lord Chancellor's Court (Lord Eldon, L.C.), January 12, 13, 14, 20, 1813]

[Reported 1 Ves. & B. 226; 35 E.R. 89]

Corporation—Powers—Alienation of powers held in fee—Trust.

Independent of positive law as to the legal powers of a corporation, corporations—civil, ecclesiastical, or of whatsoever nature—can in point of law alienate lands of which they are seised in fee. Civil corporations are in the constant habit of making those alienations, their title to make which is asserted by Lord Coke. There never was a case in which a court of equity attached the doctrine of trust as applied under the words "corporate purposes" to the alienation of a civil, or indeed of an ecclesiastical, corporation: per Lord Eldon, L.C.

Deed—Void deed—Delivery up—Jurisdiction of court of equity.

A court of equity has the jurisdiction and duty to order a void deed to be delivered up and placed with those whose property may be affected by it if it remains in other hands: per Lord Eldon, L.C.

Notes. Considered: *Davis* v. *Leicester Corpn.*, [1894] 2 Ch. 208. Referred to: *A.-G.* v. *Wilson* (1840), Cr. & Ph. 1.

As to the alienation of property by corporations, see 9 Halsbury's Laws (3rd Edn.) 78–80, and as to cancellation and delivery up of void instruments, see ibid., vol. 14, pp. 512, 513. For cases see 13 Digest (Repl.) 290–295; 20 Digest (Repl.) 304–306.

Case referred to:

(1) *R.* v. *Watson* (1788), 2 Term Rep. 199; 100 E.R. 108; 13 Digest (Repl.) 334, *1385.*

Bill for a declaration that indentures of lease and release dated July 26 and 27, 1791, being a mortgage for £2,000 and interest, a bond of the same date as a collateral security, and another indenture dated Jan. 28, 1804, alleged to have been executed under the corporate seal of Colchester, were void; for an order that they be delivered up to be cancelled or declared to stand only as a security for such sums as were bona fide advanced by the defendant for the use of the plaintiffs; and an injunction.

The bill impeached the securities of July 26 and 27, 1791, as unjustly obtained and without any good or legal consideration; alleging that by the custom or usage of the borough none of the lands, etc., vested in the mayor and commonalty, could be sold or mortgaged without the consent of the mayor and commonalty in common hall assembled, or the major part of them—a custom invariably adhered to since the Charter of Incorporation in 1763, except in the instance of these securities to which, contrary to such custom, the common seal was affixed by the contrivance of Francis Smythies, then town clerk of the borough, whose agent the defendant was, in a clandestine manner without the assent of the mayor and commonalty in common hall assembled. The bill further alleged that of the sum of £2,000, stated in the indenture of July 27, 1791, to be advanced and paid by the defendant to the chamberlain for the use of the corporation, no part was advanced, but the real consideration was a bill of costs to that amount in defending, as agent of Smythies, a quo warranto information, filed against him in 1788 for exercising the office of recorder of the borough, and other suits and prosecutions, originating in election and party purposes, and not connected with the rights and interests of the corporation.

To this bill the defendant put in a plea and answer, pleading the indentures and bond of July 26 and 27, 1791, a reference and award in 1801 between the plaintiffs and the defendant concerning the principal and interest secured by those

securities that the plaintiffs should pay the defendant £2,266 15s., and a deed, dated Jan. 28, 1804, confirming the mortgage of 1791. By way of answer the defendant said that all the circumstances under which the mortgage was obtained and the true consideration thereof were laid before the arbitrators. The plea was disallowed by the LORD CHANCELLOR as covering too much in covering the last instrument. The defendant then put in his answer from which it appeared that he had lately filed a bill against the plaintiffs for a foreclosure. He denied the custom as stated by the plaintiffs, alleging that the select body of the corporation, consisting of the mayor, aldermen, assistants and common council, which common council consisting of eighteen were elected by and out of the commonalty at large who were upwards of one thousand three hundred, had full power to sell or mortgage the corporation lands without the consent of the commonalty at large in common hall assembled. He denied that the common seal was affixed to his mortgage contrary to the usage by the contrivance of Smythies in a clandestine or improper manner, but admitted that it was affixed without the consent of the mayor and commonalty in common hall assembled, or the major part of them, which he insisted was not necessary. He admitted that the £2,000 was not advanced to the chamberlain for the use of the corporation, but arose in the following manner. In 1787 upon an election for the office of recorder Smythies was returned as duly elected. In consequence of the warmth occasioned by this contest many actions were brought against Edward Capstack, the mayor, for refusing votes tendered for Mr. Grimwood, the unsuccessful candidate, who applied to the Court of King's Bench for leave to file an information in the nature of a quo warranto against Smythies, which was terminated by a compromise, Mr. Grimwood being sworn into the office of recorder and Smythies being appointed town clerk. In 1788 upon the election of a representative of the borough in Parliament Mr. Tierney and Mr. Jackson being the candidates, Bezaliel Angier, the mayor, made a special return that the numbers on the poll were equal, and Mr. Tierney commenced an action against him for a false return.

On July 20, 1789, at a meeting of the select body of the corporation consisting of the mayor, aldermen, assistants, and common council, an order was made reciting that such actions had been commenced and the opinion of the assembly that Capstack and Angier had executed the office of mayor faithfully and honestly, and, therefore, resolving that they should be protected, defended, and indemnified by the corporation by and out of the revenues thereof against such suits, and, for better carrying that order into effect, that the mayor for the time being, together with any two of the aldermen, any two of the assistants, and any two of the common council, be a committee for the purpose of borrowing a sum not exceeding £2,000 for answering the above end. This committee was authorised to raise the £2,000 by mortgage of the estates of the corporation, and to affix the common seal to all deeds necessary for effecting such purpose. On Dec. 18, 1789, at another meeting of the select body it was ordered that they should make such return to the mandamus requiring them to swear Mr. Grimwood into the office of recorder as counsel should advise in order that the election might be tried; that it should be tried at the expense of the corporation; that the mayor should be indemnified by the corporation; that the defendant should be employed to conduct this business; and that the costs of defending the quo warranto cause against Smythies should be borne by the corporation. The answer further stated that in prosecuting and defending these causes, £2,156 6s. 11d. became due to the defendant, of which sum £1,400 was money out of pocket, and his bill of costs on that account was the consideration for his mortgage which he contended came within the spirit of the preceding orders. The interest was regularly remitted to the defendant by Smythies during his life, but after his death in 1798, no interest having been paid, the defendant applied for his money, and, the plaintiffs disputing the bills, a long correspondence ensued which terminated in an agreement for a reference of the defendant's claims, dated April 22, 1801, signed and sealed by

the defendant, and sealed on the part of the plaintiffs with the common seal, which was affixed by the direction of the select body.

The defendant said that all the objections to his security, as stated in the bill, were laid before the arbitrators in a case drawn up by the town clerk on behalf of the corporation, and by the award, dated Dec. 24, 1801, the sum of £2,266 15s. was found to be due from the plaintiffs to the defendant. That sum not being paid, the defendant in Trinity Term, 1803, filed a bill for redemption against a prior mortgagee and foreclosure against the corporation, but consented to stay proceedings in that suit for two years on receiving the interest then due and an agreement that such delay should not prejudice the suit and that the future interest should be increased from 4½ to 5 per cent. In pursuance of that agreement by an indenture dated Jan. 28, 1804, endorsed on the original mortgage, the mayor and commonalty, in consideration of the sum of £2,266 15s., which they acknowledged to be due from them to the defendant, granted and confirmed to him all the premises comprised in his original mortgage to secure the principal sum of £2,266 15s. and interest at 5 per cent., covenanting to pay the interest half-yearly and the principal in January, 1806. The interest not being paid, the defendant commenced an action upon his bond; and obtained a verdict. The defendant claimed that the debt so owing to him for his bill of costs was a legal and sufficient consideration for the bond and mortgage; that such bond and mortgage were valid and binding on the corporation notwithstanding the objection as to the mode of affixing the corporate seal; that, if the original securities were questionable, they had been since repeatedly confirmed by the award, the deed of 1804, the subsequent payment of interest, and the orders and admissions of the select body, all which acts took place with the concurrence of the recorder, the proper law officer of the corporation; and were corporate acts, binding the corporation.

On Mar. 12, 1811, the Lord Chancellor directed four issues, to be tried in the Court of Exchequer: Whether the common seal of the mayor and commonalty was duly and lawfully affixed to the identures dated July 26 and 27, 1791, the bond, dated July 27, 1791, the agreement, dated April 22, 1801, and the indenture, dated Jan. 28, 1804, or to any or either of those instruments Upon the trial of those issues, the jury found that the common seal of the mayor and commonalty was duly and lawfully affixed to the said several indentures, bond, and agreement. The cause was heard for further directions.

Sir Samuel Romilly, *Hart* and *Roupell* for the plaintiffs: All corporations are trustees for the individuals, of which they are composed, and in that character are bound to consult the interest of their members. If those who act on behalf of the corporation cannot apply the funds of the body to their own individual advantage, neither can they appropriate those funds to gratify their passions or to serve the purposes of their own particular party. In the view of a court of equity such objects must receive equal censure. It is not very probable that cases in point can be produced, corporations generally contriving to veil their abuses from the observation of justice. Yet, if authority is required, *R.* v. *Watson* (1) furnishes a clear opinion in favour of this jurisdiction of Ashurst, J., a judge who was perfectly conversant with the doctrines of this court, having sat only five years before as one of the Lords Commissioners of the Great Seal. This cannot be represented as a bill, filed by a corporation to defeat their own acts. The transactions complained of are Acts, not of the corporation, but of the select body, affixing the common seal to instruments which, though good at law, may be the proper subject of relief in equity as relief would be given against a party claiming with notice under a fraudulent execution of a legal power of attorney to execute a deed. The defendant knew that the mortgage was granted for purposes in which the corporation had no interest, and that the mortgage, if in the strict legal sense valid, amounted to a breach of trust. He admits that the consideration was, not money advanced, but a debt. Here the question arises whether that was a debt which

A the corporation ought to have paid. The charges respecting the contest for the recordership, and the actions resulting from the mayor's return at the election, constitute a very large part of this debt. The contest for the recordership was one purely individual, affecting the two candidates only, with which the corporation had really no concern. It would have been widely different had a person, not elected by the majority, been forced upon the corporate body. Resisting such an B attempt they would have been asserting their own rights, but this is the act of a minority having accidentally the seal in their power, and availing themselves of it to oppose what was in truth the election of the majority. The act of the select body was a nullity; unless the corporation by their acquiescence confirmed it with respect to third persons.

C *Sir Arthur Piggott*, *Richards*, *Wetherell* and *Horne for* the defendant: The argument in support of this bill opens to the court a most extended jurisdiction. The plaintiffs, abandoning their original position that the deeds were illegal, now call for the interference of this court to have them removed as clouds upon their title. The corporation is the sole plaintiff, no individual members impeaching the conduct of the select body. The security given by the select body is the security D of the corporation. The power of making laws binding the corporation is in the select body. This power appears to have been vested in the select body from time immemorial being derived to them by prescription, not by charter, and innumerable are the instances in which the select body has mortgaged the property of the corporation and exercised other acts of government without the interference of the burgesses. The equitable object of this bill is to set aside instruments of the plain- E tiffs themselves decided to be legal instruments, and the principle on which that is maintained is that the corporation are trustees, the bill not alleging any trust, but stating a general proposition that will entitle every corporation in the kingdom by merely filing a bill, stating no more than that some act not corporate has been done, to set aside their deliberate acts, defeat their engagements, and evade their debts. It is admitted that there is no instance of such a suit. The plaintiffs cannot main- F tain that the corporation had no interest in the appointment of the recorder, their law adviser, and if the mayor is to stand the consequences of every action brought against him in that character he may be overwhelmed. The proceedings against these officers were against them, not as individuals, but in their official characters, and why may not the corporation defend any member, attacked in his corporate character, for acts done in the execution of his office? Could the defendant know G whether the purposes for which the money was employed were corporate or not, and is he at this distance of time, when all the individuals against whom he might have proceeded are dead, to lose the security upon which he was induced to rely? At least he must be entitled to the common justice which a court of equity administers where relief is sought. The usual practice of the court when anyone comes here to set aside a deed fraudulent or illegal as being usurious is to impose the term upon H the plaintiff that he shall repay the money actually disbursed. Whatever were the original circumstances, here are the strongest acts of confirmation—payment of interest to the year 1797; the agreement to refer by which they chose the forum; and the deed of 1804.

Jan. 20, 1813. **LORD ELDON, L.C.**—I have no recollection of any case of this I kind except one, a suit instituted in this court upon a bill by some of the corporation of Alnwick against the body, the acting part of that corporation, very much of this nature, but I do not know what became of it.

The bill in this cause contends that all or part of the expenditure which is the subject of this suit was not for corporate purposes, and, if not, that it was not competent to the select body to charge the corporation with an expenditure not for corporate purposes; that the property of the corporation is held by them in trust for corporate purposes; and, therefore, the select body could not pledge the property of the corporation for purposes not corporate, at least not without the assent of the

body at large. On that hypothesis they might go further and contend that the body itself could not pledge the property for purposes not corporate. A

In answer to the claim of relief on that ground it is said that there are a great variety of subsequent transactions, and, if ever there was a case in which subsequent dealings could set right what was originally wrong, if this can be so characterised, this is that case, this defendant having been, either with or without the assent and knowledge of the body at large, dealing with the select body with a view to an B amicable settlement by a vast number of transactions through a vast series of years in every way possible. If, it is argued, in that object he has failed, as there is not the slightest pretence upon this record for saying that he has ever dealt dishonourably, though gross fraud is very blameably imputed to him, he has a fair claim to urge that, if the subsequent transactions are unavailing, he sustains considerable hardship in losing all the remedies for his advances, labour and time to which he C would have been entitled, as, if he cannot establish his demand against the corporation, with regard to a great proportion of it he might have established it against Smythies, and if the select body pledged to him the funds of the corporation for purposes to which they could not be applied, they would themselves have been personally answerable to him. All that, however, is gone by.

It is now insisted upon the subsequent transactions that, as they passed between D the select body and Lowten, they cannot have the effect he contends for. When this cause came originally before me the first question appeared to be what was the species of relief to be given if any relief was due to the plaintiffs, and it was then contended for the corporation that, notwithstanding what passed at the trial of the action upon the bond as to the use of the corporation seal, the mortgage, the bond, and the deed, as it is called, of confirmation, and the submission to E award are all good for nothing, a use having been made of the corporate seal authorising the plaintiffs to say that these are not corporate instruments. If that allegation can be made out, there is a clear title to relief, my opinion having always been, differing from others, that a court of equity has the jurisdiction and duty to order a void deed to be delivered up, and placed with those whose property may be affected by it if it remains in other hands. Issues were, therefore, directed, and all F these instruments were found to be instruments amounting to valid alienations of corporate property; in other words it was found that the seal was legally and duly affixed to them. I say "duly" having either suggested or acceded to the suggestion that this word should be inserted and it should be open to the parties to try whether anything could be made of it.

The relief now to be asked must, therefore, be upon quite a different principle, G and, though all the authorities upon what is not often the subject of consideration here, have been most usefully brought forward, I have no doubt that, independent of positive law as to the legal powers of a corporation, corporations—civil, ecclesiastical, or of whatsoever nature—could in point of law alienate lands of which they were seised in fee; and the history of what corporations, both aggregate and sole, did before the restraining statutes is very useful. Civil corporations are at this day H in the constant habit of making those alienations, their title to make which is asserted by Lord Coke. In the course of my experience in this court, of my present researches, and of my examination of authorities which having had occasion to consider them formerly, this cause has brought back to my recollection, nothing has occurred showing that there ever was a case in which this court attached the doctrine of trust as applied under the words "corporate purposes" to the alienation I of a civil, or indeed of an ecclesiastical, corporation. With regard to what was stated in *R.* v. *Watson* (1) by Ashhurst, J., a very respectable judge, who, I take this opportunity of saying, was a very useful judge as a commissioner in this court, I do not lay down either that this is the subject of jurisdiction here as trust, or of information in the Court of King's Bench. The opinion that this court has jurisdiction is to be considered as the opinion, not only of Ashhurst, J., but of the whole Court of King's Bench, stopping upon that ground the argument upon the point as

to the breach of trust. SIR SAMUEL ROMILLY has put it fairly that the court is not to act upon the supposition that corporations are constantly abusing their duty by applying the property to purposes not corporate, but, on the other hand, when a case is brought forward, the court is not to shut its eyes against the practice that has prevailed in all times and the judgment upon it, for, speaking of corporate purposes, if the purpose, though the most worthy, that can be represented, has not that character, the use of the seal is equally improper, and as much an abuse in a court of justice, though not in moral consideration. As to what obtains, for instance, in the ecclesiastical bodies that have been mentioned, the bishop, the dean and chapter, etc., the statutes, that leases for more than twenty-one years or three lives, and not at the old rent or more, shall be bad, do not say that any lease shall be good which can be taken to be an abuse of those corporate purposes for which the property was held. I apprehend that it would not be difficult now to find bishop's estates, the old rent reserved being £50 and the actual estate worth, £1,000 or £2,000 a year. All the excess of that rent, taken by the bishop himself, should, if he is a trustee in a fair sense, be taken from him by this court, yet no such attempt was ever made where the corporation was not holding for charitable purposes. Even those corporations can alienate at law, but the alienee will be a trustee; and the jurisdiction in those cases must be regarded as a contrast to the other cases of corporations, holding not for charitable, but for corporate, purposes, demonstrating that this court shall not be called upon in the latter case as it is in the former.

The next point I am called upon to consider is whether these are corporate purposes. The Attorney-General of that day seemed to think the mortgage good as to so much of Lowten's bill as was incurred under the authority of the select body. That, however, is but private opinion, and the question is still open whether that was a corporate purpose or not. It is not necessary for me to determine how many of the purposes, where the defendant was employed either by the express authority of the corporation or by Smythies as his client, were corporate or not. They appear to me much nearer that description than many purposes to which corporate property has been actually applied, but my judgment goes upon this. Though courts of equity have laid down, as a principle upon which they ought to act, that persons seeking relief should be prompt in their application, and should not deal as if they did not mean to make any application for relief in equity, suffering their opponents to lose their remedies against other parties, I do not put my judgment upon that principle. It would be difficult to maintain, though the court would struggle as far as it could judicially, that, as the defendant has lost his remedy by the death of Smythies, and the dispersion, if I may use that expression, of the select body, therefore he can in equity have the benefit of that security, which is not a valid security in law and equity: whether that benefit could be taken from him by a court of equity is a different consideration.

My opinion upon this case is that the subsequent transactions which took place between these parties bound the corporation at large. Their constitution is this. The select body have at least a right to bind the corporation by the use of the seal in matters as to which the corporation at large could bind itself. Without detailing the circumstances from the first moment of this demand, all the correspondence upon the part of the town clerk, which I take to be the correspondence of both the select body and the corporation, all the terms proposed as to part-payment, etc., it is clear that a corporation may submit to arbitration. If the matter submitted can in no fair sense be stated as matter of controversy in which the corporation could deal, such that a fair consideration could view as connected with corporate purposes, I do not say that such a submission would bind, but, if it may be represented as a fair question, whether corporate, or not, the select body, being entitled to act, may submit that to arbitration.

This was submitted to arbitration, and there is not a trace in that transaction of any inattention or want of due attention to the interest of the corporation at large.

The select body must, it is true, be considered in one sense as the same body whose acts are brought in question, but in another sense they are quite a different body. Some of them are not the individuals whose acts are brought in question, and upon examination my conclusion is that they did act as persons exerting their best attention for the corporation at large. Not a point was brought before the arbitrator otherwise than as it would have been by an agent having no other view than the advantage of his principal. The award, therefore, is binding at law, and was so conducted as to the interests of the corporation that, unless bound to say that the purposes to which the money was applied can in no sense be considered corporate purposes, I ought not to shake that award.

On these grounds I cannot give the corporation the relief prayed by this bill. The costs of the issues necessarily follow the event, and this bill imputing fraud when it is impossible that the security could be cut down except upon the principle of its invalidity in law or equity, I should not do justice in this particular case, unless I dismissed the bill with costs.

Bill dismissed.

RAPER AND OTHERS *v.* BIRKBECK AND OTHERS

[Court of King's Bench (Lord Ellenborough, C.J., Grose and Bayley, JJ.), January 25, 1812]

[Reported 15 East, 17; 104 E.R. 750]

Bill of Exchange—Avoidance—Cancellation of acceptance by stranger by mistake —Right to correct mistake.

A third person who by mistake cancels the acceptance of a bill of exchange, having no authority to do so, does not thereby avoid the bill. He is at liberty to correct the mistake in furtherance of the rights of the parties to the bill.

Notes. Referred to: *Cox* v. *Troy* (1822), 5 B. & Ald. 474.

As to discharge of a bill of exchange, see 3 Halsbury's Laws (3rd Edn.) 226–230; and for cases see 6 Digest (Repl.) 347 et seq.

Case referred to:

(1) *Fernandey* v. *Glynn* (1806–7), 1 Camp. 426, n., N.P.; 3 Digest (Repl.) 244, *649.*

Action on a bill of exchange for £534 18s. drawn by one Crossley on Samuel Shawe & Co., and accepted by them at Messrs. Ladbrooke & Co., London, payable six months after date.

The declaration, after stating several endorsements over to the defendants, alleged an endorsement by them to the plaintiffs by name, and then averred in the usual way the presentment of the bill for payment at Ladbrooke's and their refusal to pay it. At the trial before Lord Ellenborough, C.J., in 1811, it appeared that the defendants, who were bankers in Yorkshire, paid the bill in question, with others, to the plaintiffs, who were likewise bankers there, and it was then in a perfect state with the several endorsements and acceptance on it. When the bill became due, on Jan. 21, 1811, being then in the hands of Down & Co. their clerk carried it to the general clearing house of the bankers in London, and received it back from Ladbrooke's clerk as a dishonoured bill, with the words "no account" written thereon. As there was also written at the back of it "in case of need apply to Boldero & Co., the bill was sent to Boldero's house in the course of the clearing

hours. H. Boldero, one of the partners, upon receiving the bill from his clerk and intending to allow it in account with Down & Co., drew his pen through the acceptance and so cancelled it by mistake, thinking it had been an acceptance payable at their house, but the bill had not then been allowed in the clearing-house nor taken down in the clearing-book. In less than ten minutes from the time of cancelling it, the clerk informed him of his mistake, and wrote under the acceptance, "cancelled by mistake," to which H. Boldero subscribed his initials. Nevertheless, the bill was taken up by Boldero's house for the honour of the plaintiffs with whom they had an account, and was never out of their hands afterwards. On the following day, one of the prior endorsers called at Boldero's for the bill in order to pay it, but, on finding that the acceptance had been cancelled, said that, as it appeared cancelled, he would not take it up. Upon these facts the jury found a verdict for the plaintiffs. Subsequently, *Sir Vicary Gibbs*, for the defendants, obtained a rule nisi for a new trial on the ground that the cancellation, though accidental, threw a difficulty upon the defendants' recovering over against the prior endorsers, as it would be necessary to go through the same media of proof to establish their claim over against such prior endorsers, a difficulty which ought not to be thrown upon them especially by the act of the then holders of the bill and which might be increased by the death of any of the witnesses in the meantime. Therefore, he contended that this action did not lie.

Garrow and *Holroyd* for the plaintiffs, showing cause against the rule, said that the only pretence there could be for disturbing the verdict was that the effect of the accidental cancellation might be to prevent the defendants from recovering over against the prior endorsers. But their legal remedy upon the bill remained the same as before, however the circumstance might throw more difficulty in their way and require some additional proof by way of explanation. That was no more than might happen from any other accident to which a bill of exchange was liable, as if it should be obliterated by a quantity of ink falling upon it or be torn by a child; it could not be contended in such case that the party would be precluded from his remedy on the bill. It was observable that this cancellation was not only done by mistake, but was done also by a person who had no authority to cancel, for the acceptance was at Ladbrooke's and not Boldero's. Wherever an instrument was not made an end of, then, if anything be done to it by a person who had no authority to do the act, the act so done would not vitiate it. In *Fernandey* v. *Glynn* (1) it was held, where a banker's clerk had cancelled a cheque by mistake, but had afterwards written under it, "cancelled by mistake," that the banker might, notwithstanding, return the cheque unpaid, for he had not thereby made it his own.

Sir Vicary Gibbs for the defendants, supported the rule: The objection is not of the plaintiffs' own raising, but, as appears by the evidence, has been made by one of the prior endorsers refusing to take the bill up. The question, then, is whether the defendants, before they are compellable to pay the amount of the bill to the plaintiffs, have not a right to require that they shall be placed in such a situation as to have the usual means furnished them of resorting over against the prior endorsers. If they have such right, it is an answer to this action, for it is clear that the cancellation will impose upon them many difficulties of proof out of the ordinary course. The bill upon the face of it appears to have been paid, and it will be necessary, in order to support any action on it, to go into evidence explanatory of that circumstance. That evidence may be removed out of the reach of the defendants, either by death, or a variety of other accidents. It is said that this is the common chance attending upon all cases, the answer to which in the present case is that the parties themselves who held the bill at the time had no right by their own act to impose these difficulties upon others, though, if the law had cast them upon the defendants, it might have been different.

LORD ELLENBOROUGH, C.J.—I should have felt considerable pressure in the argument used on behalf of the defendants if the fact had borne them out.

Undoubtedly the endorsees, generally speaking, are bound to return the bill to the endorsers in the same plight as they received it, unchanged by any act of theirs, but I cannot consider the act of Boldero as the act of the endorsees for he had no authority, either express or implied, from them to do the act, and the whole originated in his mistake. The case then comes to the instances put in argument at the trial, of a blot having fallen upon, or a child having torn or destroyed, the instrument. In such cases the law is not so strict as to require the precise formal proof which is ordinarily required, for that would be at once to preclude the party of his remedy. I remember POTHIER in his treatise on BILLS OF EXCHANGE, vol. 2, 114, para. 1, c. 3, s. 3, speaking of an acceptor who has put his signature to a bill, but has not parted with it, says, that before he does part with it, "il peut changer de volonté et rayer son acceptation." A fortiori, then, a third person who cancels an acceptance by mistake, having no authority so to do, shall not be held thereby to make void the bill, but shall be at liberty to correct that mistake, in furtherance of the rights of the parties to the bill.

GROSE, LE BLANC and **BAYLEY, JJ.**, concurred.

Rule discharged.

R. *v.* CROSS

[COURT OF KING'S BENCH (Lord Ellenborough, C.J.), May 22, 1812]

[Reported 3 Camp. 224]

Highway—Nuisance—Obstruction—Stage-coach stopping to set down and take up passengers—Waiting between journeys.

Every unauthorised obstruction of a highway to the annoyance of the subjects of the Crown is an indictable offence. A stage-coach may set down and take up passengers in the street, this being necessary for public convenience, but it must be done in a reasonable time, and private premises must be procured for the coach to stop in during the interval between the end of one journey and the commencement of another. "No one can make a stableyard of the King's highway."

Easement—Nuisance—Public nuisance—Right to commit by prescription.

It is immaterial how long a practice amounting to a public nuisance has prevailed, for no length of time will render such a nuisance legal.

Notes. Considered: *Walker* v. *Brewster* (1867), L.R. 5 Eq. 25; *Wilkins* v. *Day* (1883), 12 Q.B.D. 110; *Barber* v. *Penley*, [1893] 2 Ch. 447. Referred to: *R.* v. *Carlile*, [1824–34] All E.R. Rep. 491; *Rich* v. *Basterfield* (1847), 16 L.J.C.P. 273; *Brackenborough* v. *Thorseby* (1869), 33 J.P. 565; *Mercer* v. *Woodgate* (1869), 34 J.P. 261; *Harris* v. *Mobbs* (1878), 3 Ex.D. 268; *Fritz* v. *Hobson* (1880), 14 Ch.D. 542; *A.-G.* v. *Brighton and Hove Co-operative Supply Association*, [1900–3] All E.R. Rep. 216; *Butterworth* v. *West Riding of Yorkshire Rivers Board* (1908), 78 L.J.K.B. 203.

As to common law nuisances on highways, see 19 HALSBURY'S LAWS (3rd Edn.) 270–283; and for cases see 26 DIGEST (Repl.) 466 et seq.

Case referred to:

(1) *R.* v. *Russell* (1805), 6 East, 427; 2 Smith, K.B. 424; 102 E.R. 1350; 26 Digest (Repl.) 484, *1701.*

Indictment for causing and permitting divers coaches to stand and remain for a long and unreasonable time on the public highway.

The defendant was proprietor of a Greenwich stage-coach which came to London twice a day, and drew up at a place on the highway near Charing Cross. There it remained for about three quarters of an hour, taking in parcels and waiting for passengers. On Sundays, and occasionally at other times, the defendant employed extra coaches, which plied there in the same manner. A great number of other stage-coaches from Greenwich and the adjoining villages came to the same spot, and there were generally six or seven in a row close to the curbstone, often two tiers and sometimes three. A number of persons were employed to solicit passengers to go by those coaches. Private carriages could rarely draw up to the opposite houses, and considerable difficulty was experienced in passing along that side of the street. It appeared that for a great number of years Greenwich stages had stopped and plied at this place, but that their number had of late been greatly increased.

Garrow (with him *Gurney*), for the prosecution, contended that the defendant was clearly guilty of a public nuisance in keeping his coaches standing in the public street for such an unreasonable length of time. He relied upon *R.* v. *Russell* (1), where it was held that a wagoner occupying one side of a public street in a city before his warehouses in loading and unloading his wagons for several hours at a time both day and night, and having one wagon at least usually standing before his warehouses so that no carriage could pass on that side of the street and sometimes even foot passengers were incommoded by cumbrous goods lying on the ground on the same side ready for loading, was indictable for a public nuisance, although there were room for two carriages to pass on the opposite side of the street.

Marryat (with him *Adolphus*) for the defendant, contended that there was hardly any resemblance between that case and the present. All that had been proved against the defendant was that twice a day his coach drew up at the side of a very wide street, and remained there for a short time to set down and take up passengers. He could not be answerable for any improprieties of which persons connected with other coaches stopping there might be guilty. The practice of Greenwich coaches waiting at this place had prevailed ever since the building of Westminster Bridge, and had never been complained of till the present indictment was preferred. In all the great avenues to the metropolis, there was some spot where stage-coaches going to particular villages assembled. A great share of accommodation was thus afforded to the public which much more than counterbalanced any partial inconvenience which the practice might occasion. If the defendant was guilty of a nuisance, there might be an hundred indictments for the same offence every time a rout was given by a fashionable lady at the west end of the town.

LORD ELLENBOROUGH, C.J.—Is there any doubt that, if coaches on the occasion of a rout, wait an unreasonable length of time in a public street and obstruct the transit of His Majesty's subjects who wish to pass through it in carriages or on foot, the persons who cause and permit such coaches so to wait are guilty of a nuisance? In measuring out the punishment, the court would examine whether the act was repeated, and what degree of public inconvenience was experienced. But every unauthorised obstruction of a highway to the annoyance of the King's subjects is an indictable offence. Upon the evidence given, I think the defendant ought clearly to be found guilty. The King's highway is not to be used as a stableyard. It is immaterial how long the practice may have prevailed, for no length of time will legitimate a nuisance. The stell fishery across the river at Carlisle had been established for a vast number of years, but Buller, J., held that it continued unlawful, and gave judgment that it should be abated. A stage-coach may set down or take up passengers in the street, this being necessary for public convenience, but it must be done in a reasonable time, and private premises must be procured for the coach to stop in during the interval between the end of one journey and the commencement of another. No one can make a stableyard of the King's highway.

The defendant was found guilty.

Ex parte KENSINGTON

[Lord Chancellor's Court (Lord Eldon, L.C.), April 10, 1813]

[Reported 2 Ves. & B. 79; 2 Rose, 138; 35 E.R. 249]

Mortgage — Equitable mortgage — Deposit of deeds — Effect of accompanying written agreement—Enlargement of purpose of deposit by parol agreement.

A mere deposit of deeds, without a single word passing, operates as an equitable mortgage. Where the deposit is accompanied by a written agreement that agreement must prima facie determine the purpose of the deposit. Where the deposit originally was for a particular purpose that purpose may be enlarged by a parol agreement, as, for instance, on a change of the members of a partnership firm.

Notes. Applied: *Re Ablett, Ex parte Lloyd* (1824), 1 Gl. & J. 389. Followed: *Re Burkill, Ex parte Nettleship* (1841), 2 Mont. D. & De G. 124. Applied: *James* v. *Rice* (1854), 5 De G.M. & G. 461. Referred to: *Goodwin* v. *Waghorn* (1835), 4 L.J.Ch. 172.

As to equitable mortgages, see 27 Halsbury's Laws (3rd Edn.) 165–174; and for cases see 35 Digest (Repl.) 288 et seq.

Cases referred to:

(1) *Ex parte Langston* (1810), 17 Ves. 227; 34 E.R. 88; sub nom. *Re Knight, Ex parte Langston*, 1 Rose, 26, L.C.; 35 Digest (Repl.) 296, *161.*

(2) *Head* v. *Egerton* (1734), 3 P. Wms. 280; 24 E.R. 1065, L.C.; 35 Digest (Repl.) 545, *2236.*

(3) *Russel* v. *Russel* (1783), 1 Bro. C.C. 269; 28 E.R. 1121; 35 Digest (Repl.) 296, *155.*

Petition by creditors for a declaration that they were to be considered as mortgagees of certain property, and for an account and other relief.

Duncan Hunter on Mar. 19, 1805, deposited with the petitioners, his bankers, several deeds, and signed the following memorandum, addressed to Messrs. Moffatt, Kensington, and Styan, bankers, London:

"Gentlemen, Herewith I beg leave to deposit in your house the deeds and policy of assurance upon the following leasehold property [describing it] to remain with you as a collateral security for the balance of any sum or sums of money which you may at any time advance for my account, and which I hereby oblige myself, heirs or executors to assign in a legal manner whenever required so to do."

On Sept. 25, 1805, Hunter executed a bond to the same persons in the penalty of £40,000, with condition for payment to them, and in case of any alteration taking place in their firm then to the persons composing a new firm, if comprising two of the original members, of all sums thereafter in any manner lent unto or advanced on account of said Duncan Hunter by the petitioners.

In December, 1805, Moffatt retired from the partnership. On Aug. 6, 1807, Hunter, requiring additional advances, deposited with the petitioners the title deeds of an estate called Cromwell Park, and on Aug. 7 signed the following memorandum:

"Messrs. Kensington & Co. Gentlemen, I hereby deposit in your hands the title deeds which I hold of Cromwell Park as a collateral security for any cash transactions which I have had or may have with your house, and which I agree to assign whenever I am required so to do."

In March, 1809, Hunter, wanting further advances, proposed a deposit of other deeds of premises held under the Drapers' Company by lease at a rent of £400 a year, and agreed to assign to the petitioners his interest in £3,000 3 per cent. Consolidated Bank Annuities, invested in the names of the Drapers' Company and

A him the said D. Hunter, for securing the due payment of the rent of £400 and performance of the covenants of the lease, and on Mar. 30 he signed the following memorandum:

> "Messrs. Kensington, Styan, and Adams. I have lodged in your hands the lease and other deeds belonging to the Old Stock Exchange which are to lay as a collateral security for any advances which you may make for my account and which I hereby engage and promise to assign over to you in the regular way when required, as also £3,000 3 per cent. consols which are deposited in my name with that of the Drapers' Company as a security for the ground rent, and which I hereby acknowledge are also to be transferred or assigned over to you when required."

C No further assignment or transfers were made. In July, 1811, Hunter was declared a bankrupt. A considerable balance being due to the petitioners and their application, as mortgagees, for a sale being rejected by the Commissioners, this petition was presented praying a declaration that the petitioners were to be considered as mortgagees of the estates and the £3,000 3 per cents.; that the Commissioners might take an account of the principal and interest due to the D petitioners and appoint a sale of the mortgaged premises and the bankrupt's interest in the £3,000 stock; and that the moneys to arise from the sales might be applied in reduction of the petitioners' debt with liberty to prove for the remainder.

Sir Samuel Romilly and *Wilson*, in support of the petition: The questions are E whether this deposit of title deeds with a written agreement can be held by the petitioners as a security for advances after Moffatt retired, and, secondly, as to the bank annuities. Your Lordship has gone much further in decision than these circumstances, having held a mutual understanding with reference to securities in the hands of the creditor sufficient without any express agreement: *Ex parte Langston* (1); which has been followed in many instances. The stock cannot be F brought within the Bankrupts Act, 1623. It is not like a personal chattel, passing by delivery, being in truth a chose in action. The bank would not take notice of any trust. To whom was notice to be given? The bank are not the debtors for bank annuities. If, therefore, notice was necessary, it must be given to the government. Is stock standing in several names to be considered as the stock of one becoming bankrupt? The effect as to transfers in marriage settlements must G be considered. If, however, it could be considered within the statute, that cannot be under these circumstances.

Leach and *Montague* for the assignees: Here is no agreement that this deposit in March, 1805, should be a security to the new house, formed afterwards by a change of the firm. At least there must be a clear verbal contract. Here is no written agreement, and no verbal contract of any description. The stock is within H the statute of 1623. The books are the best evidence of the apparent ownership.

LORD ELDON, L.C.—It has been so long settled that a mere deposit of deeds, without a single word passing, operates as an equitable mortgage that, whatever I might have thought originally, I must act upon that as settled law. I have often expressed my surprise how it came to be so settled as judicial decisions are to be I found that a lien upon deeds may exist without giving any right at law to the estate, and there is a remarkable case—*Head* v. *Egerton* (2)—where a prior encumbrancer was held to have the interest in the estate, but the court would not take away the deeds from a subsequent encumbrancer, allowing all the benefit he could have from those deeds, but giving him no interest in the estate. The decision, however, of *Russel* v. *Russel* (3), by Lord Thurlow, has been followed ever since.

The present is the case, not of a mere deposit, but a deposit with a written agreement which must prima facie determine the purpose of the deposit, and it would be stretching the expression much to construe that as an engagement that would

affect the deeds, not only with regard to the money advanced by the old house, but the advances, afterwards to be made by the house, whenever the partners should be changed. It must, therefore, be considered as having been originally only a collateral security for any money that might become due from the house while the partners remained the same. A

In the cases alluded to I went the length of stating that where the deposit originally was for a particular purpose that purpose may be enlarged by a subsequent parol agreement and this distinction appeared to me to be too thin, that you should not have the benefit of such an agreement unless you added to the terms of that agreement the fact that the deeds were put back into the hands of the owner and a re-delivery of them required, on which fact there is no doubt that the deposit would amount to an equitable lien within the principle of these cases. B

In the present case a bond was given, dated Sept. 25, 1805, at which time they stood with a written contract affecting these deeds and the estate only to the extent in which Moffatt & Co. should make advances, but with a written contract arising from the bond for a personal obligation for the advances, not only of that partnership, but of any other of which two of the original members constituted part. Moffatt retired from the partnership in December following, and this considerable difficulty occurs in the case. Understanding alone, unless in a fair sense amounting to agreement, would not do, and in this case no two of their agreements would admit the same construction. My opinion, however, is that if, upon the affidavit and examination taken together, aided by the extreme probability of their intention, I can collect that what was originally deposited for one purpose should be held as deposited also for the other with reference to the demand of the subsequent partners, that, though by parol, would be sufficient within these cases. C D E

Upon the other question, with regard to the stock, my opinion is extremely clear. When that stock was placed in the hands of Hunter & Co. it was upon a trust, which must exist as long as the lease to which the agreement refers. The equitable interest was in different persons, one being both trustee and cestui que trust. I do not apprehend that the bank would take notice of an agreement to transfer. The bankrupt, therefore, having only an equitable interest, and no power to make an actual transfer, his equitable interest passed by the agreement without the legal interest, with which he could not part. F

Order accordingly.

A

BRICE *v.* STOKES

[Lord Chancellor's Court (Lord Eldon, L.C.), July 22, 1805]

[Reported 11 Ves. 319; 32 E.R. 1111]

B *Trustee — Duty of trustee — Misapplication of trust money by co-trustee— Recovery into hands of trustees.*

As soon as a trustee is fixed with knowledge that his co-trustee is misapplying trust money a duty is imposed on him to bring the money back into the joint custody of the trustees.

C *Trustee — Cestui que trust — Remedy against trustee for breach of trust — Acquiescence in breach by cestui que trust.*

A cestui que trust who concurs or acquiesces in a breach of trust cannot recover against the trustees in respect of the breach.

Trustee—Liability—Receipt of trust money—Signature by trustee for conformity —Money in fact received by co-trustee.

D Where trustees join in a receipt of trust money prima facie all are to be considered as having received the money, but it is competent to a trustee to exonerate himself from that inference by showing that the money acknowledged to have been received by all was in fact received by one, and that he joined in the receipt only for the conformity.

E **Notes.** The holding in this case with regard to the indemnity of a trustee who has signed a receipt for the sake of conformity is now incorporated in s. 30 (1) of the Trustee Act, 1925 (26 Halsbury's Statutes (2nd Edn.) 50).

Considered: *Walker* v. *Symonds*, [1814–23] All E.R. Rep. 71. Applied: *Hanbury* v. *Kirkland* (1829), 3 Sim. 265. Distinguished: *Coppard* v. *Gates* (1854), 23 L.T.O.S. 165. Considered: *Thompson* v. *Finch* (1856), 22 Beav. 316. Applied: *Re Fryer's Estate, Martindale* v. *Picquot* (1857), 26 L.J.Ch. 398. Referred to: F *Langford* v. *Gascoyne* (1805), 11 Ves. 333; *Gregory* v. *Gregory* (1836), 2 Y. & C. Ex. 313; *Terrell* v. *Matthews* (1841), 1 Mac. & G. 433, n.; *Broadhurst* v. *Balguy* (1841), 1 Y. & C. Ch. Cas. 16; *Stiles* v. *Guy* (1849), 14 L.T.O.S. 305; *Symonds* v. *Jenkins* (1876), 24 W.R. 512.

As to the duties of trustees, see 38 Halsbury's Laws (3rd Edn.) 966 et seq., 1040 et seq. For cases see 47 Digest (Repl.) 346 et seq., 473 et seq.

G Case referred to:

(1) *Chambers* v. *Minchin* (1802), 7 Ves. 186; 32 E.R. 76, L.C.; 47 Digest (Repl.) 497, *4507*.

Exceptions to the report of a Master in an action against trustees for an account and other relief.

H By the decree in this cause an account was directed of the money arising by sale of part of the testator's estates and come to the hands of Henry Mooring, John Fielder, and John Sparrow, the trustees, or their executors, etc., and an inquiry into the manner in which the purchase-money was paid and the receipt signed, in what manner and by whom the interest was paid during the lives of Mooring and Fielder, and in whose hands the principal remained.

I The Master's report stated the will of John Taylor devising and bequeathing to his executors, Sparrow, Mooring, and Fielder, their heirs, executors, etc., all his freehold and leasehold estates upon trust to pay the rents and profits to the testator's niece Elizabeth Sparrow while unmarried and after her marriage to hold on trust for her, her heirs, executors, etc. He gave full power to his trustees and executors, and their survivors to sell and dispose of all or any part of the estates, and directed the moneys arising from such sale or sales to be put out by his trustees upon government or real security, such moneys and the interest and proceeds thereof in the meantime to be applied upon the trusts before directed as to the

estates and the rents. He declared that the trustees should have full power and authority to make such settlement of all or such of the estates as should be unsold and the money produced by the sale as they should judge fit on the marriage of Elizabeth Sparrow to the use of her and her issue and under such restrictions as the trustees should think fit and proper, and he directed that his trustees and executors should not be answerable or accountable for any loss which might happen of all or any part of his real and personal estate unless such loss be through their wilful neglect or default, and that one of them should not be answerable for the others or other of them, or for the acts, receipts, payments, or defaults, of the other or others of them, but each of them for himself and for his own acts, receipts, and defaults only.

The report also stated the marriage of Elizabeth Sparrow with Thomas Brice, the plaintiff, in 1783, upon which occasion a settlement was made to the separate use of Mrs. Brice for life with remainders to her husband, surviving her, for his life, and to the issue. She died, leaving no issue, in September, 1784. That settlement contained a power similar to that in the will to the trustees to sell, with the consent of Mrs. Brice, if living, the receipt of the trustees to be a discharge to the purchaser, and forthwith and with all convenient speed to invest the money in their names upon government or real securities, with a declaration that the trustees should not be chargeable with, or accountable for, any more of the trust moneys and premises than he or they should actually receive, nor with or for any loss which should happen of the same moneys and premises, or any part thereof unless such loss happened through his or their wilful default, nor the one for the other of them, but each of them only for his own acts, deeds, receipts, disbursements, and defaults.

By indentures dated Nov. 27, 1784, it was witnessed that Mooring and Fielder, in consideration of the sum of £1,260 to them paid (with the approbation of Thomas Brice) by Robert Lillington, conveyed part of the freehold estate to him and his heirs, for which sum of £1,260, the consideration-money, Mooring and Fielder signed a receipt on the back of the deed. No part of that sum was laid out, but some money by way of interest on part of it was paid by Fielder to Brice. Fielder died insolvent in April, 1794, and Mooring died in October following.

The Master certified that, though the evidence appeared exceedingly contradictory, yet, as the receipt for the £1,260, written on the back of the conveyance, was signed both by Mooring and Fielder, and witnessed by four witnesses of their signatures, it must be presumed that they received such consideration-money. Therefore, the defendant Stokes, as executor of Mooring, and Braxton, the surviving administrator with the will annexed of Fielder, ought to be charged with the consideration-money and interest.

Exceptions were taken by the defendant Stokes to the Master's report for charging the defendant, as executor of Mooring, with the sum of £1,260, as having been received by him with Fielder and interest. The examination of the plaintiff Brice stated that he was ignorant of the treaty for the sale except that for the purchaser's satisfaction he joined in the conveyance. Mooring resided at Christchurch, twelve miles from Lymington where the plaintiff and Fielder resided, the latter being an attorney. The plaintiff never received any money from Mooring, but he received various sums from Fielder by way of interest for part of the trust estate. On account of Mooring's residing at a distance the plaintiff never applied to him for any interest during the life of Fielder, but always applied to Fielder who lived near him. The evidence as to the fact of the payment was contradictory. Mooring's widow stated that she was present at the execution of the conveyance, but did not see the money paid to anyone. Fielder told Mooring it was necessary for him to execute the conveyance and sign the receipt, to which Mooring objected, alleging, that Fielder never consulted him in the management of the trust, but Fielder pressed him, saying it was only matter of form for he should receive the purchase-money and place it in the stocks for the benefit of the children. At

length Mooring, after much hesitation, executed. There was also evidence that among Mooring's papers was found an account in the handwriting of Fielder showing that the whole of the money was received by Fielder and the greater part invested in securities, and, that by an account, discovered among Fielder's papers, it appeared that he received the money, deducted £400 for legacies and retained £860, for which he paid interest to the plaintiff.

Romilly and *Hart* in support of the exceptions.
Richards and *Bell* for the report.

LORD ELDON, L.C.—It does not appear for what purpose this sale was made except for the mere purpose of converting real estate into personal. If the sale was made for a purpose not authorised by the settlement, Brice, the husband, being an executing party, could not complain of that sale. The money must upon this evidence be taken to have been paid to Fielder. At law, where trustees join in a receipt, prima facie all are to be considered as having received the money, but it is competent to a trustee, and, if he means to exonerate himself from that inference, it is necessary for him, to show that the money acknowledged to have been received by all was in fact received by one, and the other joined only for conformity. In the case of executors it has been said, and well said, to be otherwise. An executor, as it is not necessary for him to join, interfering in the transaction unnecessarily, the inference is just the other way; he is to be considered as assuming a power over the fund, and, therefore, answerable for the application, as far as it is connected with the particular transaction, in which he joins. Upon considering the cases paring down that rule I repeat what I have said upon a former occasion [in *Chambers* v. *Minchin* (1), 7 Ves. at p. 198] that it is much safer for executors to abide by a general rule of that sort than to lay down a rule, trying the application of it by looking to particular circumstances in particular cases which will raise very different inferences in different minds. In this case it was absolutely necessary that all the trustees should join in the receipt, for the law empowering the sale is the settlement which in principle and terms requires that the purchaser should not be discharged but upon the joint receipt of all. The money was not in a strict sense received by both trustees, for the weight of evidence is that Mooring let Fielder, a professional man, circumvent him a little in taking into his own hands the money, probably upon some confidence that he would lay it out either in the funds, or such other security as it might be invested in consistently with the settlement, viz., a good real security. It is a clear fact now that it remained with Fielder until his death in 1794.

Two questions arise: (i) whether Brice, the husband, can complain with respect to his interest in the produce of this sale, as against Mooring; (ii) whether those who are to take after him can complain. It is clear upon settled cases that, if there are two trustees and a transaction takes place in which the fund is taken out of the state in which it ought to have remained, and is not placed in the state in which it ought to be, but is kept in hands that ought not to retain it, if any particular cestui que trust has acted in authorising that as much as the trustee, who has not the money in his hands, and continues to permit it to be so treated, in a question between that cestui que trust and that trustee the latter cannot be called upon by the former. There is very satisfactory evidence that Brice must be considered as having for ten years permitted this money to remain with Fielder alone, and, therefore, cannot complain as against Mooring, that it was not laid out by Fielder with Mooring.

Upon the evidence Brice received the interest from Fielder alone, having no communication with Mooring until shortly before or after the death of Fielder, and made no demand upon Mooring. He ought to be taken upon the account to know that as late as 1786 this was cash in the hands of Fielder, charged in account as one of the executors having that money. There is not one item in respect of which he debits himself that does not expressly name the security

upon which the money was out, except the sum of £860, and then it is no longer interest at 4 per cent., but 5 per cent., charging himself with a larger interest, after he received it than he gave credit for before he received it. Afterwards from 1878 he proceeds dealing with Fielder only, receiving the interest of that particular sum until 1794. The result of the evidence is that with Brice's permission this money was suffered to remain with Fielder upon his personal security, and, if Mooring knew as much as Brice, so Brice knew as much as Mooring and cannot complain that this was a misapplication, permitting it with respect to his own interest.

Mooring also placed so much confidence in Fielder that, though the money got into the hands of Fielder alone, it is very difficult to say, as against those who come after Brice, that Mooring is not to be answerable. This is a sale under a power, but without necessity. This is an act that never could have been done by the mere exercise of the judgment of one of the trustees, enabling him to determine that it was necessary. There was no necessity in respect to which the other should join. But, though a trustee is safe, if he does no more than authorise the receipt and retainer of the money as far as the act is within the due execution of the power, yet, if it is proved, that a trustee under a duty to say that his co-trustee shall not retain the money beyond the time during which the transaction requires retainer, and says with his knowledge, and, therefore, with his consent, that the co-trustee has not laid it out according to the trust, but has kept it, or lent it, in opposition to the trust, and the other trustee permits that for ten years together, the question turns upon this, not whether the receipt of the money was right, but whether the use of it subsequent to that receipt was right, after the knowledge of the trustee that it had got into a course of abuse. Of that it seems Mooring was distinctly informed, the paper connected with the marriage settlement stating upon the face of it a breach of trust. Though not very intelligible, it shows that an account of the securities taken by Fielder for £1,260 was put into the hands of Mooring. That gave him information that Fielder was lending some of the money upon notes, some upon bonds, and, as soon as a trustee is fixed with knowledge that his co-trustee is misapplying the money a duty is imposed upon him to bring it back into the joint custody of those who ought to take better care of it.

The conclusion is that Brice cannot call upon Mooring as to the interest, but as to the principal Mooring is answerable. He is not, however, to be charged with more than was actually misapplied.

Order accordingly.

A

SANSOM AND OTHERS *v.* BELL

[Court of King's Bench (Lord Ellenborough, C.J.), March 3, 1809]

[Reported 2 Camp. 39]

B *Guarantee—Surety—Liability—Duration of liability—Period specified in recital of guarantee—Extension—Need for express provision.*

Where the period for which a surety is to be liable is definitely marked out in the recital of the guarantee it is not to be extended by any general words.

Accordingly, where a guarantee, having recited a specific debt already in existence, referred to that debt and also a debt "on any other account thereafter to subsist" between debtor and creditors,

C **Held:** the guarantee was extended beyond the specific debt without any limitation of time or restriction as to the nature of the transaction.

Notes. Referred to: *Hassell* v. *Long* (1814), 2 M. & S. 363.

As to effect of recitals in a guarantee, see 18 Halsbury's Laws (3rd Edn.) 440, 441; and for cases see 7 Digest (Repl.) 188–190.

D Cases referred to:

(1) *Liverpool Waterworks Co.* v. *Atkinson* (1805), 6 East, 507; 2 Smith, K.B. 654; 102 E.R. 1382; 7 Digest (Repl.) 188, *215.*

(2) *Wardens of St. Saviour's, Southwark* v. *Bostock* (1806), 2 Bos. & P.N.R. 175; 127 E.R. 590; 26 Digest (Repl.) 172, *1275.*

E **Writ of Inquiry** of damages under the [repealed] Administration of Justice Act, 1696 (8 & 9 Wills 3, c. 11).

The plaintiffs declared in debt on a bond dated Mar. 17, 1803, for £20,000. The defendant pleaded a former recovery, and there was judgment for the plaintiffs on an issue of nul tiel record. The plaintiffs set out the condition of the bond which, after reciting that they had agreed to accept bills of exchange to be drawn upon

F them by one W. Bell to the amount of £10,000, for which Bell had agreed to remit to them good bills of exchange or notes to answer the payment of all such bills to be drawn as before mentioned as they should become due, and that the defendant and one Hugh Bell, in order to secure the plaintiffs against such acceptances as they might be under for W. Bell, had agreed to join with him in that bond of indemnity, and it was declared that, if W. Bell should well and truly pay to the

G plaintiffs all such sum of money as he might thereafter owe them by reason of their being under acceptances for him, or on any other account thereafter to subsist between them, when and as the same should become due and payable, or in default thereof, if the defendant and Hugh Bell, or either of them, should, within one month next after demand thereof, well and truly pay or cause to be paid such sum of money to the plaintiffs not exceeding in the whole the sum of £10,000 and also

H well and sufficiently indemnify the plaintiffs on account of their being under acceptances for W. Bell or on any other account to be thereafter subsisting between W. Bell and the plaintiffs, then the said writing obligatory to be void. The only question between the parties was whether the indemnity was confined to one set of acceptances to the amount of £10,000, or extended to a balance of that sum upon a running account.

I *Dampier* and *Moore* for the plaintiffs.

Gaselee, for the defendant, contended that the indemnity could not be carried beyond the first £10,000. The recital expressly limited the amount of the acceptances to £10,000, and it was there that the real agreement of the parties was to be looked for. The words were enlarged by the condition itself to any account thereafter to subsist, but that must be referred to the foregoing agreement. It had been decided that as against a surety, the condition of a bond could not be carried beyond the limits marked out in the recital. Thus, in *Liverpool Waterworks Co.* v.

Atkinson (1), where the condition of the bond recited that A. had agreed with the plaintiffs to collect their revenues

"from time to time for twelve months" and afterwards stipulated that "at all times thereafter during the continuance of such his employment, and for so long time as he should continue to be employed, he should justly account,"

the obligation was held to be confined to the twelve months mentioned in the recital. So in *Wardens of St. Saviour's, Southwark* v. *Bostock* (2), where sureties were bound for the collector of a church rate accounting

"for all moneys collected or received by him on account of the said rate, as also on all and every other rate or rates thereafter to be made and collected by him,"

it was held that the sureties were only answerable for his accounting during one year, because such appeared to be the meaning of the parties as expressed in the recital of the condition.

LORD ELLENBOROUGH, C.J.—I fully accede to these cases. They apply to the time for which sureties shall be liable, and where this is definitely marked out in the recital of the condition it is not to be extended by any subsequent general words. Here had the condition only referred to the acceptances mentioned in the recital, I should have thought the defendant liable for one set of bills accepted by the plaintiffs on account of W. Bell and no more. But a new subject-matter is afterwards introduced, and the guarantee is extended to "any other account thereafter to subsist between them" without any limitation of time or restriction as to the nature of the transaction. An expanded liability is thus created. The inquiry must be taken for all such sums to the amount of £10,000 as the plaintiffs can show to be on any account due to them from W. Bell.

Order accordingly.

CHETHAM *v.* WILLIAMSON AND OTHERS

[Court of King's Bench (Lord Ellenborough, C.J., Lawrence, Grose and Le Blanc, JJ.), January 3, 1804]

[Reported 4 East, 469; 1 Smith, K.B. 278; 102 E.R. 910]

Mine—Licence to mine—Covenant that "it shall be lawful to enter and dig for mineral"—No exclusive right.

By a covenant in a mortgage deed the mortgagee granted to the mortgagor "that it shall and may be lawful to [the mortgagor] at all times hereafter to enter into all or any part of the premises to search for and dig for coal or any other mineral and the same to take, have, and carry away . . ."

Held: even if the mortgagor had been seised of the legal estate, which he was not, having only the equity of redemption, this liberty reserved to him of digging for coals would not have given him an exclusive right thereto so as to enable him to maintain trover against the mortgagee for coals raised by him.

Notes. Followed: *Doe d. Hanley* v. *Wood* [1814–23] All E.R. Rep. 136. Applied: *R.* v. *Trent and Mersey Canal* (1825), 6 Dow. & Ry. K.B. 47. Followed: *Denison* v. *Holliday* (1857), 1 H. & N. 631. Approved: *Sutherland* v. *Heathcote*, [1892] 1 Ch. 475. Referred to: *Lee* v. *Stevenson* (1858), E.B. & E. 512; *Gilbertson* v. *Richards* (1859), 4 H. & N. 277.

As to licences to mine, see 26 HALSBURY'S LAWS (3rd Edn.) 444–446; and for cases see 33 DIGEST (Repl.) 834 et seq.

Case referred to:

(1) *Earl of Huntingdon and Lord Mountjoye's Case* (1583), 4 Leon. 147; Moore, K.B. 174; 1 And. 307; 74 E.R. 786; sub nom. *Lord Mountjoy and Earl of Huntington's Case*, Godb. 17; 30 Digest (Repl.) 527, *1656*.

Action of trover for so many horse loads of coals.

Richard Nettleton, being seised in fee, subject to an equity of redemption in one Edward Hyde, of certain lands and tenements in Haughton, in the county of Lancaster, by an indenture of lease of Mar. 28, 1694, between the said Nettleton, of the first part, and D. Hobson, of the second part, and by another indenture of release of Mar. 29, between the same parties, of the first and second part, and the said Edward Hyde of the third part, in consideration of 5s. paid by Hobson to Nettleton, and of £63 paid by Hobson to Hyde, Nettleton granted, released, and confirmed to Hobson and his heirs the said premises, to have and to hold the same to Hobson and his heirs, and E. Hyde thereby released to Hobson and his heirs all his power, title, and equity of redemption, and all his right, title, estate, etc., in the premises. The last-mentioned indenture, after reciting that the same premises had been before conveyed in mortgage by Hyde to Nettleton and his heirs, witnessed that Nettleton, at the instance of Hyde and for the said consideration of £63 paid by Hobson to Hyde, granted, released, and confirmed to Hobson the premises, in Haughton then in the tenure of Hobson, habendum to Hobson and his heirs, with all ways, liberties, easements, profits, etc., absolutely, without any equity of redemption, and Hyde thereby released to Hobson and his heirs all his equity of redemption, and all his right, title, interest, estate, claim, and demand whatsoever in the same premises. Hobson covenanted and granted to Hyde and his heirs an annual rent of 19s. 4d. payable out of the premises with a power of entering and distraining for the same in case of non-payment at the time. Hobson further covenanted and granted for himself, his heirs, etc., to Hyde and his heirs, etc.

> "that it shall and may be lawful to and for the said E. Hyde, his heirs, etc., at all times hereafter to enter into all or any part of the premises to search for and dig for coal or stone or any other mineral whatsoever, and the same to take, have, and carry away to their own use; provided and upon condition, that it shall and may be lawful to and for the said D. Hobson, his heirs, etc., and the occupiers of the premises, to have and take, by way of deduction and allowance, all or so much of the rent of nineteen shillings and fourpence aforesaid as shall be reasonable for any hurt, damage, or prejudice that shall be done to the premises by reason of digging for or carrying away of any mine or mines as aforesaid."

Hobson likewise covenanted with and granted to Hyde, his heirs, etc., to suffer and permit Hyde, his heirs, etc., or agents, to hunt, etc., upon the premises, and take the game, etc. E. Hyde was also seised in fee of other lands in Haughton, and he conveyed the same in several parcels to other persons by indenture of lease and release to which Hobson was also a party, made in the same form and containing the same exceptions, reservations, gifts, grants, and covenants as were contained in the indentures of lease and release to Hobson. On Jan. 1, 1777, all the estate, right, title, interest, and property granted and conveyed to Hobson by the indentures of lease and release of Mar. 28 and 29, 1694, and also granted and conveyed to the said several other persons by indentures of lease and release, by divers mesne descents and conveyances became and were vested in George Hyde Clarke, as tenant for life thereof, without impeachment of waste. On Jan. 1, 1781, all the estate, right, title, interest, property, claim, demand, and power of E. Hyde, which was excepted, reserved, given, granted, or conveyed to him by the indenture of lease and release, became and were, by divers mesne assignments and conveyances, vested in the plaintiff Chetham in fee, who became entitled thereto in the same and

in as ample and beneficial a manner as E. Hyde would have been if still living. On Jan. 1, 1781, all the estate, right, title, interest, property, claim, demand, and power of the said E. Hyde, which was excepted, reserved, given, granted, or conveyed to him by the said other conveyances to the said other persons respectively, became and were, by divers mesne descents and conveyances, vested in the plaintiff in fee, and he became entitled thereto in the same and in as ample and beneficial a manner as E. Hyde would have been if now living.

Upwards of sixty years previously and also within sixty years the persons respectively claiming under E. Hyde by virtue of the exception, reservation, gift, grant, or conveyance to him in the indentures of lease and release above mentioned, and their respective lessees and agents, had from time to time at their pleasure dug and got coals for their own use under the premises mentioned in the indentures of lease and release and had paid or allowed to the persons who were owners or tenants of the estate and interest conveyed to D. Hobson different sums of money as compensation for the injury from time to time done to the land.

By an agreement in writing, made on Nov. 4, 1782, at Preston, between the plaintiff and one Fletcher, and signed by them (which Fletcher was then an agent of G. Hyde Clarke for the management of his collieries in Haughton, worked by a water engine, G. H. Clarke then being resident in the island of Jamaica) it was agreed between the plaintiff and Fletcher as follows:

"(i) Mr. Chetham agrees to set all his coals in Haughton that lie above the level of or can be laid dry by Mr. Clarke's present water engine in Haughton to Mr. Clarke of Hyde, except so much of his coal as is in a meadow in Haughton called Jasper Meadow in the occupation of S. Hague, which coal in said meadow Mr. Chetham agrees to set to Mr. Arden of Stockport, together with the liberty of sinking pits, etc. for the getting, and vending the same. (ii) Mr. Clarke and Mr. Arden to begin with all convenient speed to prepare for getting said coal respectively, and work the said intended collieries in a regular and proper manner, so as to get said coal in its due course with their other coal in other lands adjoining, according to the usual method, etc. (iii) Mr. Clarke and Mr. Arden to render an account once in each month, if required, of all coal which shall have been gotten and sold by them respectively, and suffer Mr. Chetham to inspect the colliery books, etc., and once in every quarter of a year pay one penny for every horse load of coal so gotten and sold; and also to allow Mr. Chetham to take and carry away for the use of his own fire two horse loads of coal from each of their coal pits weekly, etc. (iv) Mr. Chetham not at any time to do or suffer anything whereby the said collieries of Mr. Clarke or Mr. Arden may be injured, etc. And, lastly, Mr. Chetham agrees to execute a lease to Mr. Arden and Mr. Clarke as soon as leases and counterparts can be prepared agreeable to the above conditions. It is at the same time agreed that Mr. Chetham is to have the liberty of appointing one collier to be employed at each pit, and such collier to be paid the usual wages by Mr. Arden and Mr. Clarke, he doing the like work."

Such part of the coals mentioned in the indentures of lease and release of Mar. 28 and 29, 1694, as lay above the level of or could be laid dry by the water engine of G. H. Clarke in the agreement mentioned were part of the coals comprised in the above agreement. G. H. Clarke, after the making of the agreement, assented to it, and by virtue thereof from time to time got the coal lying above the level of his water engine, and he and his agents or lessees regularly paid to the plaintiff one penny for every horse load of coal got under the agreement. The plaintiff had from time to time since the making of the agreement appointed a collier, who had been employed at each pit by G. H. Clarke, and been paid by him according to the agreement. G. H. Clarke, on Dec. 22, 1798, demised to the defendants the coal mines mentioned in the agreement, together with his other coal mines in Haughton, as tenants from year to year, and they entered and were possessed of the same. It

A then stated, that the defendants got the coals in question under the premises mentioned in the indentures of lease and release of Mar. 28 and 29, 1694, which coals were got by them under a level of the water engine of G. H. Clarke mentioned in the agreement, and that no part of the said coals could be laid dry by the said water engine; and that no part of the said coals were comprised in the said agreement. Notice was given by the plaintiff to the defendants not to get the coals B so situated, and the defendants after such notices, got and converted the same to their own use.

Littledale for the plaintiff.

Wood was not called on to argue for the defendant.

LORD ELLENBOROUGH, C.J.—Even if E. Hyde had been seised of the legal C estate, which he was not, yet the liberty reserved of digging for coals could not give him the exclusive right to them. No case can be named where one who has only a liberty of digging for coals in another's soil has an exclusive right to the coals so as to enable him to maintain trover against the owner of the estate for coals raised by him. *Lord Mountjoy and Earl of Huntington's Case* (1) as cited from 1 ANDERSON, 307, is decisive against the plaintiff, and still more as it is reported in D GODBOLT, 17, which is directly in point. Those who compared it to a grant of common sans nombre used that as the strongest instance to show that it could not be an exclusive right.

LAWRENCE, J.—The covenant in this case cannot operate as an exception or reservation in favour of E. Hyde, who had no legal estate in him at the time, but E only the equity of redemption. He was in law no more than a stranger to the estate, and could not except or reserve that which he had not before. The covenant, therefore, can only operate as a grant, but a grant will not pass the land itself without livery.

GROSE and **LE BLANC, JJ.**, concurred.

Judgment for defendant.

DANN *v.* SPURRIER

[Court of Common Pleas (Lord Alvanley, C.J., Heath, Rooke and Chambre, JJ.), Easter Term, 1803]

[Reported 3 Bos. & P. 399; 127 E.R. 218]

Landlord and Tenant—Lease—Construction most beneficial for lessee—Determination—Option as to date—Exercise by lessee.

If a doubt arises regarding the construction of a lease between lessor and lessee, the lease must be construed most beneficially for the lessee.

Therefore, where a lease is for an optional period, e.g. seven, fourteen, or twenty-one years, and there is no provision that it shall be determinable by either party or at the option of the lessor, nor any custom to the contrary, the lessee is entitled at his option to take that term which is most beneficial to himself.

Notes. Referred to: *Doe d. Pitcher* v. *Donovan* (1809), 1 Taunt. 555.

As to options to determine leases, see 23 Halsbury's Laws (3rd Edn.) 474, 475; and for cases see 31 Digest (Repl.) 596–598.

Cases referred to:

(1) *Goodright d. Hall* v. *Richardson* (1789), 3 Term Rep. 462; 100 E.R. 678; 30 Digest (Repl.) 485, *1288*.

(2) *Ferguson* v. *Cornish* (1760), 2 Burr. 1032; 97 E.R. 691; 30 Digest (Repl.) 488, *1326*.

(3) *Bishop of Bath's Case* (1605), 6 Co. Rep. 34b; 77 E.R. 303; sub nom. *Fish* v. *Bellamy*, Cro. Jac. 71; 31 Digest (Repl.) 57, *2142*.

(4) *Heyward's Case* (1595), 2 Co. Rep. 35a; 2 And. 202; 76 E.R. 489; 17 Digest (Repl.) 367, *1739*.

(5) *Keble* v. *Halls* (1630), Litt. 363; 124 E.R. 286; sub nom. *Keeble's Case*, Litt. 370; 17 Digest (Repl.) 300, *1062*.

Case submitted by the Lord Chancellor for the opinion of the court.

The Case stated that the defendant, on Oct. 14, 1791, entered into the following agreement with one William Atkinson:

"Memorandum. I, William Atkinson of Saint Olaves, Southwark, have this day agreed to take on lease of John Spurrier the dwelling-house and premises now occupied by him in Old Broad Street, together with a bedroom, now in the possession of Mr. Amory, which is over the one now used by the said John Spurrier himself, to hold for seven, fourteen or twenty-one years, at the yearly rent of £150 payable half yearly, including all taxes which are to be paid by the said John Spurrier, the term and rent to commence from Christmas next, the usual fixtures, carpets, and floor-cloths fitted to the floors, to be taken and paid for at a fair valuation by the said William Atkinson."

On the back of the agreement was the following memorandum:

"I agree to let the premises mentioned on the other side hereof upon the terms and conditions expressed therein. John Spurrier."

William Atkinson accordingly took possession of the premises, and afterwards disposed of his interest therein to the plaintiff Richard Dann, who took possession thereof and paid the rent. The defendant, on June 20, 1798, gave notice to the plaintiff to quit the premises at Christmas then next, which the plaintiff refused to do, alleging that the defendant had no right to determine the agreement at the expiration of the first seven years, but that the tenant only had that right. In Hilary Term, 1799, the defendant commenced an action of ejectment in the Court of King's Bench in order to obtain possession of the premises upon which the plaintiff and William Atkinson filed a bill in the High Court of Chancery against the defendant for a specific performance of the agreement and an order that the defendant might be compelled to execute a lease of the premises to them or one of them

A for twenty-one years. The question for the opinion of the court was whether upon the legal construction of the agreement the defendant had a right to determine the term of twenty-one years thereby agreed to be granted at the end of the first seven years.

Serjeant Shepherd for the plaintiff.

B *Serjeant Heywood* for the defendant.

Cur. adv. vult.

LORD ALVANLEY, C.J.—This question turns upon the legal construction of the agreement stated in the Case. It is to be observed that the agreement is not an offer on the part of the lessee to take a lease for seven or a lease for fourteen, or a lease for 21 years, but it is an offer to take a lease with an habendum, as C stated by the lessee in his proposals, viz., to hold for seven, fourteen or twenty-one years. The lessor having assented to let the premises upon the terms and conditions proposed, it must now be taken as if a lease had been actually granted containing such an habendum as that stated in the proposals. It is for us, therefore, to determine what is the legal construction of such an habendum in a lease.

D It has been contended that where the terms are not defined, either positively or by any circumstance, but an alternative is stated which cannot be made certain without the option of one of the parties, the lease is determinable at the option of either. There seems to be great authority for such a proposition, for undoubtedly LORD KENYON and BULLER, J., both intimate in *Goodright d. Hall* v. *Richardson* (1) that the option would be in either party. But it must not be forgotten (for I wish E it to be understood that had the judgment of the court in that case proceeded upon the point alluded to, it would probably have guided our judgment in the construction of such doubtful words as those which occur in this case) that LORD KENYON and BULLER, J., only threw out their opinion obiter. Had it been otherwise, there are no authorities, particularly that of LORD KENYON, upon a point of law arising out of real property to which I should be more disposed to defer. The lease F in that case was for three, six, or nine years, determinable in the years 1788, 1791, and 1794, and the construction put upon that lease was that it gave an option to either party, but that such option must be exercised with reasonable notice previous to the expiration of any of the terms, and, as reasonable notice had not been given, the court held that the lease was not determined. With respect to *Ferguson* v. *Cornish* (2), there referred to, it is surprising that any doubt should have arisen, G and, indeed, it does not appear that any doubt was entertained by the court. A lease having been granted for seven, fourteen or twenty-one years, and an action of covenant having been brought against the lessee during the first seven years, it was contended by the lessee that it was no lease at all according to the old doctrine that a lease uncertain in its commencement or duration was void. LORD MANSFIELD held that at all events it was a good lease for seven years.

H These two cases decide nothing with respect to the point now before the court. It remains, therefore, for us to consider, notwithstanding the opinions thrown out in these cases, whether, according to the construction which deeds between lessor and lessee have received, the power of determining the lease in this case must not be confined to the lessee. Much is to be found in the books relative to the construction of deeds which contain covenants in the alternative, from all of which I the rule appears to be perfectly clear, that, if a doubt arise as to the construction of a lease between lessor and lessee, the lease must be construed most beneficially for the lessee. It is laid down in the books, that, if a man covenant to do one of two things, and he does either, the covenant is not broken. Thus in 1 ROLLE'S ABRIDGMENT, tit. CONDITION (Y) pl. 3, fo. 446, it is said that, if a condition be that the obligor shall enfeoff a man of lands in D. or S. upon request, the obligor has his election of which of the two he shall enfeoff him. So in pl. 4 it is laid down that, if the condition be that the obligor shall pay £20 or a pint of wine upon request, he has his election. This election, however, is said to depend upon which

of the two parties to the contract is to do the first act. Therefore, if a man make a grant in the alternative and the grantee enter into possession, the grantor is no longer at liberty to exercise an option. So if A. says to B.: "I grant you a horse out of my stable", he puts it in the power of B. to take which horse he shall think proper.

In the *Bishop of Bath's Case* (3), it was resolved that the construction of law as to the commencement of leases should be taken strongest against the lessor and most beneficially for the lessee. Another strong authority to this effect is *Heyward's Case* (4), where one having demised, granted, bargained, and sold certain lands, and the question being whether the grantee should take by demise or by bargain and sale, it was held that the grantee had his election. In 3 DYER, 261 b, the Court of Common Pleas held that where a lease of premises which had been granted for thirty-one years, was granted to a new lessee, a die confectionis præsentium termino prædicto finito usque ad finem termini 31 annorum tunc immediate sequentium, the term should commence in possession from the end of the former term and not from the making of the deed, and the reason which they give for the opinion was that every grant should be expounded most favourably for the grantee, and if the lease were to commence from the making of the deed the lessee would only have four years. It is true that BROWNE, J., doubted upon this point, and that the Court of King's Bench came to a different decision. But although the Court of King's Bench might not think proper to go so far in favour of the lessee as the Court of Common Pleas did, yet it does not follow that they were disposed to deny the rule of construing leases favourably for the lessee, for where two periods are mentioned in a deed from which the commencement of a lease is to take place the legal construction is that it shall commence from which of the two periods shall first happen, and so it was determined in 3 DYER 312 b, in margin.

This principle of exposition is found, but if it is not applicable to this case which does not depend upon the priority of different periods, but upon the question in whom the option of deciding upon the alternative is vested. The lease agreed for in the present case was for seven, fourteen or twenty-one years. An option, therefore, was certainly intended. If, then, the principle be just that a lease is to be construed most favourably for the lessee, why are we to determine in this instance that the option is in the lessor? If, indeed, a provision had been inserted that the lease should be determinable at the option of either party, the lessor would have been entitled to take advantage of it, but where no such proviso is inserted, the true construction seems to be that the lessee is entitled at his option to take that term which is most beneficial to himself. Notwithstanding, therefore, the opinions which have been referred to of LORD KENYON and BULLER, J., we think that where no custom of the country exists upon the subject, the principle of construing deeds between lessor and lessee requires us to hold that where a grant is made in an alternative which cannot be determined by extrinsic circumstances the option is left in the lessee. We shall certify accordingly. *Keble* v. *Halls* (5) bears very strongly upon this subject. In that case, a lease having been granted to A. and B. for forty years if they and three others, or any of them, should so long live, a second lease was granted

> "habendum from the administration*, which should be in the year 1568, or from and after the surrender, forfeiture, or other determination of the said lease to A. and B.,"

and, some of the persons for whose life the first lease was granted having survived the year 1568, a question arose when the second lease ought to commence. The case, indeed, does not appear by the report to have been finally determined, but the court strongly inclined to think the lessee should have his election, because that construction ought to be adopted which is most favourable for lessees.

* This seems to be misprinted in LITT. for annunciation.

HALL *v.* CAZENOVE

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), February 3, 1804]

[Reported 4 East, 477; 1 Smith, K.B. 272; 102 E.R. 913]

Deed—Date—Effect from date of delivery—Prior date appearing on deed.

A deed takes effect from the date of its delivery, and though the deed is stated on the face of it to have been made on one day evidence is admissible to show that it was delivered on a later day, which shall then prevail.

Shipping — Charterparty — Condition precedent — Covenant that ship leave on voyage on specified date.

By a charterparty the shipowner undertook that the ship would proceed from D. for a voyage to the West Indies on or before Feb. 12, 1801. In fact, the vessel left D. on the voyage on Mar. 15.

Held: the term that the ship would leave D. on Feb. 12 was not a condition precedent, and the fact that it had not been complied with did not disentitle the shipowner from recovering the amount due for freight under the charterparty.

Notes. Considered: *Tarrobochia* v. *Hickie* (1856), 1 H. & N. 183. Referred to: *Davidson* v. *Gwynne* (1810), 12 East, 381; *Reffell* v. *Reffell* (1866), L.R. 1 P. & D. 139; *Re Slater, Ex parte Slater* (1897), 76 L.T. 529.

As to evidence to prove date of a deed, see 11 Halsbury's Laws (3rd Edn.) 403, and as to conditions precedent in charterparties, see ibid., vol. 35, pp. 260, 261. For cases see 17 Digest 240, 241; 41 Digest (Repl.) 186–190.

Cases referred to:

(1) *Goddard's Case* (1584), 2 Co. Rep. 4 b; 76 E.R. 396; sub nom. *Denton and Goddard's Case*, 3 Leon. 100; 21 Digest (Repl.) 329, *825*.

(2) *Stone* v. *Bale* (1693), 3 Lev. 348; 83 E.R. 724; 17 Digest (Repl.) 241, *442*.

(3) *Constable* v. *Cloberie* (1625), Palm. 397; Poph. 161; Lat. 49; 81 E.R. 1141; sub nom. *Conustable* v. *Clowbury*, Noy, 75; 41 Digest (Repl.) 157, *37*.

(4) *Boone* v. *Eyre* (1779), 1 Hy. Bl. 273, n.; 1 Wms. Saund. 320 c.; 2 Wm. Bl. 1312; 126 E.R. 160; 12 Digest (Repl.) 472, *3526*.

Demurrer to an action on a charterparty.

The plaintiff declared that whereas by a charterparty of affreightment, purporting to be indented, made, and concluded in London on Feb. 6, 1801, between the plaintiff as owner of the ship *Argo*, then lying in the river Thames and bound on a voyage to Demerara, of the one part, and the defendant and one J.B. of London, merchants, of the other part, but the charterparty was in fact first indented, made, and concluded after Feb. 6, to wit, on Mar. 15, 1801, it was witnessed that the plaintiff for the considerations after mentioned, agreed with the defendant that the ship would proceed from Deptford, where she then lay, on or before Feb. 12 to the port of rendezvous for the ships that were to join convoy for the West Indies and proceed under convoy to Demerara. On delivery of the cargo outwards, which was to be within ten days after arrival, she was to receive on board from the agents of the freighters a full cargo, and, having received the same on board, should therewith proceed thence, after the expiration of the lay-days thereinafter mentioned, to the place of rendezvous for the convoy for England, and, having joined the fleet, should sail therewith for London, and there make delivery of the cargo to the defendant. The plaintiff said that in consideration of everything above mentioned, the defendant agreed that he and J.B. would pay the freight within two months after the ship reported at the Custom House at London. The plaintiff then averred that on Mar. 15, 1801, the ship proceeded from Deptford on the voyage, and duly returned to London, but two months and upwards had elapsed from the time of reporting the ship at the Custom

House, and, that though he had performed and been ready and willing to perform everything in the charterparty contained on his part to be performed, which on his part and behalf could possibly be performed, according to the true intent and meaning of the charterparty, yet the defendant did not, at the expiration of two months from the report of the ship's arrival or at any other time, pay to the plaintiff the sums due for freight and demurrage.

The defendant pleaded that the ship did not proceed from Deptford on or before Feb. 12 as agreed in the charterparty. He also said that the charterparty was not concluded on Feb. 6, 1801, but, as the charterparty stated that it was concluded on Feb. 6 the plaintiff was estopped from alleging that it was concluded after that date. Joinder in demurrer.

Giles, for the defendant, in support of the demurrer, argued that the plaintiff was estopped from alleging that the charterparty was indented, made, and concluded after Feb. 6, when it appeared upon the face of it to have been indented, made, and concluded on Feb. 6. Though it was competent to a party to aver that a deed was delivered after the date, yet he could not make any allegation inconsistent with the deed: *Goddard's Case* (1); BROOKE'S ABRIDGMENT, Obligation, pl. 40, Departure, pl. 14. [LORD ELLENBOROUGH, C.J.: *Stone* v. *Bale* (2) is decisive to show that a party may aver a delivery of a deed on another day than that on which it bears date.] The distinction taken is that a party cannot aver a delivery on a day prior to the date. If the plaintiff be not estopped from making the particular allegation in the declaration as being equivalent to an averment of the day of delivery of the deed, then the deed must be considered as delivered on Mar. 15 in which case it was void upon the face of it, because it appeared from the whole scope of it that it was a condition precedent to the payment of freight that the ship should proceed from Deptford on or before Feb. 12, to the port of rendezvous, and proceed under convoy to Demerara. The allegation that the deed was executed after Feb. 12 would not supersede the necessity of alleging that a thing was done on the 12th which by the terms of the deed was made a condition precedent: Co. LITT. 206.

Lawes, for the plaintiff, was stopped by the court.

LORD ELLENBOROUGH, C.J.—First, as to the objection that the party is estopped from saying that the deed was indented, made, and concluded on a different day from that of the date which it bears, I see nothing inconsistent with the deed in such an allegation any more than if he had alleged that it was sealed and delivered on a day subsequent. It is quite unimportant when it was indented, and equally so when it was made, by which may be understood when it was written. The only material word is "concluded", and a deed can only be said to be concluded when it is delivered. The time of delivery is the important time when it takes effect as a deed, and *Stone* v. *Bale* (2) is in point to show that the delivery may be averred to be after the date. There is, therefore, no repugnancy in the allegation.

Secondly, it is objected that the sailing on Feb. 12 was a condition precedent, the performance of which was necessary to be alleged to entitle the plaintiff to recover. If it had been possible to have been performed at the time of the delivery, if the time itself had not then gone by, the inclination of my opinion at present is, that it would have been a condition precedent. I do not, however, mean to give any opinion on that point. But when the deed was executed or concluded by delivery, the stipulation, which was not impossible in its nature when the deed was first framed, had become impossible as between these parties from the time having passed. The stipulation, therefore, had then become wholly nugatory, and cannot be understood as having formed any part of the contract between the parties without imputing to them the most manifest absurdity. The rest of the contract may take effect which was prospective at the time when the deed was concluded.

GROSE, J., declared himself of the same opinion.

LAWRENCE, J.—Though the allegation here be not in exactly the same words as in *Goddard's Case* (1), yet it is the same in substance, and according to that case, though the deed appear on the face of it to have been made on one day, yet if in truth it were delivered on a subsequent day, that may be shown by averment, and there is no more inconsistency in the one case than in the other. As to the second objection, I doubt whether the sailing on or before Feb. 12 be a condition precedent on the part of the plaintiff to his recovery; it is a covenant that the ship should or would sail prospectively. Taking it, as my Lord has said, to be a condition precedent, it having become by the lapse of time altogether impossible when the deed was executed, it could form no part of the agreement between the parties.

In construing instruments we must look to the substance of them in order to discover the meaning of the parties; and looking at the substance of this charterparty, it is not unlike *Constable* v. *Cloberie* (3), where the plaintiff covenanted in a charterparty that his ship should sail with the next wind upon a voyage to Cadiz, and the defendant covenanted that, if the ship went the intended voyage and returned to the Downs, the plaintiff should have so much for the voyage. The defendant traversed that the ship sailed with the next wind and upon demurrer the traverse was overruled, for the substance of the covenant was considered to be that the ship should perform the intended voyage, that being the primary intention of the parties, and not merely that she should sail with the next wind which might change every hour. This was shown by the covenant of the defendant who was to pay so much for the freight, that is, for performing the voyage, and not merely for sailing with the next wind. So here the substance of the covenant is that the ship shall go to Demerara on freight and return again.

I take this to be rather a case of mutual covenants than a condition precedent, and in that view *Boone* v. *Eyre* (4) is material to be attended to. That was where the plaintiff had conveyed a plantation in the West Indies with the negroes upon it to the defendant in consideration of an annuity to be paid him for his life, and covenanted that he had a good title to the land and was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted that the plaintiff, well and truly performing all and everything therein contained on his part to be performed, he (the defendant) would pay the annuity. The breach assigned was the non-payment of the annuity. The defendant pleaded that the plaintiff was not at the time of making the deed legally possessed of the negroes on the plantation, and so had not a good title to convey. But it was held that these were mutual covenants, and that where mutual covenants go only to a part of the consideration on both sides, and where a breach may be paid for in damages, there the defendant has a remedy on his covenant and shall not plead it as a condition precedent. According to this case, therefore, it would not have been a condition precedent to the plaintiff's recovering on the covenant for freight even if it had been possible for the ship to have sailed on or before Feb. 12, and she had not done so. If the voyage has been performed and the profit of it gained by the defendant, there can be no foundation for saying that he shall not pay the freight for it. He may recover damages for not sailing in time, if any damage has been occasioned by it.

LE BLANC, J.—The substance of the pleadings shows that the charterparty was executed after the day on which it bears date, which, by all the authorities, the defendant is not estopped from doing. As to the other objection, if the defendant sustained any damage by reason of the ship's not having sailed on the particular day, he may recover it by bringing his action on the covenant, but, at any rate, the objection does not go to the plaintiff's right of action as on the ground of a condition precedent.

Judgment for plaintiff.

JONES *v.* ASHBURNHAM AND WIFE

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), January 31, 1804]

[Reported 4 East, 455; 1 Smith, K.B. 188; 102 E.R. 905]

Contract—Guarantee—Consideration—Forbearance to sue—Need for threatened suit to be capable of effective enforcement.

Forbearance to sue constitutes valuable consideration for a contract provided that the forbearance is of a suit which can be effectively enforced at law or in equity.

Notes. Referred to: *Petch* v. *Lyon* (1846), 9 Q.B. 147; *Smith* v. *Hartley* (1851), 2 L.M. & P. 304; *Hardie and Lane, Ltd.* v. *Chilton*, [1928] All E.R. Rep. 36.

As to consideration for a contract or a guarantee, see 8 Halsbury's Laws (3rd Edn.) 113–121, and ibid., vol. 18, pp. 419–423. For cases see 12 Digest (Repl.) 196 et seq.; 26 Digest (Repl.) 17 et seq.

Cases referred to:

(1) *Pillans* v. *Van Mierop* (1765), 3 Burr. 1663; 97 E.R. 1035; 12 Digest (Repl.) 198, *1372*.

(2) *Rosyer* v. *Langdale* (1650), Sty. 248; 82 E.R. 684; 12 Digest (Repl.) 222, *1640*.

(3) *Hume* v. *Hinton* (1651), Sty. 304; 82 E.R. 730; 26 Digest (Repl.) 24, *126*.

(4) *Quick* v. *Coppleton* (1665), 1 Lev. 161; 1 Keb. 866; 1 Sid. 242; 83 E.R. 349; 12 Digest (Repl.) 218, *1587*.

Also referred to in argument:

Smith v. *Jones* (1610), Yelv. 184; Cro. Jac. 257; 80 E.R. 122.

Hill v. *Bailey* (prior to 1651), 1 Roll. Abr. 22; cited in Sty. at p. 305.

Reynolds v. *Prosser* (1656), Hard. 71; 145 E.R. 386; 12 Digest (Repl.) 217, *1561*.

Tooley v. *Windham* (1590), Cro. Eliz. 206; 78 E.R. 463; sub nom. *Toley and Windham's Case*, 2 Leon. 105; 12 Digest (Repl.) 221, *1635*.

Loyd v. *Lee* (1718), 1 Stra. 94; 93 E.R. 406, N.P.; 12 Digest (Repl.) 221, *1632*.

Rann v. *Hughes* (1778), 7 Term Rep. 350, n.; 4 Bro. Parl. Cas. 27; 101 E.R. 1014, H.L.; 12 Digest (Repl.) 198, *1373*.

Demurrer to an action for debt.

The plaintiff declared that one S. F. Bancroft, deceased, at the time of his death was indebted to him in the sum of £58 for goods sold and delivered to him (Bancroft). The second defendant, Nancy Ashburnham, had been Bancroft's wife, and after his death she married the first defendant. The plaintiff alleged that in consideration that he (the plaintiff) at the special instance and request of the defendant Nancy would forbear to give day of payment of the said £58, she, by a note in writing signed by her on Mar. 20, 1801, promised the plaintiff to discharge the debt due and owing to him in a reasonable time, and to send him £20 in part payment in the July following. The plaintiff said that, although July was long since passed and a reasonable time had elapsed for the payment of the whole £58, according to the tenor and effect of the said promise, the defendants had refused to pay it. The defendants pleaded, inter alia, a demurrer contending that the declaration did not disclose any legal and sufficient consideration for the alleged promise.

Marryat, for the defendant, in support of the demurrer.

Jervis for the plaintiff.

LORD ELLENBOROUGH, C.J.—The way in which I am disposed to consider this case will break in upon no recognised rule of law, nor on the plain sense of what was laid down by Yates, J., in *Pillans* v. *Van Mierop* (1).

A It is a known rule of law that to make a promise obligatory there must be some benefit to the party making it or some detriment to the party to whom it is made, otherwise it is considered as nudum pactum and cannot be enforced. I do not say that the opinion which I have formed will not break in on any of the cases which have been cited, but it entrenches on no general rule, and in order to show that, I will examine the rule referred to as laid down by YATES, J., and to see how it B applies to the present case. He says that

> "any damage to another, or suspension or forbearance of his right, is a foundation for an undertaking."

How does the plaintiff show any damage to himself for forbearing to sue when there was no fund which could be the object of suit, where it does not appear C that any person in rerum natura was liable to be sued by him? No right can exist in this vague, abstract, and indefinite way. "Right" is a correlative term; there must be some object of right, some object of suit, some party who, in respect of some fund, or some character known in the law, is liable, otherwise there cannot be said to be any right. Has there been any suspension of the plaintiff's right? Unless a right is capable of being exercised, unless it can be put in force, D there can be no suspension of it, and that it could have been exercised or put in force, but for the promise made by the defendant, is not shown. Then what forbearance is shown? It must be a forbearance of a right which may be enforced with effect. It is true that a promise may be binding though there may be no actual benefit resulting to the party making it, because it is enough if the plaintiff may be damaged by it, but it does not appear here that the forbearance could E produce any detriment to the plaintiff.

It does not, therefore, appear that YATES, J., laid down any doctrine which does not square with the general received rule of law that to sustain a promise there must be a benefit, on the one hand, or a detriment on the other. Here, whether there were any representative or any funds of the original debtor does not appear. As to the cases cited, *Rosyer* v. *Langdale* (2) is strong to the purpose, for it was F there decided that a promise in consideration that the plaintiff would forbear suit until the defendant had taken out letters of administration was without foundation because it did not appear that the party was liable before administration taken out. This was rightly determined, for forbearance of an unfounded suit is no forbearance. But this case is attempted to be met by *Hume* v. *Hinton* (3), where a promise by the mother of an intestate indebted to the plaintiff that, if he would G stay for the money till a given day, she would pay it was sustained. That, however, was after verdict, and that is material to be attended to because it might be presumed to have been proved that the defendant had so intermeddled with the intestate's effects as to make herself liable as executrix de son tort and had funds of the deceased in her hands for which, but for the promise made, she might have been sued in that character. No such intendment can be made here.

H *Quick* v. *Coppleton* (4) is also relied on. That too was after verdict, and it was moved in arrest of judgment for want of consideration. I think that even after verdict that declaration would be bad, being vicious on the face of it. It is stated that the defendant's late husband was indebted to the plaintiff, and that she (not stating her to be clothed with any representative character), about to come to London, and being in fear to be arrested by the plaintiff, promised, etc. An I attempt to impose upon a person an unlawful terror (and the threatening of an unlawful suit is as bad) can never be a good consideration for a promise to pay, yet that ground is insisted on by HYDE, C.J. As to the case there cited by him of a mother who promised to pay on forbearance of the plaintiff to arrest the dead body of her son, which she feared he was about to do, it is contrary to every principle of law and moral feeling. Such an act is revolting to humanity and illegal, and, therefore, any promise extorted by the fear of it could never be valid in law. It might as well be said that a promise in consideration that one would withdraw a pistol

from another's breast could be enforced against the party acting under such unlawful terror. Here, there being no consideration of benefit to the defendant, or of detriment or possibility of detriment to the plaintiff, shown by him on the face of the declaration, and this coming on upon demurrer where nothing can be intended as it may after verdict, I am clearly of opinion that the declaration is bad.

GROSE, J.—It must be admitted that if a consideration for the promise do not sufficiently appear upon the face of the declaration it cannot be supported. There is a great difference between questions of this sort arising upon demurrer to the declaration and in arrest of judgment after verdict, in which latter case everything is to be intended which can be in favour of the verdict, but not so on demurrer. It is, however, said that a detriment to the plaintiff will support an assumpsit as well as a benefit to the defendant, and that here the plaintiff alleges a forbearance. But it is a perversion of terms to call that a forbearance to sue if there were no person who was capable of being sued, and here none is shown. There can be no forbearance in such a case, and, therefore, there is an end of the consideration. This is too plain to require anything further to be said upon it, and makes it unnecessary, after what my Lord has said, to enter into the consideration of the cases.

LAWRENCE, J.—This question arises upon a special demurrer which points out an objection to the declaration that no person is stated who was liable to be sued at the time of the promise made in respect to whom the plaintiff can be said to have forborne suit. On this ground the case is distinguishable from those relied on by the plaintiff's counsel, which were after verdict, and in support of which it might be said that when the jury found that the plaintiff did forbear to sue, they must be presumed to have found, upon proof laid before them, that there was somebody who could have been sued. But no such intendment can be made upon demurrer. The argument proceeds upon a fallacy in supposing that some person must exist liable to the plaintiff's suit to forbear whom must consequently be a disadvantage to him and a consideration for the defendant's promise. But that is not so. The deceased might leave no assets and there might be no administration to him taken out; there would then be no person to sue. So he might be a bastard and have no legal representatives entitled to take out administration of his effects, in which case the Crown would be entitled to them, and still there would be nobody to be sued. It is not, therefore, true that there must be somebody liable to whom a forbearance to sue may refer.

I agree with the argument of the defendant's counsel that if it be no consideration for the promise to forbear to sue the defendant without showing that the defendant was liable to be sued, it can be no consideration for a promise to forbear to sue all the world generally without showing that some person or other was liable to be sued, for without that the plaintiff does not show any detriment arising to him from the forbearance of his suit. The principle is admitted that the plaintiff must show some benefit to the defendant or some detriment to himself. I understand YATES, J., in illustrating that principle in the passage cited, to say that where it appears on the face of the declaration that there is somebody whom the plaintiff may sue, it is not necessary to show that he would be benefited by suing him; it is sufficient that there is some person whom he might sue and from whom he might obtain satisfaction.

LE BLANC, J.—The definition by YATES, J., of a consideration sufficient to maintain a promise is that it be either of some benefit to the defendant, or some detriment to the plaintiff. It is sufficient if it be a detriment to the plaintiff though no actual benefit accrue to the party undertaking. So far only the definition goes. Afterwards, indeed, in commenting on that definition, he says that the promise of the defendant did occasion a possibility of loss to the plaintiffs. They might, he

says, have been thereby prevented from resorting to the original debtor or getting further security from him. But all this latter part is only a comment on the definition, and showing how the case then in judgment applied to it. I do not take it to be any part of the definition itself intended to be laid down by him that, if any person stated that he had forborne suing on a cause of action which might (or might not) by possibility occasion a loss to him, that was a sufficient ground for an undertaking by another to pay him. Here the plaintiff endeavours to make out a detriment to himself by showing that one deceased was indebted to him, and that in consideration that he would forbear and give day of payment the defendant promised, etc. But it does not follow from that that any detriment arose to the plaintiff from his forbearance if it does not appear that there was any person whom he could have sued. The general current of authorities shows that it is not sufficient to state a consideration to forbear generally, unless it be also shown that there was some person to be forborne. Here the declaration does not state that there was any representative of the debtor, or that any person had taken out administration to him, or that any person was going to administer to the effects and to satisfy the plaintiff's debt, but was prevented from so doing by the undertaking of the defendant. There, therefore, appears to be a want of consideration to sustain the promise.

Judgment for defendant.

EMERY *v.* WASE

[Lord Chancellor's Court (Lord Eldon, L.C.), May 7, 14, 20, 21, 1803]

[Reported 8 Ves. 505; 32 E.R. 451]

Specific Performance—Sale of land—Price—Valuation by third person—Contract on which damages recoverable—Capricious valuation—Adoption of valuation made by others.

If persons enter into an agreement to purchase property at the valuation of a third person, they must, in ordinary cases, be bound by that valuation. They must be taken to be judges of the discretion and skill of the person entrusted. If damages could be recovered in such a case it does not follow that the court is bound specifically to perform the agreement to abide by the valuation; some attention must be given to the principles on which the court refuses to perform agreements on which without doubt damages might be recovered. If a valuation was proved to be that of caprice by a man who never looked at the estate, taking its value from others who had very carelessly made the valuation, that is a case in which the court would hesitate extremely to perform the contract.

Sale of Land—Price—Payment at future date—Inference that price fixed with reference to postponement.

Where in a contract for the sale of land the payment is to be made at a future date a fair inference arises that the value is fixed with reference to the fact that payment was postponed: per Lord Eldon, L.C.

Arbitration—Arbitrator—Misconduct—Delegation of powers conferred on him by agreement to refer.

An arbitrator may not delegate to another the powers which by the agreement of reference the parties have conferred on him.

Notes. Approved: *Mortlock* v. *Buller* (1804), 10 Ves. 292. Considered: *Anderson* v. *Wallace* (1835), 3 Cl. & Fin. 26. Applied: *Collier* v. *Mason* (1858), 25 Beav. 200.

Referred to: *Howell* v. *George* (1815), 1 Madd. 1; *Gourlay* v. *Somerset* (1815), 19 Ves. 429; *Smyth* v. *Smyth* (1817), 2 Madd. 75; *White* v. *Cuddon* (1842), 8 Cl. & Fin. 766; *Castle* v. *Wilkinson* (1870), 5 Ch. App. 534.

As to circumstances in which specific performance will be refused, see 36 Halsbury's Laws (3rd Edn.) 281 et seq.; and for cases see 44 Digest (Repl.) 29 et seq.

Cases referred to:

(1) *White* v. *Damon* (1802), 7 Ves. 30, 34; 32 E.R. 13, L.C.; 44 Digest (Repl.) 6, *12*.

(2) *Candler* v. *Fuller* (1738), Willes, 62; 125 E.R. 1057; 2 Digest (Repl.) 721, *2331*.

Appeal by the plaintiff from a decree of Lord Alvanley (then Sir R. P. Arden, M.R.), reported 5 Ves. 846, dismissing a bill for the specific performance of a contract for the sale and purchase of an estate.

The agreement of which specific performance was prayed was in the following terms:

"Memorandum of an agreement made on Mar. 24, 1797, between Richard Emery of Watling Street in the county of Salop, on the one part, and John Wase of Waters Upton in the said county and the daughters of the said John Wase on the other part, as follows, viz., First, the aforesaid John Wase and daughters hereinafter mentioned do agree and consent that the aforesaid Richard Emery doth purchase at the valuation of Mr. John Bishton of Kilsal all the estate now in possession of the said John Wase or his under-tenants or assigns, situate and being in Waters Upton, together with all rights, privileges, ways, and every interest whatsoever kind or sort soever; and that the said valuation should be completed as soon as possibly convenient; and that the said Richard Emery be then put into immediate possession. Unto which agreement each party have put their hands the day and year above written. (Signed) Richard Emery—John Wase—William Emery—A. Maria Emery—John Dickin for self and wife—Sarah Wase—Mary Wase—Margaret Wase, and Charlotte Wase."

Bishton made the following award:

"April 26, 1797: I, John Bishton of Kilsal in the county of Salop, did on or about the 5th of this instant (April) survey and estimate the estate of Mr. John Wase and others at Waters Upton in the said county of Salop, and found the same to contain 197 acres and 15 perches; and that the value of the timber growing thereon exclusive of so much thereof as is immediately wanted for gates and posts for the use of the said premises was £300; which two sums together amount to the sum of £4,910; which sum of money I do direct shall be paid on Mar. 25 next unto the said John Wase and others by Mr. Richard Emery of Watling Street in the said county of Salop for their said estate and timber growing thereon with their appurtenances thereunto belonging, agreeable to articles made by and between the said John Wase and others and the said Richard Emery, bearing date on or about Mar. 24, provided a good title is made out to the said Richard Emery on or before Mar. 25 next; and the said John Wase to enter into an agreement with the said Richard Emery on or before May 12 next to quit and deliver up the possession of all the said estates and timber and the appurtenances so sold to the said Richard Emery on Mar. 25 next, except one room in the dwelling-house of the said John Wase, the use of the fold yard and a boosey pasture to be appointed by the said Richard Emery for the eating and reducing into dung the hay and straw and fodder of the last year's growth, which he shall quit on May 1 following; and also shall agree to the good husbandlike management, manuring, and cultivating of the said estate and for the proper quitting and yielding up

the same at the times above mentioned; and for leaving all the hay and straw of the last year properly reduced into dung in the usual place upon the premises for depositing the same for the use of the said Richard Emery, who is to pay for it, and also for the customary straw of corn, the clover seed last sown, and for pin-fallowing the corn stubbles, such price as shall be fixed within the month of May next after the time for quitting, as aforesaid, by referees to be chosen in the usual way; and, lastly, if a good and sufficient title to the said estates can be made out and the said Richard Emery shall choose to pay the said purchase-money on Sept. 29 next, the said John Wase shall receive the same, and shall pay and allow to the said Richard Emery on Mar. 25 next the sum of £86 as half a year's rent for the said premises. But, if the said Richard Emery shall not pay the said purchase-money on Sept. 29 next, he shall pay to the said John Wase such sum of money in addition to the said purchase money as every £100 3 per cent. annuities shall be bona fide worth more than £86 on Mar. 25 next; and in that case the said half a year's rent of £86 shall not be paid by the said John Wase to the said Richard Emery."

The prayer of the bill was that the agreement might be specifically performed and the report of Bishton declared valid, pursuant to the agreement, so far as related to the valuation of the estate, but no further, the plaintiff offering to waive every part except what related to the valuation. Bishton by his deposition stated, as the grounds of his valuation and omitting to make a separate valuation of the common, that the estate was disjointed and scattered, the roads bad, the house ill fitted up, and the outbuildings bad, and inconvenient. As to the timber he employed Thorpe, who always valued timber for him. He struck off £20 from Thorpe's valuation at £320 for gates and stiles. Thorpe stated that he had omitted some pollards, etc., for the same purpose.

Mansfield, *Pigott*, *Richards*, *Stanley*, and *Benyon*, for the plaintiff, in support of the appeal: A contract to sell at the valuation of another person is not unlawful if it is fair. A price was not put upon the right of common specifically, but Bishton states expressly that he considered it in valuing the estate. The mistake in valuing the timber is trifling. As to the value of the estate, upon what subject is there so much difference of opinion? Suppose the plaintiff had found it inconvenient to perform the agreement and the suit had been reversed, could he upon such grounds have resisted a bill? The difference must be of such a size and description as of itself to imply undue influence, partiality, etc. Perhaps such a case of mistake of value might exist as independent of those considerations would dispose a court of equity to refuse assistance. Lord Alvanley, in his judgment, expressed some apprehension of weakening the authority of arbitrators, intimating great difficulty, standing upon the record, to decide against the plaintiff. At the time this decree was made, the court was contracting a habit of looking into the value and refusing a performance on the mere ground of inadequacy, as in *White* v. *Damon* (1). This would necessarily put an end to all confidence in arbitrators. There can be no valuation to which objections will not be taken. The circumstances in which Bishton exceeded his authority do not affect the valuation, and the excess may be rejected as surplusage.

Lloyd and *Romilly* for the defendants: This award cannot be supported. First, the arbitrator has exceeded his authority in a part inseparable from that upon which the plaintiff insists. Secondly, as to the timber he has delegated his authority, and adopted the valuation of another person. As to the first objection, if it could be separated, the award might be good in part and bad in part according to the rule laid down by Willes, C.J., in *Candler* v. *Fuller* (2). But the time and mode of payment cannot be entirely distinct from the sum to be paid, which will vary accordingly. As to the delegation of power, an arbitrator may take the advice of another, but this person has delegated his authority as to a part entirely, which

an arbitrator cannot do. It is difficult to find the principle upon which the timber was valued. The evidence is contradictory, and an allowance for repairs seems to have been twice made. Upon all the circumstances of this case the court ought not to decree a specific performance. On the evidence there is a gross mistake by an agent appointed to value. Mere inadequacy of price may be a ground for refusing to carry an agreement into execution, though not for setting it aside.

LORD ELDON, L.C., having dealt with a point which does not now call for report: I cannot satisfy myself that the valuation, on account of the particular terms in it, is to be considered as a valuation that may be disconnected from the rest of the award. The payment being to be made at a future day, a fair inference arises that the value is fixed with reference to the fact that the payment was postponed. I do not, however, go upon that, though it has some effect. [His Lordship said that he ought not to make a decree of specific performance where he was not completely satisfied by the evidence that the price had been as deliberately fixed, at least, as it ought to be in the ordinary case in a transaction between persons dealing prudently and deliberately in estimating a matter of so much consequence.]

I admit that if persons will enter into such an agreement to purchase at the valuation of another person, they must in ordinary cases be bound by that valuation. They must be taken to be judges of the discretion and skill of the person entrusted. If damages could be recovered in such a case, it does not follow that the court is bound specifically to perform the agreement to abide by the valuation, but some attention must be given to the principles upon which the court refuses to perform agreements upon which without doubt damages might be recovered. To put, therefore, an extreme case, if it was proved to be the valuation of caprice by a man who never looked at the estate, taking its value from others who had very carelessly made the valuation, that is a case in which the court would hesitate extremely specifically to perform the contract. Where the estate of a married woman is to be taken away, it ought to be proved to the clear satisfaction of the court that the valuation was in a reasonable sense very carefully made. Is that so upon this evidence? I do not deny that mere difference in value, though considerable, is not of itself a sufficient ground for refusing a specific performance of a contract. But very considerable difference in value is not inconsiderable evidence, that it was not made with great care and attention.

As to the timber, I do not mean to determine that referring the valuation of that to Thorpe would be a sufficient ground to refuse a specific performance. But by this evidence a reasonable ground is laid before me for doubting whether Thorpe's valuation is such that Bishton, adopting it, can be said to have made a reasonable valuation by which I ought to bind these married women. There is a looseness in that transaction not very favourable to the conclusion that the rest of the valuation is very accurate. The right of common also is not valued in the way which this court requires upon the performance of such a contract. It was very loose to throw it in, whatever was its value, in respect of the circumstance that some part of the estate was detached, the nature of the land, etc.; the value of the common being put in issue. It is unfortunate that the evidence of the manner in which Bishton made his valuation is so defective, knowing the purpose for which he was called before the commissioners, yet unable to answer having left all his papers behind him. Surveyors are bound to produce the documents on which they proceed, and must not set up that sort of delicacy which has the effect of deluding both the parties, and the court who must make the decree blindfold. On that ground in the Court of Common Pleas I directed a jury to pay no attention to the evidence of a surveyor who would not produce the documents; and that direction I still think was right.

This evidence is not accurate enough for a court of justice to trust upon transactions of such a nature. Then there is the difference of value of the estate, as

considerable as between £4,000 and £6,000. These circumstances altogether appear to warrant a judicial suspicion that this valuation was not made with due attention to accuracy, and there is so little proof of that before the court that I am fairly justified in following Lord Alvanley on the ground that on the whole there is reasonable doubt whether the valuation was made upon such a principle as to make it not unfit that this plaintiff should seek the benefit of his contract at law. I do not feel an opinion that would justify a reversal of this decree.

Appeal dismissed.

BUCKLE *v.* MITCHELL AND OTHERS

[Rolls Court (Sir William Grant, M.R.), February 17, March, 1812]

[Reported 18 Ves. 100; 34 E.R. 255]

Sale of Land—Conveyance—Setting aside—Voluntary conveyance—Subsequent purchase for value—Specific performance of purchase.

As against a purchaser for value whose title dates before June 29, 1893, a voluntary conveyance of the same land which was previously made by the vendor is void, although the prior transaction was free from fraud and was made for the benefit of relatives or some other laudable or meritorious purpose. It is immaterial whether or not the purchaser had notice of the voluntary conveyance and whether or not the estate purchased was legal or equitable. The court will grant a decree for the specific performance of the purchase for value.

Notes. Considered: *Rosher* v. *Williams* (1875), L.R. 20 Eq. 210. Referred to: *Doe d. Baverstock* v. *Rolfe* (1838), 8 Ad. & El. 650; *Butterfield* v. *Heath* (1852), 15 Beav. 408.

As to conveyances impeachable by subsequent purchasers, see 17 Halsbury's Laws (3rd Edn.) 664–672; and for cases see 25 Digest (Repl.) 246 et seq.

Cases referred to:

(1) *Evelyn* v. *Templar* (1787), 2 Bro. C.C. 148; 29 E.R. 85, L.C.; 25 Digest (Repl.) 266, *748*.

(2) *Pulvertoft* v. *Pulvertoft* (1811), ante p. 273; 18 Ves. 84; 34 E.R. 249, L.C.; 25 Digest (Repl.) 268, *760*.

(3) *Leach* v. *Dene* (1640), 1 Ch. App. 461, n.; 1 Rep. Ch. 146; 12 Jur. N.S. 481, n.; 14 W.R. 811, n.; 21 E.R. 533; 25 Digest (Repl.) 268, *768*.

(4) *Parry* v. *Carwarden* (1778), Dick. 544; 21 E.R. 381; 25 Digest (Repl.) 252, *597*.

Also referred to in argument:

Douglasse v. *Waad* (1668), 1 Cas. in Ch. 99; 22 E.R. 713, L.C.; 25 Digest (Repl.) 262, *700*.

White v. *Hussey* (1690), Prec. Ch. 13; 25 Digest (Repl.) 250, *577*.

Doe d. Watson v. *Routledge* (1777), 2 Cowp. 705; 25 Digest (Repl.) 250, *579*.

Bennet v. *Musgrove* (1750), 2 Ves. Sen. 51; 28 E.R. 34, L.C.; 25 Digest (Repl.) 216, *327*.

Mortlock v. *Buller* (1804), 10 Ves. 292; 32 E.R. 857, L.C.; 44 Digest (Repl.) 7, *19*.

Burke v. *Dawson* (1805), Sugden's Law of Vendors and Purchasers (4th Edn.) 439.

Oxley v. *Lee* (1736), 1 Atk. 625; 25 Digest (Repl.) 250, *577*.

Bill for an order for the specific performance of a contract for the sale of rectorial tithes.

Thomas Peace, seised in fee of the impropriate rectory of Rogate subject to an outstanding mortgage for the term of one thousand years, by indentures of lease and release dated Sept. 9 and 10, 1793, in consideration of the natural love and affection which he had for his sister Mary Gardner and for her children Ann Stevens, Frank Gardner and Harriet Gardner, and in consideration of ten shillings, granted the rectory of Sibthorpe and Daintry in fee subject to the payment of any money then due on any mortgage of the premises and to all the specialty and simple contract debts then due, or to be due, from the said Thomas Peace, in trust for Thomas Peace for life and after his death, if Harriet Gardner should survive him, to raise by sale or mortgage £500 for Harriet Gardner, with a proviso that she should not have that sum unless she should relinquish and give up to Frank Gardner her distributive share in the personal estate of Thomas Peace, and, subject as aforesaid, in trust for Frank Gardner for life without impeachment of waste, then to secure to any woman whom he might leave his widow an annuity of £40 for life, with remainder in trust for the children of Frank Gardner for such estate as he should appoint, and in default of appointment for all his children as tenants in common in fee. If he should die without leaving any issue, the property was to be held in trust for Thomas Peace, his heirs and assigns, with a power to Thomas Peace, and after his death for Frank Gardner, to sell for the purpose of discharging any mortgage or other encumbrance upon the premises. There was a proviso that no sale or mortgage should be made for the purpose of raising the £500, if Frank Gardner, his heirs, executors, or administrators, or the heirs, executors, or administrators of Thomas Peace, should within twelve months after his death pay Harriet Gardner £500.

On Oct. 4, 1794, £2,678, the amount due on the mortgage, was paid to Mary White, the assignee of the mortgage term, by Sibthorpe and Daintry by direction of Thomas Peace with his money, and the term was assigned to Andrews in trust for Peace, and to attend the inheritance. In 1794 Frank Gardner married Elizabeth Winter, and had children by her F. T. Gardner, E. M. Gardner, and L. S. Gardner. Harriet Gardner married Mitchell. Daintry died on June 26, 1810. By an agreement in writing signed by Peace and by Andrews on behalf of Buckle, in consideration of £500 paid down and of £6,500 to be paid, Peace agreed to convey to Buckle the tithes of divers lands, parts of the rectorial tithes, and it was declared, that, if it should be impracticable to part with the title deeds by reason of the trusts of a settlement voluntarily made by Thomas Peace affecting the tithes agreed to be sold and other hereditaments, then Buckle should at the expense of Peace accept attested copies with a covenant to produce originals. Thomas Peace died on June 28, 1810, intestate, leaving Frank Gardner his heir-at-law. Gardner died on July 28, 1810, intestate, leaving his wife and children surviving. Harriet Mitchell took out administration to Peace. Buckle filed this bill against Mitchell and his wife, Sibthorpe, the Gardners, and Andrews, for a specific performance of the agreement, and for repayment of his deposit if the agreement could not be performed.

Sir Samuel Romilly and *Courtenay* for the plaintiffs.

Hart and *Daniel* for the defendants, Mitchell and wife.

Leach and *Roupell* for the other defendants claiming under the voluntary settlement.

March, 1812. **SIR WILLIAM GRANT, M.R.**—The objection to the specific performance prayed for by the bill is made by those who claim interests under the voluntary settlement executed by the vendor of the estate.

It must, I conceive, be assumed that the statute 27 Eliz. I, c. 4, s. 2 [1584: avoiding fraudulent conveyances: in the Statutes Revised s. 2 is printed as part of s. 1: see now Law of Property Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.)

427), s. 173, which re-enacts the provision of 1584] has now received the construction that a voluntary settlement, however free from actual fraud, is, by the operation of that statute deemed fraudulent and void against a subsequent purchaser for a valuable consideration even when the purchase has been made with notice of the prior voluntary settlement. I have great difficulty to persuade myself that the words of the statute warranted, or that the purpose of it required, such a construction, for it is not easy to conceive how a purchaser can be defrauded by a settlement of which he has notice before he makes his purchase. But it is essential to the security of property that the rule should be adhered to when settled, whatever doubt there may be as to the grounds on which it originally stood. The statute must receive the same construction, and produce the same effect, in a court of equity as in a court of law. The purchaser of an equitable estate for a valuable consideration ought no more to be affected by a voluntary settlement than the purchaser of a legal estate. A contract for a purchase is an equitable title, and the party having such title is in equity to most purposes considered as the complete owner of the estate. It is true that equity does not in every case lend its aid to carry a contract for a purchase into execution, but it does not arbitrarily execute one contract and refuse to execute another. Some ground must be laid to prevent the party from obtaining in his case the assistance which the court usually gives in cases of the same general description.

The question is whether the existence of a prior voluntary settlement be a sufficient ground to induce a court of equity to refuse to complete a contract in favour of a party who has notice of such settlement. If a settlement were shown to be really fraudulent in the ordinary acceptation of the word, I presume it would not be contended that the court would, out of regard to such settlement, refuse to give to a party purchasing with notice of it the benefit of his contract, but it is said that voluntary settlements are often made upon laudable and meritorious considerations, and that a court of equity ought not to be instrumental in defeating such as are of that description. But is not this an assumption which the statute, according to the construction it has received, does not permit us to make? Considering the party contracting for a purchase as in equity a purchaser, the statute, as construed, says that the settlement set up against him is merely a fraudulent device to cheat and impose upon subsequent purchasers. Is the court to say that because of that fraudulent device it will refuse to act in favour of a purchaser who stands in need of its interposition? The statute, as it has been construed, says that a purchaser who has notice of a voluntary settlement has notice, not of a title, but of a nullity and a fraud. How then can a court of equity say that it is unconscientious in a person having such notice, to enter into a treaty for a purchase when it is bound to say that there is nothing unconscientious in his taking a conveyance of the estate? In *Evelyn* v. *Templar* (1) the circumstance of the purchaser's having notice of a covenant in a voluntary settlement that the purchase-money should be paid to trustees to be laid out in other lands to be settled to the same uses was held to be immaterial. As it is clear that he would have been affected by notice of such a covenant in a deed for a valuable consideration, the case proves that in Lord Thurlow's opinion notice of the contents of a voluntary settlement has no effect even in a court of equity.

In *Pulvertoft* v. *Pulvertoft* (2) Lord Eldon, L.C., held that even before any third person has acquired an interest in the property, voluntarily settled, and when the matter rests entirely between the grantor or grantee, the latter has no equity to prevent the former from defeating the grant by a sale of the estate. It would be a strong thing, then, to say that he has an equity after the estate is contracted for, and after a third person has acquired an interest in it to prevent that third person from obtaining the benefit of the contract which the court would not restrain the settlor himself from entering into.

Leach v. *Dene* (3) is a very material case, and seems to be a direct decision on the point. It is true no mention is made of the purchaser's having had notice

of the voluntary settlement before he entered into the agreement, but in the first place, it being now settled that according to the true construction of the statute a voluntary settlement of which a purchaser has notice is as against him just as fraudulent as one, of which he has no notice, the difference seems to be immaterial. In the second place the purchaser had notice before he had either paid his purchase-money or got his conveyance. If notice were material, it came in sufficient time, yet the court with full knowledge of the settlement went on and executed the contract. The same observation applies to *Parry* v. *Carwarden* (4) where only £10 of the purchase-money had been paid before the voluntary settlement was set up. It was said in the argument that in *Leach* v. *Dene* (3) the settlor was before the court and he could not avoid the performance of the contract by setting up his own voluntary deed, but the settlor's being before the court could not at all affect the case of the son who was also before it. It was necessary to decide whether his interest under the settlement should prevent the court from decreeing a specific performance against the father. Accordingly the court first considers how the case stood with respect to the father, and, secondly, with respect to the son, and decided that the case of the son was not distinguishable quoad hoc from that of the father, which was deciding that the grantee in a voluntary settlement has no more right than the grantor to object to the completion of a contract for the sale of the settled estate.

I shall conclude with observing that, as in this case the legal estate is in trustees, the question comes to be which party has the best right to call for a conveyance of it. For the reasons I have already given I think it is the purchaser, and, therefore, the decree must be in his favour.

Order accordingly.

ROE d. CONOLLY *v.* VERNON AND ANOTHER

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), April 26, 1804]

[Reported 5 East, 51; 1 Smith, K.B. 318; 102 E.R. 988]

Deed—Construction—Surrender—Description of property—General or particular terms—Effect of additional words.

Where there is a grant of a particular thing sufficiently ascertained by some circumstance belonging to it, the addition of an allegation which is mistaken or false respecting it will not frustrate the grant, but where a grant is in general terms the addition of a particular circumstance will operate by way of restriction and modification of the grant. Therefore, where one having customary tenements, compounded and uncompounded, surrendered to the use of his will "all and singular the lands, tenements, etc., whatsoever in the manor, which he held of the lord by copy of court-roll, in whose tenure or occupation soever the same were, being of the yearly rent to the lord in the whole of £4 10s. 8½d. and compounded for,"

Held: the words "and compounded for" restrained the operation of the surrender to that description of copyholds then belonging to the surrenderor, and, the words "being of the yearly rent, etc., of £4 10s. 8½d.," which were not referable to any actual amount of the rents either compounded or uncompounded, though much nearer to the whole than to the compounded only, could not qualify or impugn that restriction.

Notes. Distinguished: *Pullin* v. *Pullin* (1825), 3 Bing. 47. Applied: *Wilkinson* v. *Malin* (1832), 2 Cr. & J. 636. Explained: *Doe d. Campton* v. *Carpenter* (1850),

15 Jur. 719. Referred to: *Doe d. Beach* v. *Jersey* (1818), 1 B. & Ald. 550; *Portland* v. *Hill* (1866), L.R. 2 Eq. 765; *Dean* v. *Gibson* (1867), 15 W.R. 809.

As to the rule falsa demonstratio non nocet, see 11 HALSBURY'S LAWS (3rd Edn.) 424–429; and for cases see 17 DIGEST (Repl.) 286-292.

Cases referred to:

(1) *Blague* v. *Gold* (1637), Cro. Car. 447, 473; 79 E.R. 989, 1008; 48 Digest (Repl.) 554, *5204*.

(2) *Windham* v. *Windham* (1581), 3 Dyer, 376 b; 73 E.R. 843; 17 Digest (Repl.) 288, *944*.

(3) *Swyft* v. *Eyres* (1639), Cro. Car. 546; 79 E.R. 1070; sub nom. *Swift* v. *Heirs*, March, 31; sub nom. *Litchfield* (*Vicars Choral*) v. *Ayres*, W. Jo. 435; 17 Digest (Repl.) 288, *946*.

(4) *Gascoigne* v. *Barker* (1743), 3 Atk. 8; 26 E.R. 808, L.C.; 48 Digest (Repl.) 466, *4200*.

(5) *Wilson* v. *Mount* (1796), 3 Ves. 191; 30 E.R. 963; 48 Digest (Repl.) 556, *5223*.

(6) *Walter* v. *Drew* (1723), 1 Com. 372; 92 E.R. 1117; 49 Digest (Repl.) 1227, *11291*.

Action of Ejectment for the recovery of customary tenements in the manor of Wakefield, in the county of York.

The customary tenements within the manor of Wakefield were of two sorts, compounded and uncompounded. The compounded were liable to a fine certain on alienation and descent by reason of a composition or agreement anciently made with the lord of the manor; the uncompounded were those for which no such agreement had been made, and were, therefore, liable to a fine arbitrary, that is, a fine not exceeding two years improved value of the premises. Thomas Earl of Strafford, being seised in tail male, viz., to him and the heirs male of the body of his father Sir William Wentworth deceased, with reversion to himself in fee as eldest son and heir of his father, of certain customary tenements with the appurtenances in the manor of Wakefield as well compounded and uncompounded, held of the lord by copy of court-roll, by rents and services, according to the custom of the manor, and also seised of a moiety of certain other customary tenements in the manor held in like manner of the lord, viz., of certain customary tenements compounded in fee, and of certain customary tenements uncompounded, in tail general, with reversion to himself in fee, and also seised in fee of certain other customary tenements which he himself had lately purchased, on April 10, 1732, according to the custom of the manor, made the following surrender out of court of his customary tenements with the appurtenances to the use of his will:

> "All and singular the messuages, dwelling-houses, cottages, closes, lands, tenements, and hereditaments whatsoever, with their and every of their appurtenances, situate, lying, and being in Wakefield, Stanley, Alverthorpe, Thornes, and Sandal Magna, or elsewhere within the said manor of Wakefield, which he the said earl now holds of the lord of the said manor of Wakefield by copy of court-roll, in whose tenures or occupations soever the same now are or be, being of the yearly rent to the lord in the whole of £4 10s. 8½d and compounded for."

The surrender was not brought into court till the year 1741 after the death of the earl, when the same was presented according to the custom of the manor. The rent of £4 10s. 8½d. exceeded the amount of the rents payable to the lord for the compounded customary tenements of Thomas Earl of Strafford, Sir William Wentworth, the father of Thomas Earl of Strafford having, on his admission in 1672 to the premises of which the earl was seised as aforesaid (except those lately purchased by him), paid a fine for his compounded customary tenements only of £3 15s., being three times the amount of £1 5s., the lord's rent for the same,

and a fine of £80 for his uncompounded lands. The whole of the rents paid to the lord by William Earl of Strafford and his successors for all the customary tenements, both compounded and uncompounded, amounted to £4 14s. 6d., of which sum 1s. 9d. was for the rents of the lands purchased by Thomas Earl of Strafford. A

Thomas Earl of Strafford died in November, 1739, leaving his son William Earl of Strafford, his three daughters, and his nephews William and George, the only issue of his brother Peter Wentworth, then deceased, of whom George subsequently died without issue. William Earl of Strafford entered upon the customary premises, and died without issue in March, 1791. Lady Ann, the eldest daughter of Thomas Earl of Strafford, married William Conolly. She survived her husband, and died in February, 1794, leaving the lessor of the plaintiff, her only son. The defendant R. W. H. Vyse was the grandson of Lady Lucy, the second daughter, also deceased, by her daughter Anne, who married General Vyse, and was since deceased, and the defendant Henry Vernon was the son of Lady Harriott, the third daughter of Thomas Earl of Strafford, also deceased. Frederick Thomas, the son of William Wentworth, in March, 1791, upon the decease of William Earl of Strafford, became Earl of Strafford, entered upon the customary premises, and died without issue in August, 1799, leaving Augusta Anne Kaye, his sister and heir-at-law, but never was admitted tenant to the premises or any of them. He also, in 1791, suffered a recovery of Wentworth Castle and the other premises of freehold tenure in the county of York, devised to him by Thomas Earl of Strafford. On Feb. 11, 1802, the lessor of the plaintiff was admitted at the court baron tenant to the customary premises under a writ of mandamus, the copy of the admittance stating that he as heir male of the body of Lady Anne prayed to be admitted tenant under the will to all the copyhold messuages, lands, etc., within the manor of which Thomas Earl of Strafford died seised, stating also some of them to be of the nature of copyhold uncompounded for and the residue to be of the nature of copyhold compounded for, and that the same were granted by the lord of the manor to Thomas Conolly to hold to him and the heirs male of his body, according to the limitations of the will, to be held of the lord of the manor by the rents, fines, suits, and services, according to the custom thereof. On Feb. 20, 1802, the lessor of the plaintiff, according to the custom of the manor, suffered a recovery of the compounded part of the customary premises to which he had been so admitted. B C D E F

The action was tried before Rooke, J., at the York assizes last preceding the hearing of the case. A verdict was then given for the plaintiff subject to a Case stated for the opinion of the court. The question for the opinion of the court was whether the lessor of the plaintiff was entitled to the whole of the customary tenements compounded and uncompounded, or to the compounded only, and to the whole of the customary tenements which Thomas Earl of Strafford purchased, compounded and uncompounded, or to the compounded only, or any, and which of them. G H

Holroyd for the lessor of the plaintiff.
Walton for the defendants.

Cur. adv. vult.

April 26, 1804. **LORD ELLENBOROUGH, C.J.,** delivered the following judgment of the court.—Upon the argument of this case two principal points were contended for on behalf of the plaintiff. The first was that in the surrender by Thomas Earl of Strafford on April 10, 1732, to the use of his will all his customary estates, as well those which were uncompounded as those which were compounded, were comprehended. The second point was that by the devise of I

> "all his freehold manors, messuages, lands, tenements, and hereditaments in the counties of York, Nottingham, Lincoln, Northampton, Suffolk, Kent, and Middlesex, or elsewhere in Great Britain,"

the customary lands, the subject of this ejectment, passed.

A As to the first question which has been made upon the effect of the surrender, *Blague* v. *Gold* (1), *Windham* v. *Windham* (2), and *Litchfield* (*Vicars Choral*) v. *Ayres* (3), were relied on by the plaintiff's counsel for the purpose of showing that the surrender extended to the uncompounded as well as the compounded copyholds. But these cases appear very distinguishable from the present.

Blague v. *Gold* (1), was a devise of a corner house in Andover described as B being in the tenure of Benson and Hitchcock whereas it was in fact in the tenure of one Benson and one Nott, the devisor also having another house, thereto near adjoining, in the tenure of Hitchcock. It was held that the corner house in the tenure of Benson and Nott passed, for that was the devise of a thing sufficiently ascertained by the words "corner house," and there the intent was apparent that the corner house should pass in whosesoever tenure it might happen to be. The C case is further reported as again argued and finally adjudged, Cro. Car. 473, where it is said that the addition in tenura of Hitchcock, although it be not in his tenure and be a mistake, yet it is but surplusage and, although false, shall not vitiate the devise because the devise was of a thing certain at first and shall be expounded according as the intent of the parties is apparent.

Windham v. *Windham* (2) was the case of a feoffment of a house, lately of D Richard Cotton in D., which was false, the owner being Thomas Cotton. The feoffer had no other house in D., and the feoffment was held good. The reason, according to Lord Hardwicke in *Gascoigne* v. *Barker* (4) (3 Atk. at p. 9) was that otherwise the devise would have been void. But in the case now before the court, the surrender will not be void though it should be construed not to extend to the uncompounded lands.

E There is another circumstance by which the present case is distinguishable from those, viz., that in them the grant was of one particular thing sufficiently ascertained by some circumstance belonging to it, in which case, according to the doctrine upon this head, which is fully discussed in Hobart, 171, 172, a circumstance mistaken and false will not frustrate the grant of particulars sufficiently once ascertained. But here the words first used are general words, F not descriptive of particular things, and, according to Lord Hardwicke in *Gascoigne* v. *Barker* (4) (3 Atk. at p. 9):

> "Where a man does not make a certain definitive description, it is very difficult for courts of justice not to construe subsequent restrictive words as explanatory of the former."

G This distinction is to be found in Dyer, 50 b, where Harwood, the Attorney-General, laid it down, that

> "if I release all the right which I have in White Acre, and name all the land in certain which I bought of such a man, and in truth I bought it of another; yet because the land is certainly named at first, the release is good, notwithstanding the misrecital afterwards; but where it is made general, it is otherH wise."

As, for instance, if it had been "all my land which I bought of such a man," having bought none of him. In that case there would have been no basis of certainty laid to have given effect by reference to the other words, and they must, on that account, have been merely inoperative and void. The same doctrine is to be found in the Year Book, Michaelmas Term 2 Edw. 4, p. 29 B., pl. 36, and in I Fitzherbert's Abridgment, tit. Release, 11.

Litchfield (*Vicars Choral*) v. *Ayres* (3) was a grant of all the tithes belonging or appertaining to them as appropriators of a certain parish "all which were lately in the occupation of one Margaret Peto, widow, deceased." There it was held that all tithes belonging to the rectory passed, though none, or only a part, had been in the possession of Margaret Peto. This case, according to the report of it sub nom. *Swyft* v. *Eyres* (3) in Cro. Car. 546, and 2 Rolle's Abridgment 52, pl. 26, was decided on the ground, as stated in Rolle,

"that these words were words of suggestion or affirmation, and not of restriction or limitation, because the sentence was perfect before." A

The words "all which," etc., commence a new sentence, and are not a part of the first or general sentence, and, as said in the report in CROKE, the words "all" so disjoined cannot be a restriction, but an explanation. But here there can be no question whatever but that the words "being of the yearly rent of £4 10s. 8½d. and compounded for" are part of the general sentence, and where there is no disjoining or division in the words or sense, but the whole is one entire sentence, the one part may well restrain the other. The cases, cited by counsel for the defendants, of *Gascoigne* v. *Barker* (4), and *Wilson* v. *Mount* (5), fully show that what is mere allegation may, if consistent, operate as a restriction. We are, therefore, upon these authorities and considerations, of opinion that the words "and compounded" operate by way of restriction in the present case, and confine the surrender to that description of copyholds then belonging to the surrenderor, and that the words "yearly value of £4 10s. 8½d.," being referable to no actual amount of rents in this case, cannot qualify or impugn this restriction. B C

As to the second question, it appears by the Case that Lord Strafford, at the time of making his will, was seised of considerable freehold estates in the counties of York, Nottingham, Lincoln, Middlesex, and elsewhere in Great Britain, and that he was also seised of certain customary tenements in the manor of Wakefield, in the county of York, of some part of them in tail male, of other part in tail general, and in fee of the reversions, and of other customary lands in fee. Besides these he was seised of some copyholds in Middlesex, which were such in the strictest sense of the word. The customary lands in Yorkshire are by the surrender, which it is insisted comprehended them, described as being held of the lord of the manor of Wakefield by copy of court-roll, and the lessor of the plaintiff himself has obtained a mandamus from this court to admit him to the lands for which this ejectment is brought, describing them as copyhold lands within the manor of Wakefield, whereof Thomas Earl of Strafford died seised. It is also stated by the Case that the manor of Wakefield is ancient demesne, and that the customary tenements of the manor are demised and demisable by copy of court-roll of the said manor, and they have always been called and reputed copyholds, but that none of the admittances states the tenants to hold at the will of the lord. It appears also by the Case that in the reign of James I certain proceedings were had in the duchy court of Lancaster in which the matters in dispute were whether the fines payable to the lord were fines arbitrary or not, and whether the grants which some of the tenants had obtained of the waste were valid, and that in all those proceedings the estates of the tenants were considered as copyhold tenements demised and demisable by copy of court-roll according to the custom of the manor. In addition to this it does not appear that Lord Strafford had any other lands in Yorkshire held by copy of court-roll. D E F G

Lord Strafford being thus circumstanced with respect to his property, the question before us is: What did he mean to pass by that part of his will in which he speaks of his freehold lands, tenements, and hereditaments? In the course of the argument it could not be contended, if Lord Strafford had been seised of what the counsel for the lessor of the plaintiff allow to be copyhold lands which had lain in Yorkshire, that the devise would have comprehended them under the denomination of freehold. In order to get rid of the effect of that word freehold, which applies to his lands in Yorkshire as well as to those in the other enumerated counties, it has been insisted that the premises in question are property of that description of freeholds which are called customary freeholds. Many cases and authorities have been cited to show that customary tenants who do not hold at the will of the lord, are not copyholders but freeholders. But without going into the learning respecting tenants in ancient demesne and other tenants who hold by copy of court-roll according to the custom of the manor, though not at the will H I

of the lord (the whole of which is collected by BLACKSTONE, J., in his CONSIDERATIONS ON COPYHOLDERS), we think on this occasion, as the customary lands in question are demisable by copy of court-roll, have always been called and reputed copyhold, and as such of them as the testator himself surrendered to the use of his will are described by him expressly as holden by copy of court-roll, that he cannot be understood as having intended to pass them under the description of freehold lands. In disposing of their property testators usually advert to the known and ordinary circumstances attending it and adopt the appellations by which it is generally and more familiarly distinguished, and cannot be supposed to regard or consider those equivocal or less obvious qualities of their estates about the effect of which profound lawyers and legal antiquaries might entertain controversies.

The distinction between estates which may be immediately transferred from man to man by deeds and instruments executed merely between the parties themselves and those estates the titles to which are evidenced by copies of the rolls of the courts baron of different manors is familiar even to men the least acquainted with the rules of property, but the distinction, and still more the effect of the distinction between tenants by copy of court-roll at the will of the lord according to the custom of the manor and tenants by copy of court roll simply according to such custom, as determining the one to have a freehold interest and the other not, is a distinction not at all likely to occur to persons in general when disposing of their property; or to be adopted by them if it did occur. If Lord Strafford, having made due surrenders to the use of his will, had devised all his copyhold estates in Yorkshire, there could be no question made but that those estates which are now contended to be freehold would have effectually passed under the above description, i.e., as copyhold. If the language of this will is attended to it will be found that where the testator meant to pass or charge his estates without any regard to their quality or tenure, he has used words which, in their generality, would comprehend all, without adding others which might, by construction, operate to narrow or restrain their meaning. In the introduction to his will he speaks of his worldly estate, a most comprehensive term, extending to property of every description. To his wife he devises an annuity out of all his real estate in lieu of her dower or thirds at common law which she might otherwise claim out of any part of his real estate which he had been or should or might be seised of during their intermarriage —words of measured extent and caution peculiarly fitted for the purpose he had in view. To his mother he gives an annuity out of all his real and personal estate in lieu of her jointure, dower, or thirds at common law, and all other demands out of the real and personal estate of her late husband. After which comes the devise upon which the question arises, in which the testator no longer uses expressions of a generality calculated to carry all his lands in the enumerated counties, but only those which are freehold, accompanied by a devise by name of two copyhold messuages in Twickenham, marking thereby a knowledge on his part that in order to pass those copyholds at least the words he had used before were insufficient.

The remaining part of the will furnishes no argument of intent to be drawn from the use of any particular expressions until we come to the residuary clause which counsel for the lessor of the plaintiff contends to have furnished an argument in his favour from the circumstance of these customary lands being undevised until after failure of the issue of his son Lord Wentworth and of his, Lord Strafford's own body, unless they are comprehended under the description of freehold lands, which, it is said, he never could have intended from the introduction to his will where he professes an intent to dispose of all his worldly estate. In answer to this it has been justly said that there will be no intestacy if the heir-at-law, according to *Walter* v. *Drew* (6), took an estate tail by implication. It would be carrying the effect of introductory words much further than has been hitherto done if they should be so construed, for, though they have been held to

ascertain the extent of an estate in lands unquestionably devised, we are not aware of any case which has decided that such introductory words will alter the obvious and natural construction to be put on words used by a testator which of themselves admit of no doubt, unless, indeed, the context should necessarily and absolutely require such sense to be put upon them, which is not the case in the present instance. But this residuary clause furnishes, from the penning of it, an additional argument that the testator's intent was confined to what were, according to common understanding, freehold lands, for after, in certain events specified in that clause, devising all his said manors, lands, and hereditaments in the counties of Lincoln and Nottingham to his three daughters Ann, Lucy, and Harriott, he devises all other his manors, messuages, lands, tenements, and hereditaments whatsoever, either freehold or copyhold (except those in the counties of York, Lincoln, and Nottingham, which he had before devised) to his three daughters, again marking the distinction between freehold and copyhold estates, and showing that where he meant to pass copyhold he felt it necessary so to describe it.

Upon the whole, therefore, we are of opinion that no sufficient argument arises, either from the introductory words or from any other part of the will, which will warrant us in annexing to the word freehold, as it occurs in the devise in question, any other meaning than that which, in the ordinary understanding of a common testator, it would naturally and obviously bear, and still less so in the case of a testator conusant, as this testator appears to have been, of the proper nature, quality, and denomination of the different species of property he professes to dispose of by his will. For these reasons we are of opinion that the defendants are entitled to judgment.

Judgment for defendants.

DANIELS *v.* DAVISON

[Lord Chancellor's Court (Lord Eldon, L.C.), March 17, August 9, 1809]

[Reported 16 Ves. 249; 33 E.R. 978]

Sale of Land—Third person's interest—Possession by person other than vendor—Notice to purchaser of that person's interest.

Possession of land by someone other than the vendor is notice to a purchaser of that person's interest, and the purchaser will be bound by that interest whether it be the right to possession under a lease, or a contract of sale, or otherwise.

Specific Performance—Sale of land—Proof of land as described in contract—Effect of uncertainty.

To obtain specific performance of a contract the subject thereof must be proved as described in the contract. Where, therefore, a contract for the sale of land was conditional on the land being all copyhold land, specific performance of the contract would not be granted if the fulfilment of that term was uncertain.

Notes. Considered: *Bozon* v. *Williams* (1829), 3 Y. & J. 150; *Miles* v. *Langley* (1831), 2 Russ. & M. 626; *Jones* v. *Smith* (1841), 1 Hare, 43; *Penny* v. *Watts* (1848), 2 De G. & Sm. 501. Explained and Applied: *Bailey* v. *Richardson* (1852), 9 Hare, 734. Considered: *Barnhart* v. *Greenshields* (1853), 9 Moo. P.C.C. 18. Applied: *James* v. *Litchfield* (1869), L.R. 9 Eq. 51; *Cavander* v. *Bulteel* (1873), 9 Ch. App. 79. Considered: *Carroll* v. *Keays*, *Keays* v. *Carroll* (1873), 22 W.R. 243; *Caballero* v. *Henty* (1874), 9 Ch. App. 447; *Phillips* v. *Miller* (1874), 43

L.J.C.P. 74; *Lewis* v. *Stephenson* (1898), 67 L.J.Q.B. 296; *Reeves* v. *Pope*, [1914] 2 K.B. 248. Referred to: *Brunton* v. *Neale* (1844), 9 Jur. 338; *Holmes* v. *Powell* (1856), 8 De G.M. & G. 572; *Knight* v. *Bowyer* (1858), 2 De G. & J. 421; *Welchman* v. *Coventry Union Bank* (1860), 8 W.R. 729; *Beevor* v. *Luck*, *Beevor* v. *Lawson* (1867), L.R. 4 Eq. 537; *Hughes* v. *Scanor* (1870), 18 W.R. 1122; *Phillips* v. *Miller* (1875), L.R. 10 C.P. 420; *Hunt* v. *Luck*, [1901] 1 Ch. 45; *Green* v. *Rheinbery* (1911), 104 L.T. 149; *Ashburton* v. *Nocton*, [1915] 1 Ch. 274; *Smith* v. *Jones*, [1954] 2 All E.R. 823.

As to notice of adverse claims on sale of land, see 34 HALSBURY'S LAWS (3rd Edn.) 366; and for cases see 20 DIGEST (Repl.) 347 et seq. As to the grant of specific performance in the existence of uncertainties in the contract, see 36 HALSBURY'S LAWS (3rd Edn.) 284–288; and for cases see 44 DIGEST (Repl.) 37 et seq.

Cases referred to:

(1) *Taylor* v. *Stibbert* (1794), 2 Ves. 437; 30 E.R. 713; 20 Digest (Repl.) 319, *568*.

(2) *Douglas* v. *Whitrong* (circa 1788–1802), cited in 16 ves. 253, 254.

Bill for specific performance of a contract for the sale of a public-house.

The bill stated the following agreement, executed by James Daniels, the plaintiff, and John Davison, the defendant:

> "Memorandum: It is this day, Feb. 1, 1802, agreed between John Davison, of the East India House, London, and James Daniels, of Ealing, in the county of Middlesex, that the said John Davison shall sell to the said James Daniels, his public-house, called the Plough, now in the occupation of the said James Daniels, together with the garden belonging to the said house, for the sum of £200, to be paid on or before Mar. 25 next ensuing, provided the said premises are copyhold, but if it should appear that any part thereof is freehold, then this agreement to be void."

The bill further stated that the plaintiff, in March, 1802, before the day appointed, tendered the purchase-money, and demanded a surrender: but the defendant Davison refused to perform the contract and sold the premises to the defendant Thomas Rea Cole for £300, charging notice of the plaintiff's agreement before the surrender to Cole, and payment of his money. The bill prayed a specific performance of the agreement; that Cole might be decreed to surrender to the plaintiff: or, if it should appear that he was a purchaser without notice, that Davison might account for the difference between the price stipulated by the agreement, and the sum at which he sold to Cole.

The defendant Davison by his answer suggested that some part of the premises was freehold, and, therefore, he was discharged from the agreement. He admitted, however, that he could not distinguish the freehold from the copyhold. The defendant Cole denied notice of the agreement until after the bill was filed, which was in October, 1805; and the plaintiff's lease was to expire at Michaelmas following. The answer also admitted that the premises were conveyed to Cole by surrender; the reason of which was represented in evidence to be to save the expense of a lease and release for the freehold part, which could not be exactly ascertained. There was conflicting evidence as to part of the premises being freehold and upon the point of notice.

LORD ELDON, L.C., when the cause was opened, said that there was a decision in this court that possession of a tenant was notice to a subsequent purchaser of an equitable agreement which the tenant had, preventing the plea of purchase for valuable consideration without notice; and he afterwards mentioned *Taylor* v. *Stibbert* (1), where LORD ROSSLYN lays down that whoever purchases an estate knowing it to be in the possession of tenants is bound to inquire into the estates those tenants have; stating it to have been determined that a purchaser, being told

particular parts of the estate were in the possession of a tenant, without any information as to his interest, and taking it for granted to be only from year to year, was bound by a lease that tenant had; which was a surprise upon him, as it was sufficient to put the purchaser upon inquiry that he was informed the estate was not in the actual possession of the person with whom he contracted; and that he could not transfer the ownership and possession at the same time; there being interests as to the extent and nature of which it was his duty to inquire.

Sir Samuel Romilly, *Leach* and *Horne* for the plaintiff: The proposition to which LORD ROSSLYN refers in *Taylor* v. *Stibbert* (1) is supported by the established principle of this court that whatever puts a purchaser upon inquiry shall be held notice; and if, therefore, he knows that a tenant is in possession, he is considered as having notice of the whole extent of his interest, and bound to admit every claim which could have been enforced against the vendor. This case, though different in circumstances, is in principle the same: a tenant in actual occupation of the premises claiming an interest against his landlord, not in that character, but as a vendor. The principle extends to any interest, of whatsoever description which the tenant may have, binding the purchaser, if, omitting to inquire from the tenant as to the nature and extent of his interest, he takes the representation of the vendor.

Alexander, *Martin* and *Finch* for the defendants: *Taylor* v. *Stibbert* (1) is not an authority for a decree in these circumstances. In that case the purchaser had actual notice, that the leases contained covenants for renewal, which was the true ground for binding him. The want of all notice distinguishes this case. There is no reason that the purchaser should extend his inquiry beyond the person with whom he contracted.

LORD ELDON, L.C.—This case involves a point of very great consequence. At this moment I find great difficulty in distinguishing it from the cases of notice. To sustain the plea of purchase for valuable consideration without notice, the defendant must aver that the vendor was, or pretended to be, seised; and that he was in possession; which would be satisfied by the possession of his tenant. On the other hand, if this plaintiff had no lease but merely this equitable agreement, and had taken possession under that, the subsequent purchaser could not have made out the averment that the vendor was in possession. Such an agreement would have determined a tenancy at will. Then as to tenancy from year to year which the law favours, is the situation of a person in possession as such tenant different in equity with regard to third persons, if making an agreement with his landlord to purchase the premises, instead of giving up the possession and re-entering under that agreement, he retains the possession without going through that ceremony? If he had quitted the possession for a week, the purchaser could not make out the averment that the vendor was in possession. Suppose a lease for seven years, with an agreement that at the expiration of certain periods the tenant should have an option to purchase.

In *Douglas* v. *Whitrong* (2), LORD KENYON held that the benefit of that agreement should go to the heir, the executor paying for the purchase; and the lessee, when he made the option, was to be considered the owner ab initio: a strong decision, but, if another person dealt with the lessor pending the currency of the term, who represented the lessee as tenant under a lease, that would be notice of the lease and all its contents, including that covenant. Where the original entry was as tenant, can the purchaser protect himself under an assurance from that person who was once landlord, that the relation between them had not been changed? In equity at least this landlord could not have called for rent. The other might have refused it; and might have claimed under the agreement, as determining the relation of landlord and tenant. If he had led Cole into the purchase, that would have been a different case; but that is not the effect of Cole's answer, which is that he knew that the plaintiff was in possession, but that he did not know the nature of his possession, not taking the trouble to inquire whether he was tenant or purchaser.

I have a strong persuasion and recollection with LORD ROSSLYN, that there is such a determination as he asserts in *Taylor* v. *Stibbert* (1) in that passage of his judgment (2 Ves. at p. 440) to have been made. In the west of England leases for lives with covenant for renewal upon certain terms are usual. A purchaser, satisfied with an inquiry from the vendor, who gave no further information than that the person in possession was tenant for life would be bound by that covenant.

Aug. 9. **LORD ELDON, L.C.**—On one point in this cause there is considerable authority for the opinion I hold; that, where there is a tenant in possession under a lease or an agreement, a person purchasing part of the estate must be bound to inquire on what terms that person is in possession. If, for instance, he is occupying tenant under a lease for forty-five years, the purchaser is bound by the fact that he is entitled to that term if he does not choose to inquire into the nature of his possession, the tenant being in no fault but enjoying according to his title.

Then if in the instance of such a term the tenant would be entitled against a purchaser, why is not his title good for a greater interest? In *Douglas* v. *Whitrong* (2), the tenant was not bound to know and did not know, that it was necessary for him to make any communication of the option, which he had by the contract with his landlord to become the purchaser; and LORD KENYON held that there was nothing that could affect his conscience in favour of the purchaser, having no communication with him. My opinion, therefore, considering this as depending upon notice, is that this tenant being in possession under a lease, with an agreement in his pocket to become the purchaser, those circumstances altogether give him an equity, repelling the claim of a subsequent purchaser who made no inquiry as to the nature of his possession. That was the doctrine, laid down by LORD ROSSLYN in *Taylor* v. *Stibbert* (1), to which I referred, and think it right.

My judgment on that point lays out of consideration the question whether, taking Cole not to be affected with notice, Davison, the vendor, is to be considered in equity as holding the money derived from the second purchase, viz., the difference between the prices, in trust for the person to whom he had first agreed to sell the estate. The estate by the first contract becoming the property of the vendee, the effect is that the vendor was seised as a trustee for him; and the question then would be whether the vendor should be permitted to sell for his own advantage the estate, of which he was so seised in trust, or should not be considered as selling it for the benefit of that person for whom by the first agreement he became trustee, and, therefore, liable to account.

It is not, however, necessary to decide that point; another question being whether under the actual circumstances this is clearly now a binding contract. On the face of the agreement it is binding if the premises are all copyhold: but, if any part is freehold, there is no contract. That is the express agreement. It is alleged by the defendant that the whole or a part is freehold; but it is contended on the other side that he ought not to be permitted to say any part is freehold; and, if he may, yet there is in this cause evidence that all the premises are copyhold; and whether sufficient to persuade the court that they are so or not, it ought to be taken as conclusive against the defendant. There is by no means sufficient evidence that all the premises are copyhold, nor is the circumstance that upon the second sale they were bought and sold as copyhold, evidence that ought to be taken as conclusive against him. In order to decree a specific performance of the first agreement, the subject must be proved as it is described; and it would be too much to compel the performance, where according to the language of the agreement itself there is no contract.

Inquiry directed whether premises were copyhold or a part freehold.

A

LESTER *v.* GARLAND

[ROLLS COURT (Sir William Grant, M.R.), June 27, August 8, 1808]

[Reported 15 Ves. 248; 33 E.R. 748]

Time—Computation—Act to be performed within six months of testator's death —Exclusion of day of testator's death.

B

A bequest of residue contained a condition that, if the testator's sister should within six calendar months of the testator's death give security that she would not at any time marry A., then and not otherwise the trustees were to pay the residue to the sister's children. There was a gift over if she neglected to perform the condition. The testator died on Jan. 12, between eight and nine o'clock in the evening. The security was given on July 12, about nine o'clock in the evening. On a bill brought claiming forfeiture for non-compliance with the condition,

C

Held: although it was not necessary to lay down any general rule, reason here required the exclusion of the day of the testator's death from the period of six months, and, therefore, the testator's sister had entered into the security within the time prescribed.

D

Notes. Considered: *Pellow* v. *Wonford* (1829), 9 B. & C. 134. Applied: *Hardy* v. *Ryle* (1829), 9 B. & C. 603; *Godson* v. *Sanctuary* (1832), 4 B. & Ad. 255; *Webb* v. *Fairmaner* (1838), 3 M. & W. 473; *Young* v. *Higgon*, [1835–42] All E.R. Rep. 278. Considered: *Re Railway Sleepers Supply Co.* (1885), 29 Ch.D. 204. Approved: *Re North, Ex parte Hasluck*, [1895] 2 Q.B. 264. Applied: *Goldsmiths' Co.* v. *West Metropolitan Rail. Co.*, [1900–3] All E.R. Rep. 667. Considered: *Re Aspinall*, [1961] 2 All E.R. 751. Followed: *Cartwright* v. *MacCormack*, [1963] 1 All E.R. 11. Referred to: *In the Goods of Wilmot* (1834), 1 Curt. 1; *Re Whitby, Ex parte Whitby* (1839), 8 L.J.Bcy. 55; *Weeks* v. *Wray* (1868), 9 B. & S. 62; *Isaacs* v. *Royal Insurance Co.* (1870), L.R. 5, Exch. 296; *Migotti* v. *Colville* (1879), 4 C.P.D. 233; *Stewart* v. *Chapman*, [1951] 2 All E.R. 613; *Wilkie* v. *I.R. Comrs.*, [1952] 1 All E.R. 92.

E

F

As to the time for performance of a condition in a will laid down by a testator, see 39 HALSBURY LAWS (3rd. Edn.) 930; and for cases see 48 DIGEST (Repl.) 341 et seq. As to computation of time, see 37 HALSBURYS LAWS (3rd Edn.) 92–100; and for cases see 45 DIGEST (Repl.) 252 et seq.

G

Cases referred to:

(1) *Mercer* v. *Ogilvie* (1796), cited in 15 Ves. at p. 254; 33 E.R. 751, H.L.; 17 Digest (Repl.) 366, *1719*.

(2) *R.* v. *Adderley* (1780), 2 Doug. K.B. 463; 99 E.R. 295; 45 Digest (Repl.) 253, *208*.

(3) *Castle* v. *Burditt* (1790), 3 Term Rep. 623; 100 E.R. 768; 45 Digest (Repl.) 253, *209*.

H

(4) *Glassington* v. *Rawlins* (1803), 3 East, 407; 102 E.R. 653; 45 Digest (Repl.) 253, *210*.

Also referred to in argument:

Clayton's Case (1585), 5 Co. Rep. 1a; 77 E.R. 48; 45 Digest (Repl.) 255, *220*.

I

Bellasis v. *Hester* (1697), 1 Ld. Raym. 280; 91 E.R. 1084; sub nom. *Belesyse* v. *Hester*, 2 Lut. 1589; 45 Digest (Repl.) 253, *205*.

Pugh v. *Duke of Leeds* (1777), 2 Cowp. 714; 98 E.R. 1323; 45 Digest (Repl.) 262, *288*.

Norris v. *Gawtry Hundred* (1617), Hol. 139; 1 Brownl. 156; 80 E.R. 289; 45 Digest (Repl.) 253, *206*.

Ex parte Fallon (1793), 5 Term Rep. 283; 101 E.R. 159; 45 Digest (Repl.) 259, *253*.

Bill claiming forfeiture under conditions contained in a will.

Sir John Lester by his will dated Dec. 25, 1804, after several dispositions, gave and bequeathed all the residue of his personal estate to trustees upon trust that in case his sister Sarah Pointer shall not marry A., before all or any of the shares hereinafter given to her children shall become payable, and in case his sister shall within six calendar months after his decease give such security as his trustees or the survivor of them shall approve of, that she will not at any time marry A. or, in case she shall so marry him after the periods, when all or any of the shares hereinafter bequeathed to her children shall become payable and shall be paid to him, her, or them, that she will within six calendar months after such marriage pay the amount of such share or shares, or cause any child or children who shall have received his, her, or their, share or shares, to refund the same to the trustees. Then and not otherwise the trustees were directed to pay such residuary estate to the eight children of Sarah Pointer at the age of twenty-one or marriage, with benefit of survivorship; with a proviso, that in case his said sister shall marry A. before all or any of the shares of her said children shall become payable as aforesaid, or shall refuse or neglect to give such security as aforesaid, then and in either of the said cases he directed the sum of £1,000 apiece only with interest from his death or failure of his issue, as aforesaid, to be paid to the children of his sister; and, subject thereto, gave his residuary estate to the children of his other sister Amey Garland.

The testator died on Jan. 12, 1805, between the hours of eight and nine in the evening. On June 12 the trustees gave to Mrs. Pointer notice to give the security required by the will on or before July 12. Mrs. Pointer on June 19 gave a written notice to the trustees that she would give no security: but on July 9 she gave another notice in writing, desiring to know the nature and extent of the security required, declaring that she was then willing to give them her bond, which was the only security she had to offer. In consequence of that communication, on July 11 the solicitor for the trustees called on her for the purpose of agreeing on the terms of the bond, when she requested further time; but afterwards by a written notice, dated on that day, she refused to execute. On the next day, however, July 12, upon the remonstrances of the solicitor for the trustees, she did execute the bond about seven o'clock in the evening. On the same evening, two of the trustees declared their approbation of the security, but the approbation of the third, being at Bristol, could not be obtained until some time afterwards, Mrs. Pointer having executed the bond at her residence in the neighbourhood of Poole.

The bill was filed by the infant children of Amey Garland claiming under the forfeiture on the ground, first, that after the notices, given by Mrs. Pointer upon June 19 and July 11, she could not retract; secondly, that the security was not executed within the time.

Richards, *Alexander* and *Daniell* for the plaintiffs.
Thomson and *Roupell* for the defendants, the children of Mrs. Pointer.
Sir Samuel Romilly, *Serjeant Palmer* and *Newbolt* for the trustees.

SIR WILLIAM GRANT, M.R.—The question in this cause is whether Mrs. Pointer within six calendar months after the decease of her brother gave the security required by his will, as the condition upon which her children should take the benefit of his residuary estate. The testator died on Jan. 12, 1805, at a quarter before nine o'clock in the evening. The security required was executed on July 12 following, about seven in the evening. Computing the time de momento in momentum, six calendar months had not elapsed, but it is admitted that this is not the way in which the computation is legally to be made. The question is whether the day of Sir John Lester's death is to be included in the six months, or to be excluded: if the day is included, she did not, if it is excluded, she did, give the required security before the end of the last day of the six months; and, therefore, did sufficiently comply with the condition.

It is said for the plaintiffs that upon this subject a general rule has been by decision established that where the time is to run from the doing of an act (and for the purpose of this question it must extend to the happening of an event) the day is always to be included. Whatever dicta there may be to that effect, it is clear that actual decisions cannot be brought under any such general rule. The presentment of a bill of exchange to the sight of the drawee is an act done, and yet it is now settled that the day upon which it is presented is to be excluded, though it had been ruled otherwise by three judges of the court of Common Pleas against the opinion of TREBY, C.J. The law is now clearly settled against that decision.

The Annuity Act, 1776 [17 Geo. 3, c. 26: repealed by S.L.R., 1861] provides that the twenty days shall run from the execution of the deed. The execution of the deed is undoubtedly an act done; yet according to the decisions, the day upon which the deed was executed is excluded. So in a case in the House of Lords, in 1796, in which I was counsel, *Mercer* v. *Ogilvie* (1), where the question was whether within the meaning of the Act of Parliament in Scotland (1696, c. 4) "for regulating deeds done on death-bed" a man had lived sixty days after the making and granting of the deed, it was held that the day on which the deed was made and granted was to be excluded.

In the cases of alienation in mortmain, the alienation is an act done, and yet, according to a case in BROOKE the day is excluded in the computation of the year, which the immediate lord has to enter for the forfeiture. BLACKSTONE, J., lays down that the day of the avoidance of a living which must be by an act done or an event happening is excluded in the computation of the six months which the patron has to present. I do not, however, find that position in the SECOND INSTITUTE, to which the judge in his COMMENTARIES refers.

The cases chiefly relied on upon the other side, are: *R.* v. *Adderley* (2), where the day on which the sheriff's office expired was held to be included in the six months, after which he is not to be called on to return process—the Court of King's Bench first thought the day excluded, but, chiefly on the ground that the Act 20 Geo. 2, c. 37 [repealed by Sheriffs Act, 1887] was made for the ease of sheriffs, and ought to be construed favourably for them, afterwards determined that it was to be included; *Castle* v. *Burditt* (3), where the day on which the notice was given was included in the month that was to elapse before the action could be brought; *Glassington* v. *Rawlins* (4), where, contrary to the first opinion of LAWRENCE, J., it was determined that in the computation of two months creating an act of bankruptcy, the day of the arrest is to be included.

Lastly, the cases upon the Statute of Hue and Cry [27 Eliz., c. 13: repealed by 7 and 8 Geo. 4, c. 27, s. 1] in which the day of the robbery is included in the year which the party robbed has to bring his action against the Hundred; to which might have been added the case of Continual Claim [doctrine of Continual Claim was abolished by Real Property Limitation Act, 1833, ss. 10, 11]. To prevent a descent from barring an entry, the claim must be renewed within a year and a day. LORD COKE says the year and day shall be so accounted as the day whereon the claim was made shall be accounted one.

Upon these cases counsel for the trustees made an observation that applies correctly to all of them except the first: viz., that the act done from which the computation is made inclusive of the day, is an act to which the party against whom the time runs is privy; and, as he has unquestionably the benefit of some portion of the day, there is the less hardship in constructively reckoning the whole of it as a part of the time allowed him: whereas in this case the event was one totally foreign to the party whose time for deliberation was to begin to run from that event. Mrs. Pointer could not reasonably be supposed to have any opportunity of beginning on the day of Sir John Lester's death the deliberation, which was to govern the election, ultimately to be made. In the case of a notice of an action to be brought, the party necessarily knows the time at which he is served with the notice, and may

immediately begin to consider of the propriety of preventing the action by tendering amends.

So, a person arrested may immediately set about endeavouring to procure bail; and the same observation applies to the cases of the man robbed and of Continual Claim. But one is not necessarily conusant of the death, still less of the contents of the will, of another. Here, though it is impossible consistently with the words of the will to postpone the commencement of the time until the period of actual notice, yet it is not reasonable to include a day, useless to Mrs. Pointer for the purpose of deliberation, unless there is some clear, imperative, rule, making it absolutely necessary. She had a very important choice to make: one way debarring herself of her natural right of marrying whom she pleased: the other excluding her children from a considerable fortune. That is not a case for narrowing the time allowed, for the decision.

It is not necessary to lay down any general rule upon this subject, but upon technical reasoning I rather think it would be more easy to maintain that the day of an act done, or an event happening, ought in all cases to be excluded, than that it should in all cases be included. Our law rejects fractions of a day more generally* than the civil law does. The effect is to render the day a sort of indivisible point; so that any act done in the compass of it, is no more referable to any one than to any other portion of it; but the act and the day are co-extensive; and, therefore, the act cannot properly be said to be passed, until the day is passed. This reasoning was adopted by Lord Rosslyn and Lord Thurlow in the case before mentioned of *Mercer* v. *Ogilvie* (1). The ground, on which the judgment of the Court of Session was affirmed by the House of Lords, is correctly stated in the fourth volume of the Dictionary of the Decisions of the Court of Session. In the present case the technical rule forbids us to consider the hour of the testator's death as the time of his death; for that would be making a fraction of a day. The day of the death must, therefore, be the time of the death; and that time must be past, before the six months can begin to run.

The rule, contended for on behalf of the plaintiffs, has the effect of throwing back the event into a day, upon which it did not happen; considering the testator as dead on Jan. 11, instead of Jan. 12; for it is said, the whole of the 12th is to be computed as one of the days subsequent to his death. There seems to be no alternative but either to take, the actual instant, or the entire day, as the time of his death: and not to begin the computation from the preceding day.

But it is not necessary to lay down any general rule. Whichever way it should be laid down, cases would occur, the reason of which would require exceptions to be made. Here the reason of the thing requires the exclusion of the day from the period of six months, given to Mrs. Pointer, to deliberate upon the choice she would make; and upon the whole my opinion is that she has entered into the security before the expiration of the six months, in sufficient time, therefore, to fulfil the condition on which her children were to take.

* See the note (h), 14 Ves. 554, where it is admitted in bankruptcy.

CHURCH AND ANOTHER *v.* BROWN

[Lord Chancellor's Court (Lord Eldon, L.C.), Aug. 5, 6, 8, 9, 1808]

[Reported 15 Ves. 258; 33 E.R. 752]

Landlord and Tenant—Agreement for lease—Covenant against assignment—Need for express stipulation.

Under an agreement for a lease, the lessor is not, without express stipulation, entitled to a covenant restraining alienation without licence, whether or not the agreement provides that the lease shall contain the usual covenants.

Notes. Considered: *Blakesley* v. *Whieldon* (1841), 1 Hare, 176; *Hodgkinson* v. *Crowe* (1875), 10 Ch. App. 622. Explained: *Hampshire* v. *Wickens* (1878), 7 Ch.D. 555; *Re Lauder and Bagley's Contract*, [1892] 3 Ch. 41. Considered: *Grove* v. *Portal* [1902] 1 Ch. 727; *Jackson* v. *Simons*, [1922] All E.R. Rep. 583; *Keeves* v. *Dean*, *Nunn* v. *Pellegrini*, [1923] All. E.R. Rep. 12. Explained: *Russell* v. *Beecham*, [1923] All E.R. Rep. 318. Referred to: *Browne* v. *Raban* (1808), 15 Ves. 528; *Buckland* v. *Papillon* (1866), 15 W.R. 92; *Bartlett* v. *Greene* (1874), 30 L.T. 553; *Wall* v. *City of London Real Property Co.* (1874), 30 L.T. 53; *McKay* v. *McNally* (1879), 41 L.T. 230; *David* v. *Sabin*, [1893] 1 Ch. 523; *West Ham Central Charity Board* v. *East London Waterworks Co.*, [1900–3] All E.R. Rep. 1011; *Abrahams* v. *MacFisheries, Ltd.*, [1925] All E.R. Rep. 194; *Cook* v. *Shoesmith*, [1951] 1 K.B. 752; *Chivers & Sons, Ltd.* v. *Secretary of State for Air*, [1955] 2 All E.R. 607; *Esdaile* v. *Lewis*, [1956] 2 All E.R. 357.

As to covenants in relation to agreements for a lease, see 23 Halsbury's Laws (3rd Edn.) 442, 443; as to covenants against assigning, see ibid. 629 et seq.; and for cases see 31 Digest (Repl.) 120–122; 408–410.

Cases referred to:

(1) *Vere* v. *Loveden* (1806), 12 Ves. 179; 33 E.R. 69; 31 Digest (Repl.) 122, *2609.*

(2) *Jones* v. *Jones* (1803), 12 Ves. 186; 33 E.R. 71; 31 Digest (Repl.) 120, *2591.*

(3) *Morgan* v. *Slaughter* (1793), 1 Esp. 8, N.P.; 31 Digest (Repl.) 122, *2605.*

(4) *Folkingham* v. *Croft* (1796), 3 Anst. 700; 145 E.R. 1012; 31 Digest (Repl.) 122, *2609.*

(5) *Henderson* v. *Hay* (1792), 3 Bro. C.C. 632; 29 E.R. 738, L.C.; 31 Digest (Repl.) 122, *2604.*

(6) *Dumpor's Case* (1603), 4 Co. Rep. 119 b; 76 E.R. 1110; sub nom. *Dumper* v. *Syms*, Cro. Eliz. 815; 31 Digest (Repl.) 436, *5639.*

(7) *Boardman* v. *Mostyn* (1801), 6 Ves. 467; 31 E.R. 1147, L.C.; 30 Digest (Repl.) 404, *482.*

(8) *Browne* v. *Raban* (1808), 15 Ves. 528; 33 E.R. 855; 31 Digest (Repl.) 122, *2611.*

Exception taken by the defendant to the report of the Master, the exception being that the Master, in settling the form of lease to be granted to the plaintiffs, omitted to include a covenant against assignment without consent.

Thomas Worsfold, of Croydon, grocer, entered into an agreement in writing dated Dec. 3, 1798, with the plaintiffs Church and Upton to grant them a lease for twenty-one years from Christmas next, of a house, warehouse, and other premises in High Street, Croydon, at the yearly rent of £40, clear of taxes except the land tax; and the plaintiffs agreed to accept the said lease and to pay the rent, which lease it was agreed should contain a power for the plaintiffs to determine the lease at the expiration of the first seven or fourteen years on notice. The lease was to contain a covenant on the part of Worsfold, that he should not at any time within ten years set up, exercise, or follow the trade of a tea-dealer or grocer within four miles from Croydon, but should, on the contrary, render his assistance to the plaintiffs in the business. The agreement did not contain a provision that

A the lease should contain the usual covenants. In pursuance of the agreement, in January, 1799, the plaintiffs entered and carried on the business of grocers on the premises in partnership; until they agreed to dissolve the partnership, that Church should continue the business on his separate account, and the lease should be granted to him alone. Worsfold afterwards sold the premises to the defendant, a grocer, in Croydon, in fee.

B The bill, filed in November, 1803, prayed that the defendant might be decreed to execute a proper lease conformable to the agreement. Under a decree, directing the Master to settle a lease, a draft was carried in by each party, varying only in this respect, that the draft proposed by the defendant extended the proviso for re-entry for non-payment of rent or breach of covenants to the following case: viz., if Church or Upton or either of them, their or either of their executors or C administrators, should assign over this present indenture of lease or their term or interest therein or any part thereof, or demise, let, or part with, the demised premises or any part thereof, to any person or persons whomsoever, without the licence of Brown, his heirs or assigns, in writing, first obtained; or if Church and Upton or either of them, etc., should become bankrupt, or make any assignment for the benefit of their or his creditors. The Master's judgment being against the D insertion of that clause, an exception was taken to the report.

Sir Samuel Romilly and *Wetherell* in support of the exception.

Alexander for the report.

LORD ELDON, L.C.—I came into court with an extremely strong opinion that this covenant could not be inserted in the lease: but my mind is most seriously E affected on the one hand by the very strong reasoning of the Master of the Rolls in the two cases that have been mentioned, *Vere* v. *Loveden* (1) and *Jones* v. *Jones* (2); and, on the other, by the communication that, notwithstanding that reasoning, the Master of the Rolls considers this point bound down by the decision of LORD KENYON in *Morgan* v. *Slaughter* (3) at nisi prius, and *Folkingham* v. *Croft* (4) in the Court of Exchequer. No one will suspect me of not giving all due F weight to any opinion of LORD KENYON, but I must know a great deal more than I do before that determination at nisi prius will decide my judgment upon such a point; and, as to the other case, I have not yet had an opportunity of learning any reasons that I can represent as satisfactory to my own mind. *Henderson* v. *Hay* (5) may, as it is said, not be an authority in one sense: but, that it was LORD THURLOW'S judicial opinion, and would have been his decision if it had been G necessary to decide it, I have no doubt. I am much misled if that learned Lord, who was very apt to give his peculiar attention to legal subjects, and after he had decided upon them, ever altered his opinion under the impression of any contrary opinion or reasons that he had received.

Suppose this point altogether unprejudiced by decision. There are different sorts of landed property, known to the law: land in fee-simple and leasehold H property—I am not at present alluding to copyholds. If a man covenants to sell a fee-simple estate free from all encumbrances, and says no more, it is clear that covenant carries in gremio, and in the bosom of it, the right to proper covenants. Why? Because that sort of engagement has in all time been carried into execution in a form and mode which alter most materially, substantially, and importantly, the effect of the mere conveyance. If no more is done than the agreement I imports, the conveyance contains express covenants: the words operating warranties and obligations, which it was not understood between the persons contracting that the one was to undertake and the other to have the benefit of; and, accordingly, it is perfectly settled by the law, what are the covenants, as applied to the case of a vendor who was himself a purchaser for valuable consideration, or who took by descent, or by purchase but not for valuable consideration; and, though the agreement, if literally executed, would carry all the extensive obligations to which the legal warranties, flowing from the words, would bind the

vendor and his heirs, yet it cannot be carried into execution without express covenants, substituted for, and limiting, the implied covenants. In such a case the law would determine, according to *Henderson* v. *Hay* (5), what are usual covenants.

With regard to leasehold estates, I should lay no stress upon the word "assigns;" if the lease was to be made to the lessee, his executors or administrators: his assigns being included in himself; and the right to assign, unless restrained, being incident to his estate. The letter of the agreement, however, would not in any degree determine the form of the conveyance. The effect of the lease in the warranties and obligations, as arising out of the words of the lessor and lessee "yielding and paying," and under the execution of their agreement by the court, is perfectly different, the latter including the covenant for quiet enjoyment; and in many other respects the mutual obligations of both with reference to each other being by the express covenants very materially varied. Before *Henderson* v. *Hay* (5), therefore, upon an agreement to grant a lease with nothing more than "proper covenants," I should have said they were to be such covenants as were just as well known in such leases as the usual covenants under an agreement to convey an estate; and, though the word "incidental" is not very precise, I conceive Lord Thurlow's meaning to have been that the party had a right to those covenants that would be inserted in the execution of an agreement for a lease, arising out of the general, well known, practice as to such leases; and not contradicting the incidents of the estate belonging to a lessee, one of which is the right to have the estate without restraint beyond what is imposed upon it by operation of law, unless there is an express contract for more.

How does the history of the law with reference to this subject stand? There may be a covenant for almost anything; and this covenant against alienation without licence is as old as *Dumpor's Case* (6): but how does the fact that there was such a covenant in that case, where it was held to be gone by alienation with licence, prove that this is a usual, general, covenant in a lease? The conclusion is rather the other way; that this is a special and particular covenant. Consider how this grows. This covenant, which is represented to be usual would not prevent underletting. Then is a covenant against underletting a usual covenant? and is it proved to be so by the authorities that it is not restrained by the other covenant? Further, if the landlord has a covenant against both assigning and underletting, the tenant might by an agreement, neither assigning nor underletting, put another person in possession of the premises; and parting with the possession in that manner would not be a breach of those covenants. Is a further covenant, therefore, not to part with the possession of the premises, to be given as a usual covenant? That would not have restrained the tenant from parting with a part of the premises: these covenants having been always construed by courts of law with the utmost jealousy to prevent the restraint from going beyond the express stipulation. The court will have to consider whether all these covenants are also included under the terms "usual and proper covenants," in the construction of an equitable agreement, where the law would regard the instrument with that jealousy.

Independently, therefore, of the authorities, I should have said that the meaning of the parties to a contract for a lease was that there should be proper covenants; and that the law implies what they are; as connected with the character and title of the lessor: covenants in this sense incidental, as regulating the obligations expressed and implied; not in contradiction to the quantity of interest, which the demise itself without special words was by the agreement to give to the lessee. *Henderson* v. *Hay* (5), in its circumstances, shows what reliance is to be placed upon this word "usual." The assignee of the lease of a public-house, which lease contained no covenant restraining alienation without licence, contracted for a lease, not only of the public-house, but of other premises also. It was a case, therefore, in which, not only the original lessor had no idea of such a covenant,

A but it could not relate to the public-house only; and it was as fair to argue from the nature of the other premises which were part of the subject of the demise, as from the nature of the public-house. Lord Thurlow, however, conceived that this agreement to demise such an interest upon common and usual covenants meant only that an agreement to give an interest for twenty-one years in equity gave it to the party, his executors, administrators, and assigns; and that the B covenants were to be such as would not break down the extent of that interest contracted for.

In *Morgan* v. *Slaughter* (3), before Lord Kenyon (3), the agreement was for fair and usual covenants: but before *Henderson* v. *Hay* (5) there is no one instance that such a covenant as this was conceived to fall within the description of usual covenants. *Dumpor's Case* (6) proves no more than the fact that there was in C that instance such a covenant; not that it is a usual covenant, and on that account to be inserted in all leases. I am unable to follow that sort of reasoning. The inference from that case appears to me to be rather the other way. It is said, no lease is properly drawn without this covenant. I have seen many leases without it, and lately scarcely one with it. Such leases as fall within our observation, individually, as lessees, have no such covenant. They have a covenant of another D sort. A lease is properly drawn with or without such a covenant according to the agreement; and the lessor must show that the restraint is to be put upon the powers, which by law flow out of the interest that he has agreed to give to the other party.

Folkingham v. *Croft* (4) was upon an agreement for a lease "with all usual and E reasonable covenants commonly inserted in leases of the same nature." Some construction must be given to those latter words. The explanation with reference to the peculiar property, which was the subject of that demise, is a most dangerous proceeding: but it is stated, as a fact in that case, that there was no regular, local, practice upon the subject, it being equally common in such leases to insert or omit the covenant. The plaintiff, therefore, failed upon the ground of local usage; and, though I say that I should not have had much difficulty in deciding F that case if it had come before me without any authorities, I fear that that would have been because my opinion is directly contrary to that decision.

As this case also cannot be decided upon any usage, locally, I must look to general usage; and, if I could see a usage, with reference to the peculiar subject of this demise, authorising the insertion of this covenant, I might say the party had contracted for it: but no such fact is made out. Can it be maintained upon G a common agreement for a lease, as the meaning of the parties, that the lessee is not to make a sub-demise, to part with the possession; in short, that he is to be subject to all these restraints upon the power of alienation, flowing out of the equitable estate, if nothing is said about it, and that under the words "usual covenants" all such restraints are to be inserted? With respect to another species of covenant, it is now held that, to avoid the consequences of bankruptcy, a land- H lord may take a clause that the lease shall determine upon the bankruptcy of the tenant; and many prudent men take that clause. Is that also to be inserted as a usual and common covenant; and why not, if the fact that such a covenant as this occurred in *Dumpor's Case* (6) makes it a proper and usual one.

I do not go through the reasoning of the Master of the Rolls in *Vere* v. *Loveden* (1) and *Jones* v. *Jones* (2). It will be a satisfaction to me to learn from him, how I (rather than rest upon that reasoning which his great mind then suggested) he can bend to that which appears to me very unsatisfactory in those previous cases. My opinion that, if decision has not closed this point, the grantor has no right to his covenant, is formed upon grounds that make me lay out of consideration the small reasoning upon the word "assigns," and the circumstance that the lessor might at the end of ten years return to his trade in this shop. The safest rule for property is that a person shall be taken to grant the interest in an estate which he proposes to convey, or the lease he proposes to make; and that nothing which flows

out of that interest, as an incident, is to be done away by loose expressions, to be construed by facts more loose; that it is upon the party, who has forborne to insert a covenant for his own benefit, to show his title to it; and that it is safer to require the lessor to protect himself by express stipulation, than for courts of equity to hold that contracting parties shall insert, not restraints, expressed by the contract, or implied by law, but such, more or less in number, as individual conveyances shall from day to day prescribe as proper to be imposed upon the lessee; and that, all those restraints, so imposed from time to time, are to be introduced as the aggregate of the agreement.

In *Boardman* v. *Mostyn* (7) the parties compelled the court to inquire as to the usage in the neighbourhood; to be enforced, not as being usual in the proper sense, but as that to which it appeared they looked. So, upon many estates the expression is familiar "such covenants are as usual;" as in the leases, granted by the Duke of Bedford to Lord Grosvenor. The lessee may either desire to be informed what are the covenants usually inserted in their leases; or may not inquire about them, concluding that, being submitted to by the tenants, they are reasonable. In many of those leases it is not thought reasonable that the restraint of alienation should be during the whole term; but it is only for the last seven years of a term, perhaps of sixty or seventy years. Whether that should be applied to a term of twenty-one years is another consideration.

Is it then to depend upon the nature of the property? Is an agreement for the lease of a public-house, where nothing more is expressed, to be carried into execution in a different manner from an agreement as to property of another species; with regard to which, though there may not be the same reason, the landlord may have reasons, operating upon just as powerfully, for requiring the restraint? The proposition would appear extraordinary, as to an agreement for the lease of a public-house, that the tenant was to have a more extensive interest, before a licence was necessary, than he would now be entitled to in the execution of such a contract; that on account of the alteration of the general law in that respect a different decision is to be made upon the same words.

Upon the whole, I came into court with a firm opinion that the best, that is, the most legal, decision of this case would be that the Master is right in rejecting this covenant: but, *Browne* v. *Raban* (8) having been decided yesterday, an authority of such great weight, I will discuss the subject with the Master of the Rolls, before I decide this case. There is a specialty here; that this agreement does specify some covenants that the lease is to contain, and has no reference to the general expression "usual and proper covenants:" but there is very little difference, whether those words are found in it, or not, with reference to the ground of my opinion, which is that, where the interest to be demised carries with it the power of alienation, it can be shut out only by express contract; and the proper and usual covenants must be such as would be inserted in a lease, giving the power of alienation for twenty-one years.

Aug. 8. **LORD ELDON, L.C.**—I have not had an opportunity of consulting the Master of the Rolls, who has been out of town, but I understand that the words "with usual covenants" were relied on in the judgment at the Rolls. I am extremely anxious not to give my final judgment upon this case until I know what is the value which the Master of the Rolls sets upon that distinction. The principle upon which my opinion rests is, that before *Henderson* v. *Hay* (5) there was no sort of difference whether the agreement in the terms of it did or did not refer to usual and proper covenants; that in every agreement, whether as to freehold or leasehold estate, it was implied that there were to be usual and proper covenants. It will be a great relief to me, if it should appear that the decision of that case did not rest upon that distinction, of which, after repeated consideration, I cannot state the actual value: nor, looking back to the cases, can I state what is the result of them.

A Aug. 9. **LORD ELDON, L.C.**—I have examined the Register's Book as to the case of *Henderson* v. *Hay* (5), with the view to ascertain whether it is to be considered merely as the opinion, or as the judgment of LORD THURLOW. The cause came on upon the objection to the clause which was proposed, as it is stated in the report, and it was declared that the defendant has no right to insist upon the clause to restrain the alienation of the premises being inserted in such lease; B reserving the consideration of costs. It is, therefore, a declaration in judgment upon the very point.

I have had sufficient communication with the Master of the Rolls for this purpose. The law of this court is unquestionably, as LORD THURLOW there declared it; and I conceived it to have remained undoubted until *Morgan* v. *Slaughter* (3) before LORD KENYON, which cannot justly be considered merely as a decision, as C his Lordship was eminently skilled in the doctrine of this court and could not have been ignorant of *Henderson* v. *Hay* (5). I, therefore, say with reluctance, that the reasoning upon which LORD KENYON determined that case does not satisfy me that it is the law. When the point was before the Court of Exchequer in *Folkingham* v. *Croft* (4), it does not appear that the court found it easy so to state the law, as they deliberated upon it a considerable time. With respect to that case, I D can only say that my mind is not by any means satisfied with the reasoning. I have read *Vere* v. *Loveden* (1) and *Jones* v. *Jones* (2) before the Master of the Rolls, and certainly it would be very difficult to answer the reasoning that appears in those judgments. I have stated the grounds of my own opinion upon this point; and I understand the Master of the Rolls still considers that the better opinion: but, *Folkingham* v. *Croft* (4) having been so decided, he thought it E difficult to depart from it. With reference to that, however, it seems to me that LORD THURLOW's authority in 1791 was not treated with all the respect that is due to it in the subsequent period; and the existence of these four cases in controversy, three at the Rolls, and this one before me, is decisive evidence that the point was not set at rest by *Folkingham* v. *Croft* (4). The Master of the Rolls also agrees with me that, whether the agreement contained the clause that usual F covenants should be inserted, or not, would not make a material difference; and, with great anxiety to be right upon this point, I never will consent that my opinion shall be supposed to stand upon such a distinction. Before *Henderson* v. *Hay* (5) an agreement for a lease would have been executed precisely in the same mode as to the covenants to be inserted, whether that clause had been contained in it or not; so would an agreement for the conveyance of a real estate. In this case, G therefore, I must act upon my clear opinion of what the law is; which is, that the lessor is not entitled to such a covenant.

Exception overruled.

A

HUNTER *v.* PRINSEP AND OTHERS

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Le Blanc and Bayley, JJ.), November 25, 1808]

[Reported 10 East, 378; 103 E.R. 818]

B

Shipping—Freight—Disablement of ship—Abandonment of voyage—Right of shipowner to freight—Goods forwarded to destination by other means—Sale of cargo—Remission of proceeds to shipowners.

Under a charterparty, the shipowners were to deliver a cargo from Honduras Bay to London, the dangers of the seas and other unavoidable casualties always excepted. The freight was to become payable "on a right and true delivery of the same homeward-bound cargo." The ship and cargo, after being captured and recaptured and wrecked in a hurricane, was taken to St. Kitts, where a sale of the cargo was directed by the Vice-Admiralty Court there on the application of the master acting bona fide for the benefit of all concerned, but without orders from any. The proceeds of sale were remitted to the shipowners. In an action of assumpsit for money had and received brought by the freighters, the shipowners claimed to be entitled to freight pro rata itineris.

C

D

Held: (i) on the ship being disabled from completing her voyage, the shipowner might still entitle himself to the whole freight by forwarding the goods by some other means to the place of destination, but he had no right to any freight if they were not so forwarded, unless the forwarding them be dispensed with or unless there be some new bargain upon the subject; if the shipowner would not forward them, the freighter was entitled to them without paying anything; (ii) on the facts, no dispensation with the duty of delivering the goods could be implied as their further conveyance had been rendered impossible by the unauthorised and tortious act of the shipowners' agent; (iii) accordingly, the shipowners were not entitled to any freight, and the freighters had not, by suing for money had and received, ratified the sale by the master so as to render them liable for freight.

E

F

Notes. Applied: *The Louisa* (1813), 1 Dods. 317; *Cannan* v. *Meaburn* (1824), 1 Bing. 465. Considered: *Vlierboom* v. *Chapman* (1844), 13 M. & W. 230. Applied: *Metcalfe* v. *Britannia Ironworks Co.* (1876), 1 Q.B.D. 613; *Thomas* v. *Harrowing Steamship Co.*, [1915] A.C. 58. Referred to: *Thornton* v. *Fairlie* (1818) 8 Taunt. 354; *The Bahia* (1864), Brown. & Lush. 292; *Hopper* v. *Burness* (1876), 1 C.P.D. 137; *Assicurazioni Generali* v. *S.S. Bessie Morris Co.* (1892), 61 L.J.Q.B. 754; *Bradley* v. *Newsum, Sons & Co., Ltd.*, [1918–19] All E.R. Rep. 625; *United Australia, Ltd.* v. *Barclays Bank, Ltd.*, [1940] 4 All E.R. 20.

G

As to authority to sell cargo, see 35 Halsbury's Laws (3rd Edn.) 138, 139; as to transhipment of cargo, see ibid. 427–430; as to when freight is payable, see ibid. 490–494; as to pro rata freight, see ibid. 501; and for cases see 41 Digest (Repl.) 412–414.

H

Cases referred to:

(1) *Baillie* v. *Moudigliani* (1785), cited in Term Rep. at p. 421; 1 Park on Marine Insurance, 8th Edn., p. 116; 101 E.R. 627; 29 Digest (Repl.) 337, *2563*.

I

(2) *Reid* v. *Darby* (1808), 10 East, 143; 103 E.R. 730; 42 Digest (Repl.) 764, *5330*.

Also referred to in argument:

Luke v. *Lyde* (*or Lloyd*) (1759), 2 Burr. 882; 1 Wm. Bl. 190; 97 E.R. 614; 41 Digest (Repl.) 568, *3472*.

Cook v. *Jennings* (1797), 7 Term Rep. 381; 101 E.R. 1032; 41 Digest (Repl.) 563, *3412*.

A *Smith* v. *Hodson* (1791), 4 Term Rep. 211; 100 E.R. 979; 4 Digest (Repl.) 439, *3875.*

Lutwidge v. *Grey* (1736), cited in 2 Burr. at p. 885; 97 E.R. 616, H.L.; 41 Digest (Repl.) 568, *3462.*

Mackrell v. *Simond* (1776), 2 Chit. 666; 41 Digest (Repl.) 223, *493.*

B *Curling* v. *Long* (1797), 1 Bos. & P. 634; 126 E.R. 1104; 41 Digest (Repl.) 565, *3430.*

Kitchen v. *Campbell* (1772), 3 Wils. 304; 2 Wm. Bl. 827; 95 E.R. 1069; 5 Digest (Repl.) 1053, *8503.*

Action of assumpsit for money had and received.

The plaintiff declared in the two first counts against the defendants as owners C of the ship *Young Nicholas*, for not delivering mahogany and logwood, loaded on board that ship, in the bay of Honduras, upon freight for London, agreeably to the terms of the different bills of lading which had been signed for such goods by the master; but having before the goods arrived at London, without the plaintiff's consent and against his will, sold them, and converted the produce to their own use. The first count stated the promise to have been to carry the goods on board D the ship from Honduras to London, and there deliver them to the plaintiff, the dangers of the seas only excepted. The second count stated the exception to have been of the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever. The third count stated a delivery by the plaintiff to the defendants of 500 logs of mahogany and 100 tons of logwood; and that they, having sold and disposed of E them, promised to render to the plaintiff a just and reasonable account of the sale and proceeds, but had refused to do so. The other counts were for goods sold and delivered, for money had and received, and upon an account stated. The defendants pleaded the general issue, and gave a notice of set-off, in the common form, for freight, work and labour, and money paid.

At the trial at Guildhall a verdict was found for the plaintiff, subject to the F opinion of the court on the following facts, the damages (if any) to be settled by arbitration according to that opinion.

On Sept. 3, 1803, a charterparty of affreightment, under seal, was entered into and executed by the defendants, being owners of the ship *Young Nicholas*, and the plaintiff, as freighter of her, on a voyage from Falmouth to Honduras Bay, to fetch back from thence for the plaintiff a cargo of mahogany, with 60 tons of G dye wood and logwood or fustick, to be delivered at London, the dangers of the seas and other unavoidable casualties always excepted. By the terms of such charterparty the freight was stipulated and covenanted to be paid by the plaintiff to the defendants, in the following manner: viz., that the freighter should pay to the owners freight for the said cargo at the rate of £12 12s. per ton for mahogany, and for logwood or fustick at the rate of £8 8s. per ton of 20 cwt. at the king's H beam, with 1s. 6d. per ton, in lieu of port charges and pilotage, besides the primage therein specified, such freight, etc., to be paid as follows: to wit, one third part on a right and true delivery of the said homeward-bound cargo, and the remaining two third parts thereof by an accepted bill or bills on the freighter, payable at three months date from such delivery. And the parties reciprocally bound themselves by such charterparty to each other for the performance of the covenants I and agreements contained in it, in a penalty of £8,000. The ship proceeded to Honduras Bay, where a cargo of mahogany and logwood, amounting to above 200,000 feet, was loaded by the plaintiff on board the ship for London; and bills of lading for different parcels, with such different exceptions as are stated in the different counts of the declaration, were signed by the master of the ship for the delivery of such goods to the plaintiff, paying the before-mentioned freight for the same. The ship thus loaded, and having no other goods on board her, sailed from the bay of Honduras on her homeward voyage, on Mar. 29, 1804; and on

April 21 following, was so damaged in a storm as necessarily to put into Savannah in Georgia to repair: and the master (who was employed by the defendants) sold a part of the mahogany there to pay for the necessary repairs of the ship; but the general average on that occasion has been adjusted and settled between the parties. On July 8 in the same year, the ship, having been refitted again, put to sea with the remainder of her cargo in the further prosecution of her homeward voyage; but on the next day was captured by a French privateer and carried towards Guadaloupe. On Aug. 6 following, she was recaptured off that island by one of His Majesty's sloops of war, and sent to St. Kitts, where, on Sept. 5 following, she was driven ashore in a hurricane and wrecked; but the then remaining cargo was saved. The wreck and cargo were by order of the Vice-Admiralty Court at St. Kitts put up to public sale, without the privity or consent of the plaintiff or defendants, except only as such consent may be involved in the fact of the master of the *Young Nicholas* having applied for the said order, he acting on that occasion according to the best of his judgment for the benefit of all parties concerned. The cargo produced (after paying one-eighth of the proceeds to the recaptors for salvage) £1,776 19s. 10d. The ship netted about £200; and the proceeds of both were remitted to and received by the defendants. This action was brought to recover the proceeds of the goods sold at St. Kitts and remitted to the defendants, who insist on retaining the whole thereof on account of freight, which they allege to be due pro rata itineris. The plaintiff, on the contrary, insists that he is entitled to recover the value of the goods sold at St. Kitts, without any allowance for freight.

The questions for the opinion of the court were: Whether any freight was payable to the defendants, in respect of the cargo sold at St. Kitts? If any freight was payable for the goods sold at St. Kitts, whether such freight was to be calculated on the proportion of the voyage actually performed in point of time, or distance, or only on the proportionate diminution of expense between the rate of freight from Honduras to London, and the rate of freight from St. Kitts to London. Also, whether freight was to be allowed on the quantity of goods so sold, or only in the proportion their net proceeds, when sold, bear to their prime cost on board, or to what they would have netted if delivered at London. It was mutually agreed that when the rule had been given by the court, the result should be settled by the arbitration of William Ludlam of Lloyd's Coffee-house, London, merchant in conformity to such rule.

Marryat for the plaintiff.
Richardson for the defendants.

Cur. adv. vult.

LORD ELLENBOROUGH, C.J., delivered the following judgment of the court. —This case, which was argued on Tuesday last, stood over, rather for the purpose of our looking into some of the cases cited, particularly that of *Baillie* v. *Moudigliani* (1), than from any doubt which the court entertained upon the main points of the case now in question. It will be recollected that it was an action of assumpsit, brought by the plaintiff, a shipper of goods on board the ship *Young Nicholas*, of which the defendants were owners. The parties had mutually contracted by a charterparty of affreightment under seal, executed between them, for a voyage from Falmouth to Honduras Bay. The defendants were to fetch back from thence for the plaintiff a cargo of mahogany, logwood, etc., to be delivered at London, "the dangers of the seas and other unavoidable casualties always excepted." By the charterparty the freight was stipulated to be paid in particular modes and proportions on a right and true delivery of the same homeward-bound cargo. This right and true delivery of the homeward-bound cargo at the port of its destination never took place, as the ship, after taking in such cargo at the Bay of Honduras, was first damaged by a storm and driven into Savannah in Georgia to repair: was afterwards, in the further course of her voyage, captured by a French privateer; then recaptured by a King's ship and sent into St. Kitts, where she

A was driven on shore in a hurricane and wrecked: but the remainder of the cargo (of which part had been before sold at Savannah for the expense of repairs) was saved, and upon the application of the Captain to the Court of Vice-Admiralty at St. Kitts for an order for that purpose, was together with the wreck of the ship, there sold, without the privity or consent of the plaintiff or of the defendants. The cargo upon such sale netted, after payment of one-eighth salvage to the recaptors, £1,776 19s. B 10d., which was, together with the proceeds of the ship, remitted to and received by the defendants. The action was brought by the plaintiff to recover these proceeds of the cargo sold at St. Kitts from the defendants, who had so received them. The defendants insisted upon retaining the whole of such proceeds on account of freight, to which they claimed to be entitled pro rata itineris. The plaintiff insisted upon his right to recover the whole of these proceeds, without C making to the defendants any allowance for freight. The declaration in which this recovery was sought contained three special counts in assumpsit, founded two of them upon two bills of lading signed by the master, containing the first of them an exception of "the dangers of the seas;" the second, "of the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, navigation," etc. On these two special counts the plaintiffs clearly could not recover; both D because they contained an express exception for the very perils by which the loss of the voyage was occasioned; and also because the plaintiff, having contracted with the defendants by charterparty under seal, could not charge the defendants in respect to the same subject-matter in virtue of a contract not under seal, and signed by their master only, and not by themselves.

E As to the third count, whether the law would imply any such promise to account for the proceeds of a cargo, wrongfully sold and converted, upon the ground of such conversion only, as is therein stated, is the less material to be considered, as the same merits on the part of the plaintiff are open for discussion on the count for money had and received, and upon which count the question between the parties distinctly arises: which is whether the defendants have a lien upon and can claim F to deduct their freight pro rata itineris out of the proceeds of the cargo sold at St. Kitts, and which are now in their hands. It was contended, on the part of the defendants, that the money for which the goods sold is a substitution for, and properly represents, the goods themselves; and that as the defendants would, if the goods had subsisted in specie, have had a lien upon them for their freight, and would be entitled to have carried them if they could in the same ship, or to have G hired another for that purpose, and so to have earned their full freight: or, if the plaintiff had taken them out of their hands before the voyage was completed, would have been entitled to have claimed freight pro rata itineris against him: so, now, the plaintiff, having sued for the proceeds in this form of action "for money had and received," has, in virtue of his so suing, adopted and confirmed the act of the master, by which the goods were converted into money, by which the further con- H veyance of them in the course of the voyage was prevented, and by which of course the full freight of them was prevented from being earned. But the fallacy of the argument on the part of the defendants appears to us to consist in attributing more effect to the mere form of this action than really belongs to it. In bringing an action for money had and received, instead of trover, the plaintiff does no more than waive any complaint with a view to damages, of the tortious act by I which the goods were converted into money; and takes to the net proceeds of the sale as the value of the goods; subject, of course, to all the consequences of considering the demand in question as a debt, and, among others, to that of the defendants' having a right of set-off, if they should happen to have any counter demand against the plaintiff.

But we have been much pressed with the authority of *Baillie* v. *Moudigliani* (1) as supposed to be similar to the present case: and in which Lord Mansfield is stated to have said:

"In this case the value of the goods was restored in money, which is the same as the goods, and, therefore, freight was due pro rata itineris." A

This, however, as every other proposition laid down by a judge, ought to be understood with particular reference to the facts of the case then before the court. That was the case of a ship sailing with goods from Nevis to Bristol, which was captured in the course of the voyage, carried into France and condemned there: but the sentence of condemnation was afterwards reversed, and restitution awarded. The ship and cargo had, however, in the meantime been sold: but the proceeds of the sale had been paid, as it should seem from the note, to the owner of the goods, deducting the charges of the appeal: and the owner of the goods had out of the money paid the owner of the ship freight pro rata itineris. Of this payment of freight the owner of goods claimed the reimbursement from his underwriters upon a policy on goods: but it was properly answered on the part of the defendant, and the court held, accordingly, that the insurer on goods was not liable to have the charge of freight thrown upon him because he had not engaged to indemnify against it: and this was sufficient for the decision of the only question then directly in judgment before the court. But it appears from the note of that case, that LORD MANSFIELD did in that case further hold that freight pro rata itineris was a charge upon the proceeds of the goods sold in the hands of the owner of the goods to whom those proceeds had been rendered in lieu of his goods. But in what case, and under what circumstances, did LORD MANSFIELD so hold? Was it in the case of tortious unauthorised sale, as the one now in question must be taken to have been; particularly since *Reid* v. *Darby* (2) decided in this court in Trinity Term last? Or in a case in which the competency of jurisdiction of the several courts which condemned and restored was unquestionable: where if the ship and goods had been restored in specie, the right of the shipowner to earn full freight, by carrying the goods to the delivering port, was entire: and where the possibility of doing so had only been prevented by the act of the court or its officers, in making sale of the goods pending the suit, and by no fault on the part of the owner of the ship? However just it may be that a substitution of money for goods, made by the authority of a competent tribunal, shall be equivalent to the actual restitution of the goods themselves, as far as respects all interests in and liens upon that fund; and however reasonable it may be that an owner thus taking the substitute, which requires no further conveyance, should be considered as virtually dispensing with the further duty of the shipowners, which would have remained to be performed if the goods had still continued in specie; yet, no such dispensation with the duty of further conveyance on the part of the owner of the goods can be implied in a case like the present, in which the further conveyance of them is rendered impossible by an act of the immediate agent of the shipowners themselves, to which he, the owner of the goods, is neither actually nor virtually consenting by himself, or any other agent empowered to consent on his behalf; and to which he is not compelled to submit by any regular exercise of legal authority in any quarter whatsoever; and from which he can, according to what is contended for on the part of the defendants, derive no benefit whatever; inasmuch as the pro rata freight claimed by them exceeds the whole amount of the proceeds of the goods sold. Upon this view of *Baillie* v. *Moudigliani* (1), compared with the present case, it affords no authority adverse to the claims made by the plaintiff in the present action. B C D E F G H

The principles which appear to govern the present action are these. The shipowners undertake that they will carry the goods to the place of destination, unless prevented by the dangers of the seas, or other unavaidable casualties: and the freighter undertakes, that if the goods be delivered at the place of their destination he will pay the stipulated freight: but it was only in that event, viz., of their delivery at the place of destination that he, the freighter, engages to pay anything. If the ship be disabled from completing her voyage, the shipowner may still entitle himself to the whole freight, by forwarding the goods by some other means to the I

place of destination; but he has no right to any freight if they be not so forwarded; unless the forwarding them be dispensed with, or unless there be some new bargain upon this subject. If the shipowner will not forward them, the freighter is entitled to them without paying anything. One party, therefore, if he forward them, or be prevented or discharged from so doing, is entitled to his whole freight; and the other, if there be a refusal to forward them, is entitled to have them without paying any freight at all. The general property in the goods is in the freighter; the shipowner has no right to withhold the possession from him, unless he has either earned his freight, or is going on to earn it. If no freight be earned, and he decline proceeding to earn any, the freighter has a right to the possession. The captain's conduct in obtaining an order for selling the goods, and selling them accordingly, which was unnecessary, and which disabled him from forwarding the goods, was in effect declining to proceed to earn any freight, and, therefore, entitled the plaintiff to the entire produce of his goods, without any allowance for freight. The postea must, therefore, be delivered to the plaintiff.

Judgment for plaintiff.

MORICE *v.* BISHOP OF DURHAM AND ANOTHER

[Rolls Court (Sir William Grant, M.R.), February 7, 9, March 26, 1804]

[Reported 9 Ves. 399; 32 E.R. 656]

[Lord Chancellor's Court (Lord Eldon, L.C.) March 18, 20, 1805]

[Reported 10 Ves. 522; 32 E.R. 947]

Trust—Uncertainty—Inability of court to control and administer—Failure of trust—Charitable trust—Validity in spite of uncertainty of objects.

If, generally, the objects of a trust are uncertain so that the court, if necessary, could not control and administer the trust, it fails, and the property the subject of the trust is undisposed of. Where, however, a charitable purpose is expressed the bequest does not fail on account of the uncertainty of the objects. The particular mode of application will be directed in some cases by the Crown as parens patriae and in the other cases by the court.

Charity—Uncertainty—Bequest to executor to dispose of residue to such objects of benevolence and liberality as he in his discretion should most approve.

By her will the testatrix bequeathed her personal estate to her executor on trust to pay debts and legacies and to dispose of the residue to such objects of benevolence and liberality as the executor in his own discretion should most approve of.

Held: the words of the bequest of residue did not indicate charitable purposes in the sense in which those words were understood by the court; the trust, not being of a charitable nature, was too indefinite to be valid; and, therefore, it failed.

Notes. As to what now follows on the failure of a trust, see 38 Halsbury's Laws (3rd Edn.), 863–867.

Considered: *James* v. *Allen*, [1814–23] All E.R. Rep. 578. Followed: *Vezey* v. *Jamson* (1822), 1 Sim. & St. 69; *Ommanney* v. *Butcher*, [1814–23] All E.R. Rep. 154; *Williams* v. *Williams*, *Williams* v. *Kershaw* (1835), 5 L.J.Ch. 354; *Thorp* v.

Owen (1843), 2 Hare, 607; *Nightingale* v. *Goulburn* (1847), 5 Hare, 484. Distinguished: *Briggs* v. *Penny* (1849), 3 De G. & Sm. 525. Considered: *Lomax* v. *Ripley* (1855), 3 Sm. & G. 48. Applied: *Thomson* v. *Shakespeare* (1859), John. 612. Considered: *Dolan* v. *Macdermot* (1867), L.R. 5 Eq. 60. Distinguished: *Re Sir Robert Peel's School at Tamworth, Ex parte Charity Comrs.* (1868), 3 Ch. App. 543. Applied: *Stewart* v. *Greene* (1871), 19 W.R. 396. Considered: *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875), L.R. 6 P.C. 381. Followed: *Re Hewitt's Estate, Gateshead Corpn.* v. *Hudspeth* (1883), 53 L.J.Ch. 132. Distinguished: *Re Douglas, Obert* v. *Barrow* (1887), 35 Ch.D. 472. Considered: *R.* v. *Income Tax Comrs.* (1888), 22 Q.B.D. 296. Applied: *Re Macduff, Macduff* v. *Macduff*, [1895–9] All E.R. Rep. 154; *Hunter* v. *A.-G.*, [1895-9] All E.R. Rep. 558; *Re Davidson, Minty* v. *Bourne*, [1908–10] All E.R. Rep. 140. Considered: *R.* v. *Income Tax Special Comrs., Ex parte Rank's Trustees* (1922), 127 E.R. 651. Distinguished: *Re Clarke (deceased), Bracey* v. *Royal National Lifeboat Institution*, [1923] All E.R. Rep. 607. Applied: *Re Hummeltenberg, Beatty* v. *London Spiritualistic Alliance*, [1923] All E.R. Rep. 49. Explained: *Re Smith, Public Trustee* v. *Smith*, [1931] All E.R. Rep. 617. Considered: *Re Diplock, Wintle* v. *Diplock*, [1941] 1 All E.R. 193. Applied: *Re Gott, Glazebrook* v. *Leeds University*, [1944] 1 All E.R. 293. Considered: *National Anti-Vivisection Society* v. *I.R. Comrs.*, [1947] 2 All E.R. 217. Applied: *I.R. Comrs.* v. *Broadway Cottages Trust, I.R. Comrs.* v. *Sunnylands Trust*, [1954] 3 All E.R. 120. Referred to: *Doe d. Toone* v. *Copestake* (1805), 6 East, 328; *Gibbs* v. *Rumsey* (1813), post; *Whitaker* v. *Tatham* (1831), 5 Moo. & P. 628; *A.-G.* v. *Haberdashers' Co.* (1834), 1 My. & K. 420; *Baker* v. *Sutton*, [1835–42] All E.R. Rep. 431; *Ellis* v. *Selby* (1836), 1 My. & Cr. 286; *Nightingale* v. *Goulbourn*, [1843–60] All E.R. Rep. 420; *Green* v. *Marsden* (1853), 1 Eq. Rep. 437; *Marsh* v. *Mears* (1859), 30 L.T.O.S. 89; *Buckle* v. *Bristow* (1864), 5 New Rep. 7; *Beaumont* v. Oliveira (1868), L.R. 6 Eq. 534; *Wilkinson* v. *Lindgren* (1869), 17 W.R. 1000; *Pocock* v. *A.-G.* (1876), 25 W.R. 277; *Re Sutton, Stone* v. *A.-G.* (1885), 28 Ch.D. 464; *Re Lloyd Greame* v. *A.-G.* (1893), 10 T.L.R. 66; *Re Darling, Farquhar* v. *Darling*, [1896] 1 Ch. 50; *Langham* v. *Petersen* (1903), 19 T.L.R. 157; *Re Allen, Hargreaves* v. *Taylor*, [1905] 2 Ch. 400; *Re Wedgwood, Allen* v. *Wedgwood*, [1914–15] All E.R. Rep. 322; *Re Verrall, National Trust for Places of Historic Interest or Natural Beauty* v. *A.-G.*, [1914–15] All E.R. Rep. 546; *A.-G. for New Zealand* v. *Brown*, [1916–17] All E.R. Rep. 245; *Bowman* v. *Secular Society, Ltd.*, [1916–17] All E.R. Rep. 1; *Re Davis, Thomas* v. *Davis*, [1923] 1 Ch. 225; *Re Tetley, National Provincial and Union Bank of England* v. *Tetley* [1923] 1 Ch. 258; *Verge* v. *Somerville*, [1924] All E.R. Rep. 121; *I.R. Comrs.* v. *Yorkshire Agricultural Society*, [1927] All E.R. Rep. 536; *General Medical Council* v. *I.R. Comrs., English Branch of General Medical Council* v. *I.R. Comrs.*, [1928] All E.R. Rep. 252; *Geologists' Association* v. *I.R. Comrs.* (1928), 14 Tax Cas. 271; *Re Grove-Grady, Plowden* v. *Lawrence*, [1929] All E.R. Rep. 158; *Re Hood, Public Trustee* v. *Hood*, [1930] All E.R. Rep. 215; *Re Schoales, Schoales* v. *Schoales*, [1930] 2 Ch. 75; *Keren Kayemeth Le Jisroel, Ltd.* v. *I.R. Comrs.* (1931), 47 T.L.R. 461; *I.R. Comrs.* v. *Gull*, [1937] 4 All E.R. 290; *Chichester Diocesan Fund and Board of Finance (Incorporated)* v. *Simpson*, [1944] 2 All E.R. 60; *Re Coats' Trusts, Coats* v. *Gilmour*, [1948] 1 All E.R. 521; *Gibson* v. *South American Stores (Gath and Chaves), Ltd.*, [1949] 2 All E.R. 985; *Re Astor's Settlement Trusts, Astor* v. *Scholfield*, [1952] 1 All E.R. 1067; *Baddeley* v. *I.R. Comrs.*, [1955] 1 All E.R. 525; *Re Sayer Trusts, Macgregor* v. *Sayer*, [1956] 3 All E.R. 600; *Re Shaw, Public Trustee* v. *Day*, [1957] 1 All E.R. 745; *Leahy* v. *A.-G. of New South Wales*, [1959] 2 All E.R. 300; *Re Harpur's Will Trusts, Haller* v. *A.-G.*, [1961] 3 All E.R. 588.

As to charitable purposes and trusts, see 4 HALSBURY'S LAWS (3rd Edn.) 213 et seq., 264 et seq.; and for cases see 8 DIGEST (Repl.) 312 et seq., 383 et seq. As to certainty of trusts, see 38 HALSBURY'S LAWS (3rd Edn.) 834–836; and for cases see 47 DIGEST (Repl.) 58–62.

A Cases referred to:

(1) *Moggridge* v. *Thackwell* (1792), post; 1 Ves. 464; 3 Bro. C.C. 517; 30 E.R. 440, L.C.; re-heard (1803), 7 Ves. 36; 32 E.R. 15, L.C.; affirmed (1807), 13 Ves. 416, H.L.; 8 Digest (Repl.) 503, *2229.*

(2) *Browne* v. *Yeall* (1791), cited in 7 Ves. 47, 50, n.; 32 E.R. 18, 20, 34, L.C.; 8 Digest (Repl.) 389, *821.*

B (3) *De Costa* v. *De Pas* (1754), Amb. 228; 2 Swan. 487, n.; 27 E.R. 150; sub nom. *Da Costa* v. *Da Paz*, Dick. 258; 3 Hare, 194, n., L.C.; 8 Digest (Repl.) 339, *211.*

(4) *Howse* v. *Chapman* (1799), 4 Ves. 542; 31 E.R. 278, L.C.; 8 Digest (Repl.) 344, *248.*

(5) *A.-G.* v. *Lady Downing* (1766), Amb. 550; Wilm. 1; 27 E.R. 353, L.C.; sub-

C sequent proceedings (1769), Amb. 571, L.C.; 8 Digest (Repl.) 327, *104.*

(6) *Doyley* v. *Doyley*, *A.-G.* v. *Doyley* (1735), 7 Ves. 58, n.; 2 Eq. Cas. Abr. 194; 32 E.R. 35; 8 Digest (Repl.) 404, *952.*

(7) *Pierson* v. *Garnet* (1787), 2 Bro. C.C. 226; 29 E.R. 126, L.C.; 47 Digest (Repl.) 51, *360.*

(8) *A.-G.* v. *Whorwood* (1750), 1 Ves. Sen. 534; 27 E.R. 1188, L.C.; 8 Digest

D (Repl.) 327, *103.*

(9) *A.-G.* v. *Stepney* (1804), 10 Ves. 22; 32 E.R. 751, L.C.; 8 Digest (Repl.) 326, *94.*

(10) *A.-G.* v. *Peacock* (1676), Cas. temp. Finch, 245; 23 E.R. 135; sub nom. *A.-G.* v. *Matthews*, 2 Lev. 167; 8 Digest (Repl.) 503, *2233.*

E Also referred to in argument:

Townley v. *Bedwell* (1801), 6 Ves. 194; 31 E.R. 1008, L.C.; 8 Digest (Repl.) 371, *570.*

Cook v. *Duckenfield* (1743), 2 Atk. 562; 26 E.R. 737, L.C.; 8 Digest (Repl.) 446, *1390.*

Gwynn v. *Cardon* (circa 1800), cited in 10 Ves. 533; 32 E.R. 951; 8 Digest

F (Repl.) 389, *822.*

Bill for a decree as to the true construction of a will.

Ann Cracherode by her will, dated April 16, 1801, and duly executed to pass real estate, after giving several legacies to her next of kin and others, some of which she directed to be paid out of the produce of her real estate directed to be sold, bequeathed all her personal estate to the Bishop of Durham, his executors,

G etc., upon trust to pay her debts and legacies, etc., and to dispose of the ultimate residue to such objects of benevolence and liberality as the Bishop of Durham in his own discretion should most approve of, and she appointed the bishop her sole executor. This bill was filed by the next of kin, to have the will established except as to the residuary bequest, and that such bequest might be declared void. The Attorney-General was made a defendant. The bishop by his answer expressly

H disclaimed any beneficial interest in himself personally.

Richards, *Stanley*, and *Martin* for the bishop.

Mitford for the Attorney-General.

Mar. 26, 1804. **SIR WILLIAM GRANT, M.R.**—The only question is whether the trust upon which the residue of the personal estate is bequeathed be a trust

I for charitable purposes. That the residue is left on some trust and not for the personal benefit of the bishop is clear from the words of the will, and is admitted by his lordship who expressly disclaims any beneficial interest. That it is a trust, unless it be of a charitable nature, too indefinite to be executed by this court, has not been, and cannot be, denied. There can be no trust over the exercise of which this court will not assume a control, for an uncontrollable power of disposition would be ownership and not trust. If there be a clear trust, but for uncertain objects, the property that is the subject of the trust is undisposed of, and the benefit of such trust must result to those to whom the law gives the

ownership in default of disposition by the former owner. But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object. There must be somebody in whose favour the court can decree performance. But it is now settled upon authority which it is too late to controvert that, where a charitable purpose is expressed, however general, the bequest shall not fail on account of the uncertainty of the object. The particular mode of application will be directed by the King in some cases, in others by this court.

Is this a trust for charity? Do purposes of liberality and benevolence mean the same as objects of charity? That word in its widest sense denotes all the good affections men ought to bear towards each other; in its most restricted and common sense relief of the poor. In neither of these senses is it employed in this court. Here its signification is derived chiefly from the statute 43 Eliz., c. 4 [relating to charitable gifts]. Those purposes are considered charitable which that statute enumerates or which by analogies are deemed within its spirit and intendment, and to some such purpose every bequest to charity generally shall be applied. But, it is clear, liberality and benevolence can find numberless objects not included in that statute in the largest construction of it. The use of the word "charitable" seems to have been purposely avoided in this will in order to leave the bishop the most unrestrained discretion. Supposing the uncertainty of the trust no objection to its validity, could it be contended to be an abuse of the trust to employ this fund upon objects which all mankind would allow to be objects of liberality and benevolence though not to be said, in the language of this court, to be objects also of charity? By what rule of construction could it be said that all objects of liberality and benevolence are excluded which do not fall within the statute of Elizabeth? The question is not whether he may not apply it upon purposes strictly charitable, but whether he is bound so to apply it? I am not aware of any case in which the bequest has been held charitable where the testator has not either used that word to denote his general purpose or specified some particular purpose, which this court has determined to be charitable in its nature. All the cases upon that subject are to be found in the report of *Moggridge* v. *Thackwell* (1).

Browne v. *Yeall* (2) I should have thought a much more doubtful case. There was ground for contending that the particular purpose specified was charitable in itself, according the decisions of this court, and it was described by the testator as a charitable design. But here there is no specific purpose pointed out to which the residue is to be applied. The words "charity" and "charitable" do not occur: the words used are not synonymous: the trusts may be completely executed without bestowing any part of this residue upon purposes strictly charitable. The residue, therefore, cannot be said to be given to charitable purposes, and, as the trust is too indefinite to be disposed of to any other purpose, it follows that the residue remains undisposed of and must be distributed among the next of kin of the testatrix.

From this decision the bishop appealed to the Lord Chancellor.

Richards and *Martin* for the bishop: If this is a bequest to charity, the generality of the description will not affect the disposition, and, if that is the object, it is not necessary to point out any particular charity. Charity, in the abstract, is a very difficult consideration. In our law the sense of that word is almost as extensive as that in which it is used by general authors. The statute of Elizabeth embraces a great variety of objects that do not properly come within the ordinary meaning of the word "charity," but fall under the description of "liberality" in its usual sense, as, e.g., repairs of bridges, ports, etc. Money directed to be applied to such objects if not prevented by the Charitable Uses Act, 1735 (9 Geo. 2, c. 36) [repealed by Mortmain and Charitable Uses Act, 1888], would be applied in this court as a disposition to charity. Though clearly not within the ordinary signification, it answers the description of charity connected with liberality. It is difficult to

consider a gift to the poor of a parish as charity, for, as the law is now constituted, that is a gift in ease of [to give relief to] the landowners of the parish, the tenant paying so much less rent in proportion to the poor rate and the other taxes. These words are equivalent to "charity" in the legal acceptation. The authorities have established many objects as charitable which are not within the statute of Elizabeth, as the establishment of a Jesuba (*De Costa* v. *De Pas* (3)), an illegal establishment, upon a supposed general charitable intention. So, the establishment of the Tancred students, and the Setonian prizes, the disposition in *Howse* v. *Chapman* (4) for beautifying the city of Bath, are not within the statute, and, though liberal, cannot be described as charitable objects in the strict sense. But, upon the authorities almost everything from which the public derive benefit may be considered a charity. Suppose the testatrix had expressed the object of promoting erudition and science, various objects might be suggested as the increase of fellowships, the British Museum, etc. Why should such dispositions be discouraged? Wilmot, C.J., in his argument upon the case of Downing College (*A.-G.* v. *Lady Downing* (5), Wilm. at p. 14) speaks of the advancement of useful learning and science as a meritorious object.

The case upon Mr. Bradley's will—*Browne* v. *Yeall* (2)—may be considered as bearing hard upon this question as that disposition might, perhaps, in some respects be construed charity. That case, though frequently cited, has not been mentioned with great respect by any judge, nor was it satisfactory to the Bar. Upon all the cases upon charity which were stated by your Lordship in *Moggridge* v. *Thackwell* (1), that must be considered a single case, not confirmed by any other, and, not merely unsupported, but contradicted, by most. The distinction between this case and *Moggridge* v. *Thackwell* (1) is that in this instance the person in whom the confidence is placed is living and can execute the trust.

In considering the terms used in this will, "benevolence" is that sort of good-will peculiarly intended by "charity," especially if it is collected from the statute of Elizabeth I, but whether in the extended or the confined sense, "benevolence" has at least the same latitude and is in truth only charity in an enlarged sense. Dr. Johnson defines "benevolence" to be charity done or given. The term "liberality" is certainly more loose, but in the sense in which it is used here, coupled with a word clearly importing charity in a will reposing this high trust in the Bishop of Durham, it cannot be referred to such subjects as it was in the argument at the Rolls—horse-racing, etc. Suppose the words were "liberality and charitable purposes," the construction must have been a liberal application to such charitable purposes as the executor should think fit, extending it beyond the constrained sense of charity. There are many most proper and legitimate objects of that benevolent and liberal charity in the enlarged sense received by the law of England though not within the confined sense, but if "liberality" is to be considered as totally distinct from "charity," yet "benevolence" intimates that to some extent objects of charity are intended. The true construction is charitable objects, extended by the effect of the other word.

The Attorney-General (*Spencer Perceval*) and *Mitford* against the decree: This is a disposition substantially to charity, and, if so, there is no such uncertainty as will defeat it. The only question could be whether the execution should be in this court, or by the King's sign manual, but clearly, if it can be brought up to a design of charity, the uncertainty of the particular object will not defeat the general purpose. It is not necessary to make use of the word "charity," or to point out some specific object, falling within the range of that word. Any other words enabling the court with a sufficient degree of certainty to collect the intention are equivalent. It is not necessary to name any individual legatee if he is distinctly pointed out in any way, and "charity" is a legatee favoured more than any other. Therefore, a general description is sufficient. It is more easy to say what does not than what does come within the description of "charity." The sense in which

that word is used in the Christian religion is most comprehensive, comprising every moral virtue and duty. The objects this will has in view are objects both of benevolence and liberality, the words restrained so as to exclude all selfish views and all purposes of mere ostentation, particularly those attended with cruelty, such a disposition of the words in effect coming nearer the true nature of "charity." Suppose, a Roman Catholic bequeathed his personal estate to his confessor to be disposed of in such purposes of charity as he should think proper, it could not be doubted that superstitious uses, which this court would not permit, were intended, as masses, etc.; but that probable object would not vitiate the charitable design, and the effect would be that the court would superintend the disposition and not destroy it. If the word "liberality" is not to be limited so as to prevent an extravagant construction, the word "benevolence" is sufficiently large to signify "charity," and, if that is one of the objects, it shall not be defeated by being coupled with another. At least under the word "benevolence," the bequest must avail to some extent, and upon the principle of *A.-G.* v. *Doyley* (6), there being two objects, half ought to be given to one and half to the other.

Romilly, *Bell* and *Wingfield* for the plaintiffs, the next of kin, in support of the decree: This residue is given to the Bishop of Durham upon a trust so vague and indefinite that it cannot be executed, and, therefore, there is a resulting trust for the next of kin. The first question, whether this is a trust, was at the Rolls taken to be clear. On the second question, the nature of the trust, it must be admitted that, if the bequest is in trust for charity, it is no objection that the charity is not particularly defined, neither is it necessary that the testator should use the word "charity." The question always is whether he has given to a charity, and, therefore, in this case it must be what is the meaning in a court of justice of these two words. That, as there is no decision upon it, is a question rather of philology than of law. It is said that the word "charity" has a most enlarged sense, considered, as it is used in the Gospel, as comprehending every virtuous affection of which the mind is capable. But that is not the construction put upon it in this court—the sense, in which your Lordship is to consider it, and in which it is used by mankind in general. Dr. Johnson does not say that "benevolence" is synonymous with "charity." He states four senses in which the word is used: "Disposition to be good, kindness, charity, and goodwill." "Charity" is only one of the senses in which he states this word to be used by good authors. A large establishment, provided by a peer for his son upon marriage, is an act of benevolence not charity. If a son shows his gratitude to his father by kindness, attention to him in sickness, by relieving his difficulties, that is benevolence, not charity in the common use of that word.

A great authority, Dr. William Paley (1 Paley, Moral Philosophy, 256), after describing the different species of charity, proceeds thus:

> "Having thus described several different exertions of charity, it may not be improper to take notice of a species of liberality which is not charity in any sense of the word: I mean the giving of entertainments or liquor for the sake of popularity, or the rewarding, treating, and maintaining the companions of our diversions, as hunters, shooters, fishers, and the like. I do not say, that this is criminal: I only say that it is not charity; and that we are not to suppose, because we give, and give to the poor, that it will stand in the place, or supersede the obligation, of more meritorious and disinterested bounty."

That shows the proper use of "liberality," as contradistinguished from "charity." The words, therefore, are not synonymous. But the testatrix, selecting the former word and anxiously avoiding the latter, must have meant something very different from "charity." The meaning of "liberality" is so extensive, that it is impossible to define it. On that very ground this disposition is void, and for that reason the court cannot compel the executor to perform the trust or ascertain when there

A is a breach. There are various instances of liberality that cannot be described as charity.

LORD ELDON, L.C. This, with the single exception of *Browne* v. *Yeall* (2), is a new case. The questions are: (i) whether a trust was intended to be created at all; (ii) whether it was effectually created; (iii) if ineffectually created, whether B the defendant, the Bishop of Durham, can according to the decisions and upon the authority of those decisions take this property for his own use and benefit. As to the last, I understand, a doubt has been raised in the discussion of some question bearing analogy to this in another court, how far it is competent to a testator to give to his friend his personal estate to apply it to such purposes of bounty, not arising to trust, as the testator himself would have been likely to apply it to. That question, C as far as this court has to do with it, depends altogether upon this: if the testator meant to create a trust and not to make an absolute gift, but the trust is ineffectually created, is not expressed at all, or fails, the next of kin take. On the other hand, if the party is to take himself, it must be upon the ground, according to the authorities, that the testator did not mean to create a trust, but intended a gift to that person for his own use and benefit, for, if he was intended to have it D entirely in his own power and discretion whether to make the application or not, it is absolutely given, and it is the effect of his own will and not the obligation imposed by the testament, the one inclining, the other compelling, him to execute the purpose. But, if he cannot, or was not intended to be compelled, the question is not then upon a trust that has failed or the intent to create a trust, but the will must be read as if no such intention was expressed or to be discovered in it.

E *Pierson* v. *Garnet* (7), and the other cases of that class, do not bear upon this in any degree, for the question, whether a trust was intended arose from two or three circumstances which must all concur where there is no express trust. Prima facie an absolute interest was given, and the question was whether precatory, not mandatory, words imposed a trust upon that person, and the court has said, before those words of request or recommendation create a trust it must be shown that F the object and the subject are certain, and it is not immaterial to this case that it must be shown that the objects are certain. If neither the objects nor the subject are certain then the recommendation or request does not create a trust, for of necessity the alleged trustee is to execute the trust, and, the property being so uncertain and indefinite it may be conceived that the testator meant to leave it entirely to the will and pleasure of the legatee whether he would take upon himself G that which is technically called a trust. Wherever the subject to be administered as trust property, and the objects for whose benefit it is to be administered, are to be found in a will not expressly creating a trust, the indefinite nature and quantum of the subject, and the indefinite nature of the objects, are always used by the court as evidence that the mind of the testator was not to create a trust, and the difficulty that would be imposed upon the court to say what should be H so applied, or to what objects, has been the foundation of the argument that no trust was intended.

But the principle of those cases has never been held in this court applicable to a case where the testator himself has expressly said he gives his property upon trust. If he gives upon trusts hereafter to be declared, it might, perhaps, originally have been as well to have held that, if he did not declare any trust, I the person, to whom the property was given, should take it. If he says that he gives in trust and stops there, meaning to make a codicil or an addition to his will, or, where he gives upon trusts which fail or are ineffectually expressed, in all those cases the court has said that, if upon the face of the will there is declaration plain, the person to whom the property is given is to take it in trust, and, though the trust is not declared, or is ineffectually declared, or becomes incapable of taking effect, the party taking shall be a trustee, if not for those who were to take by the will, for those who take under the disposition of the law. It is impossible,

therefore, to contend, that, if this is a trust ineffectually expressed, the Bishop of Durham can hold for his own benefit. I do not advert to what appears upon the record of his intention to the contrary and his disposition to make the application, for I must look only to the will without any bias from the nature of the disposition or the temper and quality of the person who is to execute the trust.

The next consideration is whether this is a trust effectually declared; and, if not as to the whole, as to part. I put it so as it is said, if the word "benevolence" means charity, and "liberality" means something different from that idea, which in a court of justice we are obliged to apply to that word "charity" (and, I admit, we are obliged to apply to it many senses not falling within its ordinary signification), there is a ground for an application in this case partially if it cannot be wholly to charity. It does not seem to me upon the authorities, particularly *A.-G.* v. *Whorwood* (8), that the argument for a proportionate division or a division of some sort would be displaced. I take the result of that case to be that the substratum of that charity failed and all those partial dispositions that would have been good charity if not connected with that, failed together with it. It has been decided upon that principle that, though money may be given to an infirmary or a school, yet, if that bequest is connected with a purpose of building an infirmary or school and the money is then to be laid out upon it so built, the purpose, which is the foundation, failing, the superstructure must fail with it. *A.-G.* v. *Doyley* (6) is almost the only case that has been cited for a proportional division. The testator expressly directed the trustees to dispose of his estate to such of his relations of his mother's side who were most deserving, and in such manner and proportions as they should think fit to such charitable use as they should think most proper and convenient. The court, which has taken strong liberties upon this subject of charity, though the manner and proportion were left to certain individuals, held that equality is equity and there should be an equal division, but it is expressly declared that those who took were persons who could take under a bequest to charitable uses, and there was no difficulty in that case in saying those words must be construed according to the habit and allowed authorities of the court.

The only case decided on any principle that can govern this is *Browne* v. *Yeall* (2), which applies strongly. I do not trust myself with the question whether the principle was well applied in that instance, but the decision furnishes a principle which the court must endeavour well to apply in cases that occur. I do not hesitate to say I entertain doubt, not of the principle upon which that case was decided, but whether it was well applied in that instance. Mr. Bradley was a very able lawyer, yet he mistook his way as Serjeant Aspinall had not long before. Mr. Bradley gave a great portion of his fortune to accumulate for many years, and, meaning that it should be disposed of to charitable purposes, constituted a fund, expressly stating that his purpose was a charitable purpose, and confirming that by directing that charitable purpose to be carried on, as to the mode of executing it, by that court which according to the constitution of the country ordinarily administers property given to charitable uses. In his opinion, therefore, independent of particular authority, there was a principle suggested by all other cases of trust, that, if a trust was declared in such terms that this court could not execute it, that trust was ill-declared and must fail. The principle upon which that trust was ill-declared is this. As it is a maxim that the execution of a trust shall be under the control of the court, it must be of such a nature that it can be under that control, so that the administration of it can be reviewed by the court, or, if the trustee dies, the court itself can execute the trust. A trust, therefore, which, in case of mal-administration could be reformed and a due administration directed, and then, unless the subject and the objects can be ascertained upon principles familiar in other cases, it must be decided that the court can neither reform maladministration nor direct a due administration. That is the principle of that case. Upon the question whether that principle was well applied in that

instance, different minds will reason differently. I should have been disposed to say that where such a purpose was expressed it was not a strained construction to hold that the happiness of mankind intended was that which was to be promoted by the circulation of religious and virtuous learning, and, the testator having stated that to be the charitable purpose which unquestionably was so, the distribution of books for the promotion of religion, the court might have so understood him, and, the testator having not only called it a charitable purpose, but delegated the execution to this court, ought to be taken to have meant that.

Upon these grounds, in the subsequent case of *A.-G.* v. *Stepney* (9), as to the Welsh charities, it appeared to me too much, considering the society in this country for the propagation of the gospel, etc., to say that a trust for the circulation of Bibles, prayer-books, and other religious books, was not good. Looking back to the history of the law upon this subject, I say, with the Master of the Rolls, that a case has not been yet decided in which the court has executed a charitable purpose unless the will contains a description of that which the law acknowledges to be a charitable purpose; or devotes the property to purposes of charity in general (p. 454 ante). Upon those cases in which the will devotes the property to charitable purposes, described, observation is unnecessary. With reference to those in which the court takes upon itself to say it is a disposition to charity, where in some the mode is left to individuals in others individuals cannot select either the mode or the objects, but it falls upon the King, as parens patriæ, to apply the property, it is enough at this day to say, that the court by long habitual construction of those general words has fixed the sense, and where there is a gift to charity, in general, whether it is to be executed by individuals selected by the testator himself or the King as parens patriæ is to execute it (and I allude to *A.-G.* v. *Matthews* (10)) it is the duty of such trustees, on the one hand, and of the Crown, upon the other, to apply the money to charity in the sense, which the determinations have affixed to that word in this court, viz., either such charitable purposes as are expressed in the statute 43 Eliz., c. 4 [relating to charitable gifts], or to purposes having analogy to those. I believe the expression "charitable purposes," as used in this court, has been applied to many acts described in that statute and analogous to those, not because they can with propriety be called charitable, but as that denomination is by the statute given to all the purposes described.

The question then is entirely whether this is according to the intention a gift to purposes of charity in general as understood in this court, such that this court would have held the bishop bound and would have compelled him to apply the surplus to such charitable purposes as can be answered only in obedience to decrees where the gift is to charity in general, or is it, or may it be according to the intention, to such purposes, going beyond those, partially or altogether, which the court understands by "charitable purposes," and, if that is the intention, is the gift too indefinite to create an effectual trust, to be here executed? The argument has not denied, nor is it necessary in order to support this decree, that the person created the trustee might give the property to such charitable uses as this court holds charitable uses within the ordinary meaning. It is not contended, and it is not necessary to support this decree to contend, that the trustee might not consistently with the intention have devoted every shilling to uses in that sense charitable. But the true question is whether, if, on the one hand, he might have devoted the whole to purposes in this sense charitable, he might not equally according to the intention have devoted the whole to purposes benevolent and liberal and yet not within the meaning of charitable purposes as this court construes those words. If according to the intention it was competent to him to do so, I do not apprehend that under any authority upon such words the court could have charged him with maladministration if he had applied the whole to purposes which according to the meaning of the testator are benevolent and liberal though not acts of that species of benevolence and liberality which this court in the construction of a will calls charitable acts.

The question, therefore, resolves itself entirely into that, for I agree there is no magic in words, and, if the real meaning of these words is charity or charitable purposes, according to the technical sense in which those words are used in this court, all the consequences follow. If, on the other hand, the intention was to describe anything beyond that, then the testator meant to repose in the bishop a discretion not to apply the property for his own benefit, but a discretion which would enable him to apply it to purposes more indefinite than those to which we must look, considering them purposes creating a trust, for, if there is as much of indefinite nature in the purposes intended to be expressed as in the cases to which I first alluded, where the objects are too uncertain to make recommendation amount to trust, by analogy, the trust is as ineffectual, the only difference being that in the one case no trust is declared and the recommendation fails, the objects being too indefinite, and in the other, the testator has expressly said it is a trust, and the trustee consequently takes, not for his own benefit, but for the purposes not sufficiently defined to be controlled and managed by this court.

Upon these words much criticism may be used. But the question is whether, according to the ordinary sense, not the sense of the passages and authors alluded to treating upon the great and extensive sense of the word "charity," in the Christian religion, this testatrix meant by these words to confine the defendant to such acts of charity or charitable purposes as this court would have enforced by decree. I do not think that was the intention, and, if not, the intention is too indefinite to create a trust. It was the intention to create a trust, the object being too indefinite, which has failed. The consequence of law is that the bishop takes the property upon trust to dispose of it as the law will dispose of it, not for his own benefit or any purpose this court can effectuate. I think, therefore, this decree is right.

Decree affirmed.

FORBES *v.* MOFFATT
MOFFATT *v.* HAMMOND

[Rolls Court (Sir William Grant, M.R.), February 19, August 9, 1811]

[Reported 18 Ves. 384; 34 E.R. 362]

Mortgage—Merger—Fee simple in land vested in mortgagee—Merger of charge with fee—Considerations of advantage.

Where the merger of a charge with the estate does not affect the interests of the party in whom the interests become united the charge sinks. Where the owner expresses no intention as to merger, the court considers what is most advantageous to him.

Andrew M. died, the sum of £27,000 being due to his estate from Aaron. By indentures of lease and release reciting that Andrew's executors agreed to lend a further sum of £12,000 to Aaron, and that John M., being a party, agreed to postpone a debt of £13,000 due to him from Aaron to the advance of £12,000, Aaron conveyed his estates to the executors subject to the payment of £12,000, and conveyed the same estates to the executors and John subject to a mortgage for £12,000 and a proviso for redemption on payment of £27,000 and £13,000 to John. Aaron later died leaving all his estates to John who then died intestate. Andrew's personal representatives filed a bill for foreclosure, charging that on John's becoming absolute owner of the estates his mortgage

for £13,000 was extinguished, the £12,000 debt having been repaid. The court found that John's acts after becoming entitled to the estates were not conclusive evidence of his intentions.

Held: it was more beneficial to John to let the estates stand with his mortgage on them than to give a priority to the other mortgage and to all Aaron's debts, and, therefore, his mortgage must still be considered as subsisting for the benefit of John's personal representatives.

Notes. Applied: *Clarendon* v. *Barham* (1842), 1 Y. & C. Ch. Cas. 688; *Davis v. Barrett* (1851), 14 Beav. 542. Considered: *Grice* v. *Shaw* (1852), 10 Hare, 76; *Byam* v. *Sutton* (1854), 19 Beav. 556; *Johnson* v. *Webster* (1854), 4 De G. M. & G. 474; *Horton* v. *Smith* (1858), 4 K. & J. 624; *Richards* v. *Richards* (1860), John. 754; *Keogh* v. *Keogh* (1874), 22 W.R. 508. Referred to: *Graves* v. *Hicks* (1833), 6 Sim. 391; *Cole* v. *Stutely* (1842), 6 Jur. 314; *Faulkner* v. *Daniel* (1843), 3 Hare, 199; *Swinfen* v. *Swinfen* (*No. 3*) (1860), 29 Beav. 199; *Patten* v. *Bond* (1889), 60 L.T. 583; *Ingle* v. *Vaughan-Jenkins* (1900), 69 L.J.Ch. 618; *Re French-Brewster's Settlements*, *Walters* v. *French-Brewster*, [1904] 1 Ch. 713; *Whiteley* v. *Delaney*, [1914] A.C. 132.

As to when merger takes place, see 27 HALSBURY'S LAWS (3rd Edn.) 413 et seq.; and for cases see 35 DIGEST (Repl.) 695 et seq.

Cases referred to:

(1) *Thomas* v. *Kemeys* (1696), 2 Vern. 348; Freem. Ch. 207; 23 E.R. 821, L.C.; affirmed (1701), Colles, 112, H.L.; 20 Digest (Repl.) 493, *2021.*

(2) *Lord Compton* v. *Oxenden* (1793), 2 Ves. 261; 4 Bro. C.C. 397; 30 E.R. 624, L.C.; 20 Digest (Repl.) 537, *2463.*

(3) *Wyndham* v. *Earl of Egremont* (1775), Amb. 753; 27 E.R. 485, L.C.; 20 Digest (Repl.) 539, *2500.*

(4) *Gwillim* v. *Holland* (1741), cited in 18 Ves. at p. 393; 34 E.R. 366, L.C.; 35 Digest (Repl.) 704, *3753.*

Bills in Chancery.

By indentures of lease and release dated April 7 and 8, 1785, reciting the will of Andrew Moffatt that the sum of £27,000 was due to his estate from Aaron Moffatt and that James Moffatt and Hindman, the executors of Andrew, had agreed to lend the further sum of £12,000 on mortgage of all the estates of Aaron Moffatt in Jamaica; to secure both sums, John Moffatt, the brother of Aaron, being a party and agreeing to postpone a debt of £13,000, due to him from Aaron, to the intended advance of £12,000, in consideration of the sum of £12,000, and to enable the executors of Andrew to obtain an immediate security for the debt of £27,000, Aaron with the consent of John conveyed to James Moffatt and Hindman, and their heirs, the plantation of Blenheim, and all other the estates of Aaron in Jamaica, subject to the payment of the £12,000; and the same estates were conveyed to James, Hindman, and John and their heirs, subject to the said mortgage for £12,000, and to a proviso for redemption on payment to James and Hindman of £27,000, and to John of £13,000. Aaron died in 1797, having by his will, dated in 1795, given all his property, real and personal, to his brother John, and appointed him sole executor. John died in 1807, intestate and without issue.

The bill in the first cause was filed by Forbes and Elizabeth Moffatt, executors of James Moffatt, the surviving executor of Andrew. It prayed an account as to the mortgage for £27,000, and a foreclosure. It charged that John Moffatt, taking possession under the will of Aaron, became the absolute owner of the premises, that his mortgage was thereby extinguished, and, the charge of £12,000 being paid, the £27,000 was the only subsisting mortgage. By her answer the defendant Sarah Moffatt, the widow of John, insisted on the mortgage for £13,000 as still subsisting. She prayed a sale and an application of the produce to the two mortgages pari passu.

The bill in the other cause was filed by Sarah, the widow of John, and by his next

of kin, against the plaintiffs in the first cause and against Elizabeth Hammond and Martha Bayard, the next of kin of John Moffatt, and his co-heiresses at law, in whom the legal estate was vested under the first mortgage. The bill prayed an account with reference to the sum of £13,000, and a foreclosure.

The acts of John Moffatt, from which his intention not to consider himself a mortgagee was collected, were as follows: possession taken on the death of Aaron; considerable expenditure on the estate and the sale of some parts; the payment, as executor of his brother, of £5,000 on the mortgage account generally, without distinction of the two mortgages—that sum exceeding by about £500 the balance in his hands from the produce of the real estate. On the other hand, the personal representatives relied on the registry of the mortgage deed in Jamaica after the death of Aaron; and the accounts kept of the annual supplies and produce of the estate, entitled "the estate of Aaron Moffatt, deceased, in account current with John Moffatt."

The bill in the second cause alleged that the mortgage deed was not recorded in Jamaica until after the death of Aaron, at his request; that the estates sold by John were not named or considered by him as part of the security; and that the sum of £5,000 was paid only in part of the arrears due. The answer relied on the general words as comprising all the estates in the security.

Martin and *Trower* for the representatives of Andrew Moffatt, plaintiffs in the first cause.

Leach and *Horne* for the co-heiresses at law of John Moffatt.

Sir Arthur Piggott, *Sir Samuel Romilly*, *Heald* and *Raithby* for the other parties, claiming his personal property.

Cur. adv. vult.

Aug. 9, 1811. **SIR WILLIAM GRANT, M.R.**—In the circumstances of this case, the question arises between the real and personal representatives of John Moffatt, whether the mortgage for the sum of money due to him is to be considered as still subsisting, in which case his personal representatives are entitled to it, or whether it is extinguished by the union of the characters of owner and mortgagee in John Moffatt, or by any acts done by him after he became owner. It is clear that a person becoming entitled to an estate subject to a charge for his own benefit, may, if he chooses, take the estate at once and keep up the charge. On this subject a court of equity is not guided by the rules of law. It will sometimes hold a charge extinguished where it would subsist at law, and sometimes preserve it where, at law, it would be merged. The question is on the intention, actual or presumed, of the person in whom the interests are united. In most instances it is, with reference to the party himself, of no use to have a charge on his own estate; and, where that is the case, it will be held to sink, unless something shall have been done by him to keep it on foot.

The first consideration, therefore, is whether John Moffatt has done anything to determine that election, which he undoubtedly had. If not, the question will be on the presumption of law in the circumstances of the case.

It is disputed between the personal representatives whether John took possession in his character of owner or of mortgagee. It must, I think, be taken that he entered as devisee. There is no trace of any of the steps that a mortgagee takes to get into possession. He sold parts of the estates which, though not specifically named in the mortgage, were included in it by general words. As to his keeping an account with Aaron's estate, and therein crediting the produce of the devised estates, he could not with propriety do otherwise, because as they were subject to Aaron's debts, the account must have been kept until the debts were paid. But this goes no way towards the decision of the question.

The owner of a charge is not, as a condition of keeping it up, called on to repudiate the estate. The election he has to make is not whether he will take the estate or the charge, but whether, taking the estate, he means the charge to sink into it, or

to continue distinct from it. The fact that John caused the mortgage deed to be registered in Jamaica was relied on by the personal representatives as showing an intention to keep the charge on foot. However, the co-heirs say that, as the mortgage to Andrew's estate was included in the same deed, it was the duty of John as surviving trustee to register it for the benefit of the cestuis que trusts. It is impossible to determine on which motive he, John, acted; but I think this weighs something in favour of the personal representatives, for, though the deed containing both mortgages must have been registered as it stood, yet, if acting merely for the benefit of the owners of the £27,000 mortgage, he might have entered some memorandum on the record, signifying that the other mortgage no longer subsisted. It is hardly to be supposed that he could wish publicly to represent his estate as more heavily burthened than he really meant it to be.

The real representatives rely on the payment of £5,000 generally, without any apportionment of that sum between the two mortgages. This appears to have been within about £500 the whole balance at that time in his hands from the produce of the real estate. The argument is that, as he did not apportion that sum between the two mortgages, he must have considered his own mortgages as no longer subsisting. That, however, is far from being a necessary conclusion. He paid the sum and took the receipt as executor of his brother. The whole estate, real and personal, being in his own hands, it would not occur to him formally to set apart the same proportion of his own debt that he paid to others. From his paying the interest of another mortgage it cannot be inferred that he meant to abandon his own. John Moffatt's acts, therefore, furnish no conclusive evidence of actual intention on the subject of this mortgage.

As to presumptive intention, it was evidently most advantageous to John that this mortgage should be kept on foot, for otherwise he would have given priority to the other mortgage and all the debts of his brother. The reasonable presumption, therefore, is that he would choose to keep the mortgage on foot. Where no intention is expressed or the party is incapable of expressing any, I apprehend the court considers what is most advantageous to him. On that principle it was held in *Thomas* v. *Kemeys* (1) that the charge should not sink, as that was for the advantage of the infant who, having attained the age of nineteen, had made a nuncupative will, devising all that was in her power to devise to her mother. This could be of no avail as an election by the infant for she could make none. Her interest must have been the ground of the decision. In *Lord Compton* v. *Oxenden* (2) Lord Rosslyn says (2 Ves. at p. 264):

> "The cases of infants turn upon a supposed intent. The court saw in *Thomas* v. *Kemeys* (1), that it was much more beneficial to the infant that it should continue personal property, because an infant has the use and disposition of that before twenty-one; but he could have no disposable interest in a real estate till that age."

In *Wyndham* v. *Earl of Egremont* (3) the limitation was to Lord Thomond for life with remainder to trustees to preserve contingent remainders, to his first and other sons in tail male and to his right heirs. Yet it was determined that the charge should be raised for the benefit of his personal representatives. Counsel for the personal representatives contended that the charge should not merge unless at some period in Lord Thomond's life it was indifferent to him whether the term should be kept on foot or not.

On looking into all the cases in which charges have been held to merge, I find nothing which shows that it was not perfectly indifferent to the party in whom the interests had united, whether the charge should or should not subsist. In that case I have already said it sinks.

There is also *Guillim* v. *Holland* (4), referred to in *Lord Compton* v. *Oxenden* (2), which is not reported but which, from the statement given of it by counsel who cite it (2 Ves. at p. 263) and by Lord Rosslyn (ibid. at p. 264), seems to be in point to

the present case. Mrs. Holland had a charge on an estate which she took by devise from her brother. He had made a mortgage on it. Counsel say Lord Hardwicke thought that "was no merger; because it was more beneficial for her to take it as a charge." Lord Rosslyn says, the intervening encumbrance prevented the merger, and it was more beneficial for the person entitled to the charge to let the estate stand with the encumbrance on it, than to take it discharged of the encumbrance and give a priority to the second encumbrancer. It was certainly more beneficial for John Moffatt to let the estate stand with the encumbrance on it than to give a priority to the other mortgage, and to all the debts of his brother Aaron. On the whole, therefore, I think that the mortgage for £13,000 must be considered as still subsisting for the benefit of John's personal representatives.

Declaration accordingly.

RAWLINGS *v.* JENNINGS

[Rolls Court (Sir William Grant, M.R.), May 22, July 29, 1806]

[Reported 13 Ves. 39; 33 E.R. 209]

Will—Gift of stock—Bequest to wife of annual sum "being part of the moneys in bank security entirely for her own use"—Right to absolute interest.

Will—"Effects"—Bequest of "my household furniture and effects of what nature or kind soever"—Application of ejusdem generis rule.

A testator by his will bequeathed to his wife "£200 per year, being part of the moneys I now have in bank security entirely for her own use together with all my household furniture and effects of what nature or kind soever that I may be possessed at the time of my decease." He expressly gave interests for life to other persons.

Held: (i) the widow was entitled to an absolute interest in so much capital stock as would produce her £200 a year, and not a mere annuity for her life; (ii) the word "effects" did not pass the whole residue but must be confined to articles ejusdem generis with those specified, i.e., household furniture, though the consequence was that the residue was undisposed of.

Notes. Explained: *Fleming* v. *Burrows* (1826), 1 Russ. 276. Considered: *Parker* v. *Marchant* (1842), 1 Y. & C. Ch. Cas. 290. Distinguished: *Harris* v. *James* (1864), 12 W.R. 509. Considered: *King* v. *George* (1876), 4 Ch.D. 435. Referred to: *Hotham* v. *Sutton* (1808), 15 Ves. 319; *Oldham* v. *Slater* (1829), 3 Sim. 84; *Blewitt* v. *Roberts* (1841), Cr. & Ph. 274; *Harrison* v. *Blackburn* (1864), 17 C.B.N.S. 678; *Re Londesborough*, *Bridgeman* v. *Fitzgerald* (1880), 50 L.J.Ch. 9.

As to application of ejusdem generis rule, see 39 Halsbury's Laws (3rd Edn.) 991 et seq.; as to "effects," see ibid. p. 1020; and for cases see 40 Digest (Repl.) 454 et seq., 567 et seq., and 587 et seq.

Case referred to:

(1) *Griffiths* v. *Hamilton* (1806), 12 Ves. 298; 33 E.R. 114, L.C.; 48 Digest (Repl.) 393, *3414*.

Also referred to in argument:

Coxe v. *Basset* (1796), 3 Ves. 155; 30 E.R. 945.

Hogan v. *Jackson* (1775), 1 Cowp. 299; affirmed sub nom. *Jackson* v. *Hogan* (1776), 3 Bro. Parl. Cas. 388; 1 E.R. 1387, H.L.; 48 Digest (Repl.) 570 *5349*.

A *Woolcomb* v. *Woolcomb* (1731), 3 P. Wms. 112; 2 Eq. Cas. Abr. 326; 24 E.R. 990; 48 Digest (Repl.) 585, *5527*.
Wilde v. *Holtzmeyer* (1801), 5 Ves. 811.
Cook v. *Oakley* (1715), 1 P. Wms. 302.
Timewell v. *Perkins* (1740), 2 Atk. 102; 26 E.R. 464; 48 Digest (Repl.) 455, *4079*.

B **Bill** raising questions as to the construction of a will.

John Jennings by his will, dated Feb. 1, 1805, after directing the payment of his debts, among others, made the following disposition:

"I give and bequeath unto my wife Alice Jennings £200 per year, being part of the moneys I now have in bank security entirely for her own use and disposal C together with all my household furniture and effects of what nature or kind soever that I may be possessed of at the time of my decease. I give and bequeath unto my son Midgley John Jennings £2,000 that I have in East India Stock and £1,900 being part of the moneys that I have in bank security called the New Fives for his use during his natural life and if he should die without issue I then give and bequeath to his widow if living at the time of his decease D the sum of £500 and the remaining part to return to my family. I give and bequeath to my daughter Frances Rawlings wife of William Rawlings £50 per year during her natural life and after her decease the same to be equally divided among my grandchildren, sons and daughters of the said Frances Rawlings [naming them]."

The testator then after giving several pecuniary legacies to his grandchildren and E other persons, appointed Charles Danvers, Midgley John Jennings, the son, and Alice Jennings, the wife, of the testator, his executors and executrix, the two latter of whom only proved the will, Danvers having renounced.

The testator died on Mar. 8, 1805, leaving his wife, and the two children mentioned in the will, his only issue, surviving. The will was filed by William Rawlings and his wife Frances, claiming her annuity under the will, and insisting also that F the testator died intestate as to the residue of his personal estate; and claiming accordingly, in the right of Frances Rawlings, as one of the next of kin with the defendants Midgley John Jennings and Alice Jennings.

The defendant Midgley John Jennings, by his answer, claimed the interest and dividends of the East India stock and bank annuities under the will; and submitted the questions whether the capital of those funds would upon his death without G issue sink into the residue of the testator's personal estate, or not; and whether on his death, leaving issue, the said capital would or would not belong, and become payable to, and divisible between, such issue. He insisted that Alice Jennings was not entitled to the capital of the stock, which would produce £200 per annum; but was entitled only to the sum of £200 per annum for her life. He also claimed a share of the residue, undisposed of, as one of the executors, or, as one of the next H of kin.

The defendant Alice Jennings insisted that she was entitled, not only to the sum of £200 a year for her life, but absolutely to so much stock as will produce £200 a year. She also claimed the whole residue of the personal estate under the direct bequest to her; and, if not so entitled, she claimed a share of the residue undisposed of, as executrix or under the Statute of Distribution [repealed by Administration of Estates Act, 1925]. I

Sir Samuel Romilly and *Trower* for the plaintiffs.

Richards and *Spranger* for the defendant Midgley John Jennings, the son of the testator.

Raithby for the defendant Alice Jennings, the widow of the testator.

SIR WILLIAM GRANT, M.R.—This will is very obscure. The first question that arises upon it is whether the testator's wife takes only an annuity of £200 for

her life or so much capital stock as will produce £200 a year. The description of the subject of this bequest, "part of the moneys I now have in bank security," is the correct mode of giving the absolute property in stock, for strictly the proprietor of stock has an annuity only and no capital. It is impossible to satisfy the words of this bequest without giving the wife the absolute interest in something which the testator had in bank annuities. The words "entirely for her own use and disposal," are material. The word "disposal" seems to be intended to confer a power of disposition after her death, but, the will being in general incorrect, it might be improper to lay too much stress upon any expression as being used in the accurate sense, if there were any words having an opposite tendency.

It was argued that, where the testator meant to give an interest for life only, he has done so in the plainest terms, using the words as in the bequest of the annuity to his daughter, "during her natural life." This difference of disposition is a circumstance whence a difference of intention may be collected. The testator's wife also was to take absolutely the furniture and the effects, which are coupled with that, and given to her in the same clause. All this is in favour of the widow, who is, therefore, entitled to the absolute interest in so much capital stock as will produce to her £200 a year.

The second question arises upon the widow's claim of the whole residue of the personal estate, as passing to her under the general word "effects." That claim cannot be sustained. Part of his property being particularly given to her afterwards, the word "effects" must receive a more limited interpretation; and must be confined to articles ejusdem generis with those specified in the preceding part of the sentence: viz., household furniture.

The next question is what is to become of the residue, which is not in terms disposed of. [This was before the Executors Act, 1830.] To one of the three executors the testator has not given any legacy. But that executor disclaims. The other two, the wife and son, have unequal legacies. They are, therefore, not excluded by legacies, and are entitled by their legal right, as executors, unless there is something in the will to raise a trust: [see *Griffiths* v. *Hamilton* (1), 12 Ves. 298, and the references]. The words after the bequest of £500 to the son's wife, "the remaining part to return to my family" were much relied on. It is not easy to say what he meant by the word "family." Supposing, he meant his next of kin, this relates only to the stock given to his son, and does not show an intention with reference to any part of his property, except that specific residue. The widow and son, therefore, must take the general residue beneficially. It is unnecessary at present to determine, as to the funds bequeathed to the son, what is to become of them in the event of his death, leaving, or not leaving, issue. If he shall leave issue, the question will arise whether he might not dispose of them, or, whether his issue will be entitled to them. If he shall not leave issue, they are given over. I declare the son entitled during his life, with liberty upon his death for any party who is interested to apply.

A

ATTORNEY-GENERAL *v.* PRICE

[Rolls Court (Sir William Grant, M.R.), November 26, 1810]

[Reported 17 Ves. 371; 34 E.R. 143]

B *Charity—Relief of poverty—Gift in will to A. and his heirs with direction that yearly A. and his heirs should "for ever divide and distribute according to his and their discretion among my poor kinsmen and kinswomen . . . which shall dwell within the county of B. the sum of £20 by the year."*

A testator devised real property to A. and his heirs with a direction that yearly A. and his heirs "shall for ever divide and distribute according to his and their discretion among my poor kinsmen and kinswomen, and among their C offspring dwelling within the county of B. £20 by the year. . . ."

Held: this was a valid charitable devise.

Notes. Followed: *Gillam* v. *Taylor*, [1861–73] All E.R. Rep. 614. Considered: *A.-G.* v. *Duke of Northumberland* (1877), 7 Ch.D. 745. Distinguished: *Re Compton, Powell* v. *Compton*, [1945] 1 All E.R. 198. Explained: *Re Scarisbrick's* D *Will Trusts, Cockshott* v. *Public Trustee*, [1951] 1 All E.R. 822.

As to the charitable nature of gifts for the benefit of poor relations, see 4 Halsbury's Laws (3rd Edn.) 216, 217; and for cases see 8 Digest (Repl.) 316–319.

Cases referred to:

(1) *White* v. *White* (1802), 7 Ves. 423; 32 E.R. 171; 8 Digest (Repl.) 316, *16*.

(2) *Isaac* v. *Defriez* (1754), post p. 468.

E **Bill** filed by three poor relations of the testator on behalf of themselves and all others to establish a bequest in the testator's will as charitable.

William Evans by his will dated Aug. 3, 1581, devised all his messuages, lands, etc., to his wife for the term of forty years, if she should so long live, and after her death to Evan Johnes and his heirs; with the following direction:

F "Also that he the said Evan Johnes shall at what time soever the possession of the same premises shall fall and come to him by virtue of this my will that yearly from thenceforth he the said Evan Johnes and his heirs shall for ever divide and distribute according to his and their discretion among my poor kinsmen and kinswomen and among their offspring and issue which shall dwell within the county of Brecon the sum of £20 by the year without fraud G and collusion."

The will then proceeded to direct that the said Evan Johnes and his heirs should give and pay out of the same messuages, etc., every year for ever to the use of the poor of the parish of St. George, Southwark, £5 4s. quarterly, with directions for the distribution.

The information and bill was filed by three poor relations of the testator, on H behalf of themselves and all others. The answer submitted that the devise to the poor relations was void for uncertainty.

Hart and *Shadwell*, in support of the information, contended that this must be considered as a charitable devise; referring to *White* v. *White* (1) as an instance of a bequest to poor relations sustained as a charitable bequest.

I *Richards*, *Sir Samuel Romilly*, and *Wyatt*, for the defendants, distinguished that case, as a fund to be immediately applied in putting out as apprentices poor relations of two families specified, which was properly a charity to the persons answering that description: this case being a trust to distribute an annual payment among persons, denoted merely by the general description, "poor kinsmen and kinswomen."

SIR WILLIAM GRANT, M.R.—This appears to me to be in the nature of a charitable bequest particularly upon the case of *Isaac* v. *Defriez* (post, p. 468),

which is both imperfectly and erroneously reported. This seems to be just as much in the nature of a charitable bequest as that. It is to have perpetual continuance in favour of a particular description of the poor; and is not like an immediate bequest of a sum to be distributed among poor relations.

Inquiry directed whether the plaintiffs were poor relations of the testator, and whether there were any others of his poor relations who dwelt within the county of Brecon.

NOTE

ISAAC *v.* DEFRIEZ

[Lord Chancellor's Court (Lord Hardwicke, L.C.), February 23, 1754]

[Reported Amb. 595; 27 E.R. 387]

Bill filed by the plaintiffs, trustees under a will, for the directions of the court.

Nathan Simpson by his will, dated Aug. 3, 1725, bequeathed to his eldest sister Grace Plout an annuity of £50 during her life; and after her decease he gave the same to his own and his then present wife Dyfie Simpson's poorest relations, to be distributed and paid to them and such of them proportionably share and share alike, at the discretion of his executors. He also gave to his sister Rose Kizer the like annuity of £10 during her life, with a similar disposition over after her decease. He further gave the interest of his stock to his wife; and after her decease one half year's interest to one poor relation of his own, either male or female, for a portion in the way of marriage, and putting him or her out in the world; and the other moiety in the same manner to one poor relation of his wife: the direct management thereof to be left to the discretion of his executors; and if his own and his said wife's relations should be extinct, then he gave the said stock and securities and the produce, as therein mentioned.

The bill was filed by the trustees under the will; and the Attorney-General was a defendant with some of the poor relations.

LORD HARDWICKE, L.C., declared that the charity should be established, and directed an account of the arrears and growing payments of the annuities, and of the dividends of the stock, etc.; any of the parties to be at liberty to lay a scheme before the Master for carrying the said charity into execution according to the intention of the will; and an inquiry, whether the defendants, the Defriezes, or either of them, were poor relations, or a poor relation of the testator; with liberty to any other poor relations of him or his late wife to go before the Master to claim such benefit as they may be entitled to under the charitable bequest in the will.

WILSON *v.* WILLES

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), January 28, 1806]

[Reported 7 East, 121; 3 Smith, K.B. 167; 103 E.R. 46]

Custom—Certainty—Need to prove, however ancient—Turbary—Custom to take turf to re-turf gardens—Repair of banks for hedges and fences.

In an action of trespass a custom was pleaded for all tenants of a manor, their farmers and tenants, occupiers of tenements within the manor, having gardens, to dig, take and carry away from a common in the manor turf covered with grass fit for the pasture of cattle for making and repairing grass plots in the gardens for the improvement thereof, and for the making and repairing of the banks and mounds in, of and for the hedges and fences of the tenements, and for the improvement of the tenements, as occasion required.

Held: a custom, however ancient, must not be indefinite and uncertain; in the present case it was not defined to what sort of improvement the custom extended and its exercise was not limited in time; therefore, it was bad as being too indefinite and uncertain.

Notes. Considered: *Clayton* v. *Corby* (1843), 5 Q.B. 415; *Salisbury* v. *Gladstone* (1861), 9 H.L. Cas. 692; *Hall* v. *Byron* (1877), 4 Ch.D. 667. Referred to: *A.-G.* v. *Gauntlett* (1829), 3 Y. & J. 93; *Hall* v. *Nottingham* (1875), 45 L.J.Q.B. 50; *Wolstanton, Ltd. and Duchy of Lancaster* v. *Newcastle-under-Lyme Borough Council*, [1940] 3 All E.R. 101.

As to common of turbary, see 5 Halsbury's Laws (3rd Edn.) 315, 316; and for cases see 11 Digest (Repl.) 16, 17.

Cases referred to in argument:

Dean and Chapter of Ely v. *Warren* (1741), 2 Atk. 189; 26 E.R. 518, L.C.; 11 Digest (Repl.) 16, *177*.

Wilkes v. *Broadbent* (1745), 2 Stra. 1224; 1 Wils. 63; 93 E.R. 1146; 17 Digest (Repl.) 12, *109*.

Duberley v. *Page* (1788), 2 Term Rep. 391; 100 E.R. 211; 11 Digest (Repl.) 45, *625*.

Shakespear v. *Peppin* (1796), 6 Term Rep. 741; 101 E.R. 802; 11 Digest (Repl.) 45, *618*.

Peppin v. *Shakespear* (1796), 6 Term Rep. 748; 101 E.R. 748; 101 E.R. 806; 11 Digest (Repl.) 22, *266*.

Hoskins v. *Robins* (1671), 2 Keb. 842; Poll. 13; 2 Saund. 319; 1 Vent. 123, 163; 84 E.R. 533; sub nom. *Roberts* v. *Hoskins*, 2 Keb. 757; sub nom. *Hopkins* v. *Robinson*, 2 Lev. 2; 1 Mod. Rep. 74; 11 Digest (Repl.) 14, *140*.

Demurrer to an action of trespass by breaking and entering the close of the plaintiff, called Hampstead Heath, in the parish of St. John, Hampstead, and digging 100 square yards of the plaintiff's turf there covered with grass and fit for the pasture of cattle, of £20 value, and carrying away and converting it to the defendant's use.

The defendant pleaded, first, that he was not guilty of the force and as to the residue of the trespass, that the locus in quo is, was and from time immemorial had been, a certain large waste situate within and parcel of the manor of Hampstead within which manor there had immemorially been divers customary tenements demised and demisable by copy of court rolls, etc., in fee simple or otherwise, at the will of the lord, according to the custom of the manor, and that within the manor there had immemorially been an ancient custom that all and every the customary tenants for the time being respectively of all and every the aforesaid customary tenements having a garden or gardens parcel of the same had immemorially dug, taken and carried away, and had been used and accustomed

to dig, etc., in, on and from the close in which by themselves and their farmers and tenants respectively, occupiers of such customary tenements with the appurtenances respectively for the time being, to be used and spent in and on their customary tenements with their appurtenances respectively, for the purpose of making and repairing grass plots in the gardens, parcels of the same respectively, for the improvement thereof, such turf covered with grass fit for the pasture of cattle, as had been fit and proper to be so used and spent, every year, at all times in the year, as often and in such quantity as occasion had required. The plea then stated a grant from the lord of one of the aforesaid customary tenements, consisting of a certain messuage and garden, etc., parcel of the manor, to the defendant, his heirs, etc., at the will of the lord, etc., by virtue of which he entered and was seized, etc.; and that being so seized, etc., at the times, being times when occasion required, he entered into the locus in quo in order to dig, take and carry away, and did then and there dig, take and carry away the turf in the declaration mentioned, the same being then found in and on the close to be, and which afterwards was used and spent in and on his customary tenement, etc., for the purposes of making two grass plots in the garden, parcel of the same as aforesaid, for the improvement thereof, the same turf being then and there fit and proper to be so used and spent, and being such quantity as the occasion required.

The second special plea alleged more generally the same right in the customary tenants to dig, take and carry away the turf to be used and spent in and on their customary tenements, etc., in and for the improvement of the gardens, parcels of the same respectively; without confining the improvement to the making and repairing of grass plots therein. The third special plea alleged a similar right in the customary tenants to dig, take and carry away, to be used and spent in and on their customary tenements, for the purposes of making and repairing the banks and mounds in, of and for the hedges and fences thereof respectively, such turf, covered with grass fit for the pasture of cattle, as had been fit and proper to be so used, every year, at all times of the year, as often and in such quantity as occasion had required. A fourth special plea laid the custom still more generally to be for the customary tenants to take the turf from the locus in quo as often and in such quantity as the occasion required, to be used and spent on their customary tenements respectively for the improvement thereof. To all the special pleas there was a general demurrer, and joinder.

Const for the plaintiff, in support of the demurrer.

Lawes for the defendant.

LORD ELLENBOROUGH, C.J.—A custom, however ancient, must not be indefinite and uncertain, and here it is not defined what sort of improvement the custom extends to. It is not stated to be in the way of agriculture or horticulture; it may mean all sorts of fanciful improvements. Every part of the garden may be converted into grass-plots, and even mounds of earth raised and covered with turn from the common. There is nothing to restrain the tenants from taking the whole of the turbary of the common and destroying the pasture altogether. A custom of this description ought to have some limit, but here there is no limitation to the custom, as laid, but caprice and fancy. Then this privilege is claimed to be exercised when occasion requires. What description can be more loose than that? It is not even confined to the occasions of the garden. It resolves itself, therefore, into a mere will and pleasure of the tenant, which is inconsistent with the rights of all the other commoners, as well as of the lord. The third special plea also is vastly too indefinite. It goes to establish a right to take as much of the turf of the common as any tenant pleases for making banks and mounds on his estate; it is not even confined to purposes of agriculture. All the customs laid, therefore, are bad, as being too indefinite and uncertain.

GROSE, LAWRENCE and **LE BLANC, JJ.**, concurred.

Judgment for plaintiff.

FLUDYER *v.* COCKER

[Rolls Court (Sir William Grant, M.R.), November 29, 1806]

[Reported 12 Ves. 25; 33 E.R. 10]

Sale of Land—Purchase-money—Interest—Agreement that purchase-money to be paid on execution of conveyance—Purchaser let into possession before conveyance.

Under contracts for the sale of land in three lots the purchaser covenanted to pay the purchase-money at the time of executing the conveyances. He was let into possession of the premises, and it was agreed that he should be entitled to the rents and profits from that time. Subsequently the vendor informed him that the conveyances were ready and claimed interest on the purchase-money.

Held: although under the contracts the money was not to be paid until the day of executing the conveyances, the act of taking possession was an implied agreement to pay interest, for so absurd an agreement as that the purchaser was to receive the rents and profits to which he had no legal title and the vendor was not to have interest as he had no legal title to the purchase-money could never be implied.

Sale of Land—Title—Waiver of title—Purchaser taking possession without conveyance.

The taking of possession without a conveyance generally amounts to a waiver even of objection to title: per Sir William Grant, M.R.

Notes. Considered: *Ballard* v. *Shutt* (1880), 15 Ch.D. 122; *Re Priestley's Contract*, [1947] 1 All E.R. 716. Referred to: *Swift* v. *Board of Trade*, [1925] A.C. 520.

As to interest on purchase-money, see 34 Halsbury's Laws (3rd Edn.) 300–302; as to acceptance of title by purchaser, see ibid. 289; and for cases see 40 Digest (Repl.) 187, 210 et seq.

Cases referred to in argument:

Powell v. *Martyr* (1803), 8 Ves. 146; 32 E.R. 309; 40 Digest (Repl.) 213, *1731*.

Dickenson v. *Heron* (circa 1806), Sugden's Vendors and Purchasers (2nd Edn.) 321.

Bill praying that the defendant might be decreed to pay to the plaintiff the residue of the purchase-money with interest of certain estates.

In 1792 the defendant entered into contracts for the purchase of estates of the Duke of Newcastle, in three lots. Two of the lots were purchased by private contract on May 7 and July 18: the Duke of Newcastle covenanting to convey respectively, on or before June 25 and Feb. 18 following; and the defendant covenanting to pay the purchase-money at the time of executing the conveyances. The defendant was let into possession of the premises comprised in those lots at Midsummer and Christmas, 1792, respectively. In July the defendant purchased the third lot by auction: the conditions of sale providing that the purchaser should pay down a deposit and sign an agreement for payment of the remainder of his purchase-money on or before Feb. 18, 1793, on having good titles, abstracts of which would be ready to be delivered to each purchaser on Nov. 6 then next; and that the purchaser should have a proper conveyance on payment of the remainder of the purchase-money according to the before-mentioned condition, and be entitled to the rents and profits from Christmas, 1792. The defendant received the rents of the premises comprised in that lot at Midsummer, 1793.

In 1798 the purchaser, in answer to an application for the residue of the purchase-money with interest, offered, when the conveyances should be executed, to pay the residue of the purchase-money, or to relinquish the purchases and account for the rents and profits, upon having his deposit restored; but he refused

to pay interest. The bill was, therefore, filed praying that the defendant might be decreed to pay to the plaintiff, as surviving trustee for the sale, the residue of his purchase-money with interest from the respective times when it ought to have been paid, the plaintiff offering, on being paid the remainder of the purchase-money with interest, to deliver the conveyances. The defendant, by his answer, stated that the abstract was sent in 1793 or 1794, and immediately returned with approbation of the title; and that he was informed in 1796 that the conveyances were ready. He submitted to pay the remainder of his purchase-money, but disputed the claim of interest. He admitted that he had not deposited or set apart the money.

Romilly, *Hollist* and *Winthrope* for the plaintiff.
Piggott, *Fonblanque* and *Wynne* for the defendant.

SIR WILLIAM GRANT, M.R.—There is no doubt upon this. The purchaser does not allege that any circumstance has occurred entitling him to relinquish the contract. The only question is how the contract was to be carried into execution. What are the legal rights is totally immaterial. At law the purchaser could not have the right to the estate, nor the vendor to the money, until the conveyance was executed. But that has nothing to do with the mode in which this court executes the agreement. The purchaser might have said that he would not have anything to do with the estate until he got a conveyance. But that is not the course he took. He enters into possession: an act that generally amounts to a waiver even of objections to title. He proceeds upon the supposition that the contract will be executed, and, therefore, agrees that from that day he will treat it as if it was executed. The act of taking possession is an implied agreement to pay interest, for so absurd an agreement as that the purchaser is to receive the rents and profits to which he has no legal title, and the vendor is not to have interest as he has no legal title to the money, can never be implied. The purchaser does not state any circumstances, any inconvenience, that he has sustained by not having the conveyance, any applications by him for a conveyance at an earlier period. He rests upon the agreement, implied from the fact of possession taken. It would sound very strange if the purchaser had paid the money, as being bound to pay it, and the vendor, having had the use of it for four or five years, should then refuse to account for the rents and profits; which is this case. The only question is what is the equitable arrangement between the parties. There is not a ground for refusing the payment of interest.

Decree accordingly.

A

SCHNEIDER AND ANOTHER *v.* HEATH

[Court of Common Pleas (Sir James Mansfield, C.J.), December 22, 1813]

[Reported 3 Camp. 506]

B *Misrepresentation—Fraudulent misrepresentation—Sale of ship "with all faults" —Purchaser induced to buy ship when defects known to vendor hidden.*

Although a ship be sold "to be taken with all faults," the vendor cannot avail himself of that stipulation if he knew of secret defects in her and used means to prevent the purchaser from discovering them, or made a fraudulent representation of her condition at the time of the sale.

C Per Sir James Mansfield, C.J.: It signifies nothing whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if in point of fact it turns out to be false.

Notes. Considered: *Ward* v. *Hobbs* (1877), 3 Q.B.D. 150. Referred to: *Cornfoot* v. *Fowke* (1840), 6 M. & W. 358.

D As to fraudulent misrepresentation, see 26 Halsbury's Laws (3rd Edn.) 870 et seq.; and for cases see 35 Digest (Repl.) 29 et seq.

Action for money had and received to recover back a deposit of £397 2s. paid on the purchase of a ship called the *Juno*, on the ground of misrepresentation and fraud on the part of the defendant.

E The sale took place at Lloyd's Coffee House on July 23, when a particular was exhibited by defendant, describing the ship in the following terms:

"British-built at Monkwearmouth in 1810, for private use; 129 tons per register; is a clever, burthensome, useful vessel for general purposes; unusually well found in stores, among which are a new cable and hawser never wetted, and a large proportion of entirely new sails: the hull is also nearly as good as F when launched, requiring a most trifling outfit. Now lying off No. 3 Warehouse, London Docks. Hull, masts, yards, standing and running rigging, with all faults as they now lie."

After this description of the ship followed an inventory of the anchors, cables, sails and ship's stores, provisions and boats, and at the end of this inventory was the G following declaration:

"The vessel and her stores to be taken with all faults, as they now lie, without any allowance for weight, length, quality, or any defect whatever."

The vessel was purchased by the plaintiff for £1,580, and he immediately paid the deposit of £397 2s. Having taken possession of her, he sent her to a shipwright's H to be examined where it was found that her bottom was worm-eaten, her keel was broken, she was quite unseaworthy, and she by no means corresponded with the description in the particular. The plaintiff refused to complete the purchase and demanded back his deposit. It appeared in evidence that the ship belonged to a club of underwriters to whom she had been abandoned, and on whose account she was sold; that the state of her bottom and her keel must have been known to the I agents employed to conduct the sale; and that the captain, when the ship was advertised for sale, took her from the ways on which she lay and where the state of her bottom and her keel might easily have been discovered, and kept her constantly afloat, so that these defects were completely concealed by the water. The person who had framed the particular stated that he had inserted the description of the vessel without having examined her.

Serjeant Best, *Serjeant Vaughan* and *Scarlett* for the plaintiff.
Serjeant Shepherd and *Taddy* for the defendant.

SIR JAMES MANSFIELD, C.J.—The words are very large to exclude the buyer from calling on the seller for any defect in the thing sold; but if the seller was guilty of any positive fraud in the sale these words will not protect him. There might be such fraud either in a false representation, or in using means to conceal some defect. I think that the particular is evidence here by way of representation: that states the hull to be nearly as good as when launched and that the vessel required a most trifling outfit. Is this true or false? If false, it is a fraud which vitiates the contract. What was the fact? The hull was worm-eaten, the keel was broken, and the ship could not be rendered seaworthy without a most expensive outfit. The agent tells us that he framed this particular without knowing anything of the matter. But it signifies nothing whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if in point of fact it turns out to be false. But besides this, it appears here that means were taken fraudulently to conceal the defects in the ship's bottom. These must have been known to the captain who is to be considered the agent of the owners; and he, evidently to prevent their being discovered by persons disposed to bid for her, removed her from the ways where she lay dry, and kept her afloat in the dock till the sale was over. Therefore, consistently with the decided cases on this subject, I am of opinion that the plaintiff is entitled to recover back his deposit.

Verdict for plaintiff.

GOODTITLE d. PARKER *v.* BALDWIN

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Le Blanc and Bayley, JJ.), November 8, 1809]

[Reported 11 East, 488; 103 E.R. 1092]

Landlord and Tenant — Lease — Grant — Evidence — Crown land — Possession by encroachment on Crown.

Possession of Crown land commencing at least fifty-four years previously by encroachment on the Crown in the time of the lessor of the plaintiff's father, maintained by the father till his death nineteen years previously, and afterwards continued for two years by his widow when the defendant obtained possession, **held**, to be sufficient evidence for the jury to presume a grant from the Crown, if the Crown were capable of making such a grant.

Per Lord Ellenborough, C.J.: A lessor of the plaintiff in an action for the recovery of land must recover against the defendant by the strength of his own title and not by the weakness of the defendant's title.

Notes. Referred to: *Doe d. Devine* v. *Wilson* (1855), 10 Moo. P.C.C. 502; *Mill* v. *New Forest Comrs. in Charge* (1856), 2 Jur. N.S. 520.

As to presumptions of royal grants, see 7 Halsbury's Laws (3rd Edn.) 318 et seq.; and for cases see 11 Digest (Repl.) 658 et seq.

Case referred to:

(1) *Roe d. Johnson* v. *Ireland* (1809), 11 East, 280; 103 E.R. 1011; 32 Digest (Repl.) 564, *1552*.

Action of ejectment to recover possession of a cottage and a small piece of land adjoining.

Part of a cottage and a small piece of land adjoining, fifty-five years ago at least,

A and the rest about forty years ago, were taken by encroachment in three several contiguous plots out of the forest of Dean belonging to the Crown, partly by the lessor of the plaintiff's father, and partly by other persons who had afterwards given them up to him, and he had thrown the whole into one close. The father continued to have quiet enjoyment of the premises till his death, which happened about nineteen years ago; after which his widow continued in possession for two or three B years, and then the defendant got into possession, but by what means did not at first appear. The widow was since dead, and the lessor of the plaintiff was their eldest son. Graham, B., being of opinion on this evidence that the lessor of the plaintiff whose claim was only as heir to the former possessor could have no title to the freehold, inasmuch as that appeared to be in the Crown, against which the adverse possession of the father could not operate to give him even a possessory C right, nonsuited the plaintiff.

Dauncey for the plaintiff.
Wyburgh for the defendant.

LORD ELLENBOROUGH, C.J., said that as the plaintiff was non-suited on the supposed impossibility of presuming any title which could be derived from the D Crown, notwithstanding so long a possession commencing fifty-five years ago and continuing to the death of the lessor's father within the last twenty years and all this without any disturbance by the Crown, and as the court were of opinion that the jury might have presumed a grant from the Crown under these circumstances to the lessor's father, unless there were any provision in the Dean Forest Act, 1667 [19 & 20 Car. 2, c. 8: repealed in part by 1 & 2 Vict., c. 42, ss. 3, 18], to preclude E such a grant as would cover the lessor's title, of which they were not at present distinctly informed, and certainly that point had never been made at the trial, they thought it right to send the case to a new trial, that it might undergo further consideration; and then the defendant might show the statute to which he had referred, in order to preclude the presumption of any grant if it would bear him out in the objection. But with respect to the general impossibility of presuming a grant F against the Crown, the courts were in the daily habit of presuming grants from the Crown, as of markets and the like, on an uninterrupted enjoyment of twenty years; and it was only a few days ago, in *Roe d. Johnson* v. *Ireland* (1), that they had considered that the jury were warranted under the circumstances of the case in presuming a grant of enfranchisement of a copyhold from the Crown. Thereupon the court made the rule absolute for a new trial.

G At the second trial before Bayley, J., evidence was given that one of the pieces of land held by the lessor of the plaintiff's father had been enclosed from Dean Forest sixty years ago; and the father had been in possession of the whole for above forty years at whose death, the lessor his eldest son being out of the way, the widow continued in possession for about two years, and then gave up the premises to the defendant about seventeen years ago for a consideration of two or three H guineas, without any conveyance. It appeared also that about twenty years ago there had been a survey of the forest when all new enclosures and encroachments were levelled by the officers of the Crown; but as they had received orders to confine their prostrations to enclosures made within twenty years, the parties were left in possession of the enclosures in question. Counsel for the defendant objected at the trial to the lessor's title on the Dean Forest Act, 1667, avoiding all future I grants of the forest of Dean by the Crown, of which any presumption could otherwise have been made in favour of the lessor's title, and insisted that the defendant, though not claiming under the Crown, was entitled to take advantage of the defect. On the other hand, counsel for the plaintiff relied principally on the Crown Suits Act, 1769 [repealed by Limitation Act, 1939] as taking away all right of suit in the Crown after an adverse possession of sixty years, which would at any rate cover part of the premises sought to be recovered; and as to the rest they relied on the possession of the lessor's father for above twenty years as giving him and his son

by descent a possessory right against all the world but the Crown. BAYLEY, J., considering that no presumption of a grant from the Crown could be made against the Dean Forest Act, 1667, in favour of any title in the lessor of the plaintiff's father during his lifetime, and that when his possession ceased at his death, which was nearly nineteen years ago, he had acquired no right of possession against the Crown under the Crown Suits Act, 1769, and that since that time the possession, first of the lessor's mother for a short period, and afterwards of the defendant himself for the greater part of the time, had been adverse to the claim of the lessor as heir to his father, and, therefore, that the lessor's claim, so far as it was founded on length of possession, stood in the same predicament as it did at the death of his father left it to the jury to presume that the possession of the lessor's father up to the time of his death, and of his mother for two years afterwards, and that of the defendant for the last seventeen years, were with the licence of the Crown as being the only way of accounting legally for these respective and adverse possessions. The jury, adopting that presumption, found a verdict for the defendant.

Wigley moved to set aside that verdict and for a new trial.

LORD ELLENBOROUGH, C.J.—How can the lessor of the plaintiff make out any title in this case? No grant from the Crown can be presumed against the express provision of the Dean Forest Act, 1667, to have been made to the lessor's father in his lifetime and, unless it had been competent to the Crown to make such a grant, how can the lessor of the plaintiff, who claims under his father and who has been out of possession since his father's death, have any title? No grant can be presumed in his favour. The Crown Suits Act, 1769, does not give a title; it does not affect to repeal the Dean Forest Act, 1667, it only takes away the right of suit of the Crown, or those claiming from the Crown, against such as have held an adverse possession against it for sixty years. But here the defendant, who has been in possession for the last seventeen years, was a stranger both to the lessor and to his father; and the lessor of the plaintiff must recover against the defendant by the strength of his own title and not by the weakness of the defendant's title and the Act of 1667 bars any presumption of title in favour of the lessor.

GROSE, **LE BLANC** and **BAYLEY, JJ.**, concurred.

Rule refused.

BURROWES *v.* LOCK

[Rolls Court (Sir William Grant, M.R.), March 4, 5, 1805]

[Reported 10 Ves. 470; 65 L.T. 536, n.; 40 W.R. 51, n.; 32 E.R. 927]

Trustee—Liability—Information to stranger—False representation as to amount of beneficiary's interest—Knowledge of prior encumbrance.

C. was entitled under a will to a share in the residuary personal estate, and, being indebted to the plaintiff, he executed an assignment to the plaintiff of what remained due amounting to £288. Prior to the assignment, the plaintiff consulted the defendant, the trustee of the residuary fund, who represented C. as being entitled to the full sum of £288 although he knew that C. had previously charged a part of the fund to his brother. The plaintiff filed a bill against C. and the defendant who admitted the prior encumbrance but pleaded that he had forgotten it.

Held: the defendant in making the false representation was guilty of gross negligence and must be accountable to the plaintiff if C. failed to meet the demand.

Notes. Considered: *Gibson* v. *D'Este* (1843), 2 Y. & C. Ch. Cas. 542; *Price* v. *Macaulay* (1852), 2 De G.M. & G. 339. Applied: *Lake* v. *Brutton* (1856), 8 De G.M. & G. 440. Considered: *Slim* v. *Croucher* (1860), 1 De G.F. & J. 518; *Re Ward* (1862), 31 Beav. 1. Distinguished: *Stephens* v. *Venables* (*No. 2*) (1862), 31 Beav. 124. Considered: *Re Tichener* (1865), 35 Beav. 317; *Re Overend, Gurney & Co., Ex parte Oakes and Peek* (1867), L.R. 3 Eq. 576; *Lloyd* v. *Banks* (1867), L.R. 4 Eq. 222. Distinguished: *Peek* v. *Gurney*, [1861–73] All E.R. Rep. 116. Considered: *Eaglesfield* v. *Londonderry* (1876), L.R. 6 H.L. 377. Distinguished: *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925. Applied: *Mathias* v. *Yetts* (1882), 46 L.T. 497. Considered: *Derry* v. *Peek*, [1886–90] All E.R. Rep. 1; *Low* v. *Bouverie*, [1891–4] All E.R. Rep. 349; *Exploring Land and Minerals Co.* v. *Kolckmann* (1905), 94 L.T. 234; *Nocton* v. *Ashburton*, [1914–15] All E.R. Rep. 45. Referred to: *Ingram* v. *Thorp* (1848), 7 Hare, 67; *Pulsford* v. *Richards* (1853), 17 Beav. 87; *Robson* v. *Devon* (1857), 5 W.R. 724; *Ramshire* v. *Bolton* (1869), L.R. 8 Eq. 294; *Hill* v. *Lane* (1870), L.R. 11 Eq. 215; *Re Dangar's Trusts* (1889), 58 L.J.Ch. 315; *Balkis Consolidated Co.* v. *Tomkinson* (1893), 42 W.R. 204; *Whittington* v. *Seale-Hayne* (1900), 82 L.T. 49; *Veitch* v. *Caldicott* (1945), 173 L.T. 30.

As to information and accounts provided by trustees, see 38 Halsbury's Laws (3rd Edn.) 974 et seq.; and for cases see 47 Digest (Repl.) 360 et seq.

Cases referred to:

(1) *Mortlock* v. *Buller* (1804), ante p. 22; 10 Ves. 292; 32 E.R. 857; 47 Digest (Repl.) 415, *3708*.

(2) *Evans* v. *Bicknell* (1801), 6 Ves. 174; 31 E.R. 998, L.C.; 47 Digest (Repl.) 491, *4427*.

(3) *Pasley* v. *Freeman* (1789), 3 Term Rep. 51; 100 E.R. 450; 35 Digest (Repl.) 25, *165*.

(4) *Hobs* v. *Norton* (1682), 2 Cas. in Ch. 128; 22 E.R. 879; sub nom. *Hobbs* v. *Norton*, 1 Vern. 136; 21 Digest (Repl.) 399, *1258*.

Bill in Chancery.

Edward Cartwright being entitled, under a will, to the ninth part of the testator's residuary personal estate, the whole of which had been distributed except an outstanding debt, was being pressed by the plaintiff for a debt due to him in his trade as a baker. In consideration of £132 Cartwright executed an assignment to the plaintiff of his share of what remained due on account of the residue, amounting to £288. The expense of the transaction, amounting to £10, was also paid by the plaintiff. Prior to this assignment, the plaintiff consulted Lock, the trustee of the fund, who represented Cartwright as being entitled to the full sum

of £288, although he had ten years before created an encumbrance to the extent of a tenth part of the fund by an assignment to his brother.

In these circumstances the bill was filed against Cartwright and Lock. Lock admitted notice of the prior encumbrance when he made the representation to the plaintiff, alleging as an excuse that he forgot the circumstance.

Romilly and *Hall* for the plaintiff.
Hollist and *W. Agar* for the defendant Cartwright.
Leach and *Gregg* for the defendant Lock.

SIR WILLIAM GRANT, M.R.—As to the merits, I do not know if fraud is out of the case, that I can set aside this contract or refuse to act on it, merely on the ground of inadequacy of price; see *Mortlock* v. *Buller* (1). It is not quite so inadequate as it has been represented. The difference is not to be taken to be merely between the two sums. However, after all the allowances that can be made, I have no difficulty in believing that this was an inadequate bargain as to the price, that the defendant did not get the price the assigned property was fairly worth. Taking that to be so, however, the contract cannot be set aside within any principle this court has ever acted on, act even within the principle of the Roman law, requiring that the price should exceed half the value.

The only remaining question is that as to the trustee. It is objected on his part that this is a demand for damages and also that this was not a wilful misrepresentation. As to the first point, the demand is properly made in equity. Lord Eldon, L.C., in *Evans* v. *Bicknell* (2) declared that *Pasley* v. *Freeman* (3) and all other cases of that class were more fit for a court of equity than a court of law. His Lordship was clearly of opinion, however, that at least there is a concurrent jurisdiction and says (6 Ves. at pp. 182, 183):

> "It has occurred to me, that that case upon the principles of many decisions in this court might have been maintained here: for it is a very old head of equity; that if a representation is made to another person, going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good, if he knows it to be false."

In this case the plaintiff was going to deal with Cartwright on a matter of interest, and applied to the person best qualified to give information, the trustee, to know what Cartwright was entitled to. The trustee told the plaintiff expressly that Cartwright was entitled to £288 and had an undoubted right to make an assignment to that extent, well knowing that he had not a right to make such an assignment, having previously agreed to give another person £10 per cent. out of the fund. There is, therefore, a concurrence of all the circumstances which the Lord Chancellor thinks requisite to raise the equity.

The excuse alleged by the trustee is that, though he had received information of the fact, he did not at that time recollect it. But what can the plaintiff do to make out a case of this kind but show, first, that the fact, as represented, is false, secondly, that the person making the representation had a knowledge of a fact contrary to it. The plaintiff cannot dive into the secret recesses of his heart so as to know whether he did or did not recollect the fact, and it is no excuse to say that he did not recollect it. At least it was gross negligence to take on him to aver positively and distinctly that Cartwright was entitled to the whole fund, without giving himself the trouble to recollect whether the fact was so or not. This is a much stronger case than *Hobbs* v. *Norton* (4), and the negligence infinitely greater.

The trustee, therefore, must be answerable in case Cartwright cannot answer the demand, and must first pay over to the plaintiff the residue of the trust fund, deducting the £10 per cent. Then Cartwright must make up the deficiency, and, if he fails, the trustee must make it good.

Order accordingly.

HILL *v.* PATTEN

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), May 2, 1807]

[Reported 8 East, 373; Holt, N.P. 333, n.; 103 E.R. 386]

Insurance—Marine insurance—Policy—Alteration—Alteration made by consent after risk attached—Validity of policy.

Insurance — Marine insurance — Subject-matter of insurance — "Outfit" — "Goods."

A policy of insurance on a "ship and outfit" on a voyage on the southern whale fishery, out and home, was effected in September, 1804. On Mar. 13, 1805, after the ship had sailed and the risk attached, a memorandum was endorsed on the policy by consent of the underwriters to the effect that "ship and goods" were the subject-matter of the insurance, instead of "ship and outfit as originally declared." In an action on the policy, the underwriters objected that after the risk attached it was not competent to the parties to make the alteration without a new stamp under the Stamps Act, 1795, s. 13.

Held: the term "outfit," particularly for a whaling voyage, differed materially from what was comprehended under the term "goods"; "outfit" in a fishing voyage principally consisted of the apparatus and instruments necessary for the taking of fish, etc., and disposing of them when taken in such a manner as to bring home the oil, blubber, and other animal produce of the adventure with the greatest convenience and advantage; as far as the outfit consisted of provisions put on board for the use of the crew it was covered by an insurance on ship, being in effect part of the necessary furniture, stores, and equipment of every ship proceeding on a voyage, but "outfit," though it might in this qualified sense be considered as part of the ship or ship's furniture, could not be considered as "goods" in any proper sense of that word, i.e., as part of the wares or cargo for sale laden on board the ship; still less could it be considered as part of the homeward-bound cargo in this voyage out and home, recollecting that in a fishing voyage the only cargo on board the ship from first to last was in general the homeward-bound cargo consisting of the immediate produce and result of the fishing adventure; the "outfit" originally insured differed, therefore, so essentially from "goods" later made the subject of the insurance that such a change in the subject-matter of the policy had been made as to require an additional stamp under s. 13 of the Stamps Act, 1795 [repealed]; and, therefore, the policy was void.

Notes. The provisions of s. 13 of the Stamps Act, 1795 (35 Geo. 3, c. 63), have been repealed and materially replaced by s. 96 of the Stamp Act, 1891 (21 Halsbury's Statutes (2nd Edn.) 640).

Applied: *French* v. *Patton* (1808), 9 East, 351. Explained: *Campbell* v. *Christie* (1817), 2 Stark. 64; *Fairlie* v. *Christie* (1817), 7 Taunt. 416. Considered: *Forshaw* v. *Chalbert* (1821), 3 Brod. & Bing. 158. Explained: *Noble* v. *Ward* (1867), L.R. 2 Exch. 135. Referred to: *Sanderson* v. *Symons* (1819), 4 Moore, C.P. 42; *Reed* v. *Deere* (1827), 7 B. & C. 261; *Roddick* v. *Indemnity Mutual Marine Insurance* (1895), 72 L.T. 860; *Hoggarth* v. *Walker* (1900), 69 L.J.Q.B. 634; *Royal Exchange Assurance* v. *Hope*, [1927] All E.R. Rep. 67.

As to subject-matter insured and its description in the policy, see 22 Halsbury's Laws (3rd Edn.) 50 et seq.; as to alteration of policy, see ibid., pp. 38, 39; and for cases see 29 Digest (Repl.) 115 et seq., 87, 88.

Case referred to:

(1) *Brough* v. *Whitmore* (1791), 4 Term Rep. 206; 100 E.R. 976; 29 Digest (Repl.) 116, *606*.

Rule Nisi obtained by the defendant to set aside the verdict in an action on a policy of insurance on ship and outfit, on a voyage on the southern whale fishery out and home, which was effected in September, 1804.

On Mar. 13, 1805, long after the sailing of the ship on the insured voyage, but before any advice received of her, in consequence of some misunderstanding between the broker and his principal as to the broker's instructions at the time of effecting the policy, an application was made to the underwriters who agreed to alter it. This was done by a memorandum endorsed on the policy in these words:

"It is hereby agreed that the interest on this policy shall be on ship and goods instead of ship and outfit as originally declared."

The ship was afterwards lost in the course of the voyage. It was objected at the trial before LORD ELLENBOROUGH, C.J., that however the policy might have been effected in the original terms of it, through a misunderstanding between the principal and his agent, yet the contract was equally binding between the contracting parties at the time. Further, that as the risk had once attached, it was not competent to the parties to make the alteration, though by consent, without a new stamp, goods being a distinct subject-matter of insurance from outfit in such a voyage. Therefore, it was not within the exception of the statute 35 Geo. 3., c. 63 (the Stamps Act, 1795), s. 13, which enabled the parties to take any alteration in the terms or conditions of a policy, so that the thing insured (which must be taken to mean the same subject-matter of insurance) should remain the property of the same person.

The plaintiff, however, recovered a verdict which was moved to be set aside; and a rule nisi was granted.

Dallas, *Marryat* and *Lawes* for the plaintiff, showed cause against the rule.
Garrow and *Sir Vicary Gibbs* for the defendant, supported the rule.

LORD ELLENBOROUGH, C.J., delivered the following opinion of the court.— The question in this case was whether the alteration of this policy from a policy on "ship and outfit" to one on "ship and goods," required an additional stamp, within the meaning of the Stamps Act, 1795, s. 13. The policy was "at and from London to the South Seas, during the ship's stay and fishing there, and at and from thence to Great Britain, etc." The alteration was made from "ship and outfit" to "ship and goods," by consent of the underwriters, after the ship had sailed on the voyage insured and, of course, after the policy had fully attached on what was, at the time of such sailing, the thing or subject insured, viz., ship and outfit.

Outfit, particularly for such a voyage as is described in the policy, differs materially from what is comprehended under the term goods. Outfit, in a fishing voyage, principally consists in the apparatus and instruments necessary for the taking of fish, seals, etc., and the disposing of them, when taken, in such a manner as to bring home the oil, blubber, bone, skins and other animal produce of the adventure, with the greatest convenience and advantage. As far as the outfit consists of provisions put on board for the use of the crew, it is, according to *Brough* v. *Whitmore* (1), covered by an insurance on ship, being in effect part of the necessary furniture, stores and equipment of every ship proceeding on a voyage. But outfit, though it may in this qualified sense be considered as part of the ship's furniture, yet it cannot be considered as goods in any proper sense of that word; i.e., as part of the wares or cargo for sale, laden on board the ship. Still less can it be considered as part of the homeward bound cargo in this voyage out and home, recollecting that in a fishing voyage the only cargo on board the ship from first to last is, in general, the homeward bound cargo, consisting of the immediate produce and result of the fishing adventure.

The outfit originally insured being, therefore, thus essentially different from goods afterwards made the subject of insurance under this policy, the question is

whether such a change in the subject-matter of the insurance may be made in a policy once effected, without an additional stamp under the provisions of the Stamps Act, 1795.

Section 13 of the statute on which the question arises provides:

"Nothing contained in the Act shall prohibit the making of any alteration, which may lawfully be made in the terms or conditions of any policy of insurance duly stamped as aforesaid, after the same shall have been underwritten, or to require an additional stamp duty by reason of such alteration: so that such alteration be made before notice of the determination of the risk originally insured, and the premium or consideration originally paid or contracted for shall exceed the rate of 10s. per cent., on the sum insured; and so that the thing insured shall remain the property of the same person or persons; and so that such alteration shall not prolong the term insured beyond the period allowed by this act; and so that no additional or further sum shall be insured by reason or means of such alteration."

The question is whether that part of the provision which requires that "the thing insured shall remain the property of the same person or persons," has been in this case well complied with or not. The words, "the thing insured shall remain the property," etc., appear to us properly to require and apply to one identical and continued subject-matter of insurance, such subject-matter all along, remaining the property of the same proprietor, and to be ill-suited to a case like the present, where the thing last insured is not only in fact, but in name and kind (as a specific subject of insurance) essentially different from the thing first insured, and which begins also to have an existence at a different and much later period than the other, and when the thing first insured, hardly or in a small degree, remains or continues to exist at all. To make the words of the provision tally with such a case, instead of "the thing insured," it should be read, in the plural number, "the things insured;" and instead of "shall remain," it should be read "shall be the property," etc. Without some such change in its phrase, the Act cannot well be accommodated to the case of several things, different in name and kind as subjects of insurance, successively existing and successively covered by one and the same policy of insurance, which is the case now before us. It is not, however, to be inferred from hence, that shifting of successive cargoes on board the same ship in the course of the same continued adventure, as in the African and other trades out and home, may not properly be the subject of insurance under the word goods; for in some of those cases the successive cargoes, i.e., of English goods, African articles of traffic, and lastly, West India produce, are according to the course of such trading adventures, one continued subject-matter of insurance, under the one name of goods. The adventure is the same in its general denomination from first to last; though the parts of which it consists are not co-existing but successive, and in kind and quality wholly dissimilar from each other.

With all the unwillingness which we cannot but feel to give way to an objection which the underwriters bring forward despite their own consent on this subject once given, we are nevertheless obliged to give effect to it, by pronouncing that the terms of the Act have not been complied with and that the policy, in its last and altered state, is to be considered, on account of such alteration, as an unstamped policy. Further that the contract which it purports to contain, is on that account void and the plaintiff, therefore, is not entitled to retain the verdict he has obtained thereupon. There must be a new trial.

Rule absolute.

LORD MONTFORT *v.* LORD CADOGAN

[Rolls Court (Sir William Grant, M.R.), July 9, 10, August 9, 1810]

[Reported 17 Ves. 485; 34 E.R. 188]

[Lord Chancellor's Court (Lord Eldon, L.C.), November 8, 11, 1816]

[Reported 2 Mer. 3; 19 Ves. 635; 34 E.R. 651]

Trustee—Breach of trust—Liability—Lease—Failure to renew.

Where there is a settlement of a renewable lease in trust out of the rents and profits to pay the charges of renewal, and subject thereto for husband and wife successively for life with remainder to the first son at twenty-one, and the trustees neglect to renew, they are answerable as for a breach of trust and are liable to pay the son the amount of what he had laid out in procuring a renewal.

Notes. Applied: *Shaftesbury* v. *Marlborough* (1833), 3 L.J.Ch. 30. Considered: *Richardson* v. *Jenkins* (1853), 1 Drew. 477; *Holland* v. *Holland* (1869), 4 Ch. App. 450, n. Referred to: *Jones* v. *Jones* (1846), 7 L.T.O.S. 157; *Adey* v. *Arnold* (1852), 2 De G.M. & G. 432; *Hughes* v. *Wells* (1852), 9 Hare, 749; *Jenkins* v. *Robertson* (1853), 1 Eq. Rep. 123; *Isaac* v. *Wall* (1877), 46 L.J.Ch. 576; *Re Parkers, Ex parte Sheppard* (1887), 19 Q.B.D. 84.

As to liability of trustees for breaches of trust, see 38 Halsbury's Laws (3rd Edn.) 1040 et seq.; and for cases see 47 Digest (Repl.) 464 et seq.

Cases referred to:

(1) *Cadogan* v. *Kennett* (1776), 2 Cowp. 432; 98 E.R. 1171; 25 Digest (Repl.) 191, *140.*

(2) *Scurfield* v. *Howes* (1790), 3 Bro. C.C. 90; 29 E.R. 425; 47 Digest (Repl.) 497, *4501.*

(3) *Adair* v. *Shaw* (1803), 1 Sch. & Lef. 243; 47 Digest (Repl.) 474,* *1517.*

Also referred to in argument:

Milles v. *Milles* (1802), 6 Ves. 761; 31 E.R. 1295; 47 Digest (Repl.) 398, *3579.*

Nightingale v. *Lawson* (1785), 1 Bro. C.C. 440; 1 Cox, Eq. Cas. 181; 28 E.R. 1227, L.C.; 40 Digest (Repl.) 870, *3407.*

Stone v. *Theed* (1787), 2 Bro. C.C. 243; 29 E.R. 135, L.C.; 47 Digest (Repl.) 397, *3575.*

Adderley v. *Clavering* (1789), 2 Bro. C.C. 659; 2 Cox, Eq. Cas. 192; 29 E.R. 365, L.C.; 40 Digest (Repl.) 872, *3430.*

White v. *White* (1804), 9 Ves. 554; 32 E.R. 718, L.C.; 40 Digest (Repl.) 869, *3398.*

Bill filed by the plaintiff for a decree that trustees of a settlement procure the renewal of a lease.

By indentures of lease and release dated Feb. 28 and 29, 1772, reciting an indenture dated Jan. 15, 1772, by which the dean and chapter of Westminster demised to Thomas Lord Montfort a house and other premises in Seymour Place, to hold to Lord Montfort, his executors, administrators and assigns from Christmas preceding for the term of forty years at the yearly rent of twenty shillings, and further reciting an intended marriage between Lord Montfort and Mary Ann Blake, Lord Montfort assigned to Charles Sloane Cadogan and Sir Thomas Bunbury, their executors, administrators and assigns, the demised premises, and all the estate, right, title, interest, property, benefit of renewal, term and terms of years then to come unexpired, claim and demand whatsoever, of Lord Montfort, of, in and to the same and every part thereof, together with the indenture of lease, and the full and whole benefit of the same, to hold the leasehold premises to them, their executors, etc., for and during all the residue of the term of forty years therein to come and

unexpired, and for and during all and every other term and terms of years thereinafter to be granted on the renewal of present or of any future leases of leasehold premises, and for and during all such other term and interest as Lord Montfort had or could grant of or in the leasehold premises or any part thereof; in trust for Lord Montfort until the marriage; and after the marriage that the trustees should, by, with and out of the rents, issues and profits of the premises, pay the rent, etc., and in the next place should, by, with and out of the rents, issues and profits of the leasehold premises, pay and discharge all such fines, costs, charges and expenses as should be incident to or occasioned by the renewing the present lease or any future lease or leases of the leasehold premises, and all other costs attending the execution of the trusts; and from and after payment of the rent and all such costs, charges and expenses as aforesaid, and after performance of the covenants, clauses and agreements, and subject thereto, on trust to permit Lord Montfort and his assigns to receive the rents, etc., during so many years of the present term or of any future term or terms therein as he should live; and after his decease, if Lady Montfort should survive him, to permit her to receive the rents, etc., for so many years of the present term or of any future term or terms therein as she should live; and to have the use of certain furniture; and after the decease of the survivor that they should by mortgage, sale or other disposition of the leasehold premises as therein mentioned, raise such sum as should be necessary to make good the deficiency of portions provided for younger children. If there should be any residue of the leasehold premises, household goods, etc., the trustees were to permit the first son to take the rents, etc., of the leasehold premises, and to have the use of the goods, etc., until he should attain the age of twenty-one, or die under that age without leaving issue male living at the time of his death; and if he should arrive at the age of twenty-one, that the trustees should assign the leasehold premises for the residue of the present term or any such future term or terms therein, as aforesaid, and also the household goods, etc., to such first son attaining twenty-one. The marriage having taken place, the trustees permitted Lord Montfort to receive the rents until his death in October, 1799, and after his death Lady Montfort received the rents. The lease was renewable at the expiration of every fourteen years. The first period of fourteen years expired on Dec. 25, 1786, and the second in 1800, no renewal having taken place.

The bill filed by the plaintiff, Lord Montfort, the only issue of the marriage, against Lady Montfort, the trustees, the executor of the late Lord Montfort, and Lord Howe, the occupying tenant of the premises, prayed that the trustees might be decreed to procure the lease to be renewed, and to pay the fines and expenses attending such renewal; or that the other defendants might be decreed to contribute to the same according to the times the late Lord Montfort, Lady Montfort and Lord Howe were respectively in possession or receipt of the rents. The defendant Lord Howe, by his answer stated that an application was made to him in 1805 by the trustees to pay his rent of £200 a year to them; but Lady Montfort's solicitor refusing to authorise him to do so, he did not pay the rent to anyone. He became tenant in 1796, and in that year purchased Lord Montfort's life interest for £1,000; and after his death agreed with Lady Montfort to occupy for three years at the rent of £200 and had since continued to occupy from year to year. He submitted that he is not liable to contribute to the renewal; that the trustees ought to have procured a renewal, and ought not to have permitted Lord and Lady Montfort to receive the rents without retaining sufficient to pay the fines and expenses of renewal.

Sir Samuel Romilly and *Daniel* for the plaintiff.
Hollist, *Leach* and *Trower* for the defendants.

Aug. 9, 1810. **SIR WILLIAM GRANT, M.R.**—The proposition that under the marriage settlement of Lord Montfort, it was the duty of the trustees to keep these leases renewed, does not admit a question. The lease being made the subject of a

settlement, it was clearly meant that it should be kept on foot by renewals. The trustees were to apply so much of the rents and profits as would be necessary for that purpose. They are not in so many words directed to renew; but, the means being given and the purpose expressed, there is no doubt that they were to apply those means to that purpose. If it was not to be done by the trustees, it was not to be done at all, the tenants for life having an interest the other way as such an application was in diminution of their income.

Some difficulties were suggested at the Bar as to the mode of executing this trust; but clearly it was not incapable of being executed, nor was the execution prevented by any such supposed difficulty. A doubt was then attempted to be raised whether the trustees ever accepted or acted under the trust; on the circumstance that they do not appear to have executed that part of the settlement which has been produced. The surviving trustee does not dispute that he acted; and that Lord Cadogan's executors should have been under any mistake as to his acting is incredible. It is known by *Cadogan* v. *Kennett* (1), that the trustees of Lord Cadogan brought an action very soon after the settlement, in the execution of their trust. Their trust, thus created and undertaken, it is admitted has not been performed. One easily gives credit to persons of the description of these trustees for acting only from what appeared to them humane and proper motives; they could act from no other. But that conviction, however it might operate as an inducement to the plaintiff to forego his strict right, cannot authorise the court to refuse to listen to his claim of indemnity on account of a breach of trust, unless he has by his acquiescence precluded himself from insisting on that claim. It does not, however, appear that he was conusant of the fact that the renewals were not made; and, therefore, his silence cannot be construed into a waiver of his right.

A question was raised on the part of Lord Cadogan's executors whether, as this was a mere personal default productive of no benefit to his estate, his assets are liable to make compensation; but in *Scurfield* v. *Howes* (2) the trustee's estate had derived no benefit from the breach of trust; and in *Adair* v. *Shaw* (3), Lord Redesdale says (1 Sch. & Lef. at p. 272):

> "It has been the constant habit of courts of equity to charge persons in the character of trustees with the consequence of a breach of trust; and to charge their representatives also; whether they derive benefit from the breach of trust, or not."

But, though my opinion is that these trustees are answerable, they are not alone answerable. The tenants for life have acquiesced in the breach of trust and profited by it by receiving the whole rents and profits, a part of which was applicable to the renewals; and it is contended that Lord Howe, having taken an assignment of Lord Montfort's life interest, stands in his place and must answer if Lord Montfort's assets are deficient. All these parties are answerable to the plaintiff; but I do not think that Lord Howe is primarily answerable, as between him and the trustees. If Lord Montfort has left assets, they will in the first place be applicable to make good so much of the fine as corresponds with the period of his enjoyment. Lady Montfort is in like manner answerable for the period of her possession; and the accruing rents during her life are liable to be impounded to make good the demand against her. Whatever can be got from these funds will go in ease of [to help] the trustees; but they cannot throw any part of this burden on Lord Howe. They permitted Lord Montfort to apply to his own use all the rents and profits and from compassion to his straightened circumstances abstained from performing their trust. Their charity to him cannot be at the expense of Lord Howe. They cannot contend that it was his duty to withhold any part of the rents and profits, or the consideration that came in place of them; it being their intention that nothing should be withheld from Lord Montfort. Their purpose was to run the risk of not performing their duty, rather than distress him; and they cannot say that Lord

Howe was bound to do for them what they from motives of compassion had resolved to leave undone.

The decree declared that the trustees ought to have renewed the lease at the times when it became renewable, and to have paid the fines, etc., out of the annual rents and profits of the premises demised; that, not having so renewed, they were guilty of a breach of trust; that the sum of £3,092 17s. 6d. paid by the plaintiff for renewal ought to be paid to him by the representatives of Lord Cadogan, deceased, and by Sir Thomas Bunbury (the trustees); but that the same ought to be repaid to them out of the personal estates of Lord Montfort, deceased, and of the Dowager Lady Montfort, according to the times they had respectively been in possession of the premises, or in receipt of the rents and profits thereof.

The defendants, the representatives of Lord Montfort and Lord Cadogan, appealed to the LORD CHANCELLOR.

Hart and *Heald* for the defendants.

Sir Samuel Romilly and *Daniell* for the plaintiff.

Leach and *Trower* for the defendants Lady Montfort and Lord Howe.

Nov. 11, 1816. **LORD ELDON, L.C.**—A petition is presented by Lady Montfort which allows her to be heard as if she had appealed (though she has not) contending that the decree charges her further than she is justly chargeable if it is to be understood as charging her with more than a proportion of the rents and profits for the time of her enjoyment according to the obligation which, she contends with the plaintiff, was imposed on the trustees during the life of the late Lord Montfort. I take this lease to be by custom renewable every fourteen years; and that the Dean and Chapter of Westminster, although not compellable to renew, would have renewed at any time before the commencement of another period of fourteen years. A renewal, therefore, being highly probable, the framer of the settlement ought to have considered that; and also to have attached a trust, as far as it could be, on the property if the lease should not be renewed.

The object with regard to the leasehold estate thus by custom renewable was to make a settlement with every species of strictness, of which such an interest is capable. It is said that the trustees are not under covenant, and that they are not bound under hand and seal; but they have in equity undertaken to execute the trusts exactly as if they had so executed the instrument, and the general words "it is declared and agreed," etc., amount to a covenant. The obligation on them is to permit Lord Montfort to receive and enjoy the rents and profits, provided that was consistent with the trust and obligation imposed on them to apply so much of the rents and profits as should be necessary to the expense of renewal, in order to make his enjoyment consistent with the other objects of the settlement under which all the subsequent takers are to be considered purchasers; but it does not rest on reasoning, as on the answers it is clear that they understood the import, expressly stating that they put him in possession and assigning as their reason motives of civility and humanity. It is hard if they are to suffer by that; but the subsequent takers, unless deprived by acquiescence of their remedy, are not to suffer by the charity of the trustees. It is clear, therefore, that they did take on them these trusts; that they were under an obligation to renew at least once in fourteen years according to the custom, and were bound to purchase for those who were to take afterwards an interest equal to what those persons would take, if there was no default.

Another question is whether Lord Montfort's estate, if sufficient, and that of Lady Montfort, should have been resorted to for payment of the fine lately paid on renewal before the trustees were called on, and many cases have established that a tenant for life, joining in a breach of trust, shall be answerable in the first instance; but these persons were trustees for the present Lord Montfort, who has a right to have the estate kept from time to time exactly in the way in which the trustees had in equity covenanted to keep it, and is not bound to run the risk of the estate

wearing out, or a great increase of fine being incurred, according to the approximation of the term to its conclusion, while inquiries as to assets, or what proportion Lady Montfort is to pay, are depending. My opinion, therefore, is that the Master of the Rolls was perfectly right in charging the trustees in the first instance, and also in deciding, that they have a remedy over against those who took the rents and profits that ought to have paid the fine; but this under the circumstances raises the greatest difficulty.

The decree says that Lord Montfort ought to have renewed in 1786. Had he done so, a fund ought to have been provided in 1799, constituted of thirteen-fourteenth parts of the fine to be paid in 1800; and Lady Montfort would have taken possession of the premises with the lease renewed under these circumstances in 1786 for forty years. It is a little difficult to determine the meaning of these terms, in which they are charged "according to the times they have respectively been in possession." If that means what is the import prima facie, that they are to be charged in the ratio of proportion calculated on the length of their respective enjoyments, that Lady Montfort is to pay for her own neglect, and for Lord Montfort's also, in proportion to the time she has enjoyed, that does not appear to me to be the equity between her and the trustees. As a feme coverte, she was not chargeable with any default during the coverture; and there is no evidence that she was active in permitting his enjoyment. In 1799 she was entitled by the settlement to possession of this leasehold estate under a lease renewed in 1786 for fourteen years, in addition to twenty-six years then remaining unexpired, with a fund accumulating for the fine to be paid on the next renewal in 1800. If, therefore, this is to be thus understood that, as Lord Montfort enjoyed from 1772 to 1799, and Lady Montfort from 1799 to 1808, when a fine exceeding £3,000 was paid, that sum is to be reimbursed, as between his and her estates, in this proportion, that his estate is to be charged according to the amount of the rents between 1772 and 1799, and that she is to pay according to the rents from 1799 to 1808, she appears to me to be charged in a way in which she is not chargeable.

My opinion is that the estate of the late Lord Montfort is to be made answerable to the trustees, after paying the present lord; and Lady Montfort is also answerable, but only for the proportion for which she ought to be called on with a due regard to the obligation of the trustees to put her in possession of the estate fully renewed in 1786, and with an accumulating fund to be applied to another renewal in 1800. That is the utmost for which in the most aggravated way of putting the case against her she can be called on. The decree must go further. The late Lord Montfort having received the rents from 1772 to 1799, and not having renewed, and a much larger fine of course being required at the end of twenty-eight than fourteen years, his estate must be answerable for that increase; but, if the trustees should not find his estate sufficient to answer that, I cannot as between them and Lady Montfort throw any part of the increase on her. That must, therefore, fall on them personally.

It seems to me, as it did to the Master of the Rolls, impossible for the trustees to charge Lord Howe. The recital holds out the interest he was to purchase as one with no other obligation on Lord Montfort than payment of the rent and performance of the covenants; not adverting to the provision for payment of the fines on renewal out of the rents and profits. The plaintiff, if he cannot obtain payment in any other way, ought to have liberty to apply; but that should be expressed, not "as," but "if, he shall be so advised," so as not to imply an opinion that Lord Howe will be liable.

With these variations, removing some obscurity in the terms of the decree, which probably was not drawn by the Master of the Rolls himself, the decree must be affirmed.

Decree affirmed with variations.

ROGERS AND ANOTHER *v.* ALLEN

[Court of Common Pleas (Heath, J.), March 9, 1808]

[Reported 1 Camp. 309]

Fishery—Prescriptive right—Proof—Licences on manorial court rolls—Payment of rents—Acquiescence in acts of ownership by lords of manor.

To prove a prescriptive right of fishery as appurtenant to a manor, old licences on the court rolls granted by the lords of the manor in consideration of certain rents to fish in the locus in quo are evidence without proof of payment of the rents if it appears that in later times payments have been made under licences of the same kind, or that the lords of the manor have exercised other acts of ownership over the fishery which have been acquiesced in.

Fishery—Several right—Navigable river—Prescriptive right—Passing as appurtenant to manor.

A prescriptive right to a several fishery in a navigable river may pass as appurtenant to a manor.

Fishery—Right—Divisible—Abandonment and preservation as to part—Oyster dredging.

A right of fishery is divisible and may be abandoned as to part and preserved as to part. The public may be entitled to catch floating fish in a navigable river, but it by no means follows that they may be justified in dredging for oysters which may still remain private property.

Notes. Considered: *Malcomson* v. *O'Dea* (1863), 10 H.L. Cas. 593; *Bristow* v. *Cormican* (1878), 3 App. Cas. 441. Referred to: *Pigott* v. *Bayley* (1826), 6 B. & C. 16; *Bassett* v. *Mitchell* (1831), 2 B. & Ad. 99; *Blandy-Jenkins* v. *Dunraven* (1899), 81 L.T. 209.

As to the nature of private fisheries, see 17 Halsbury's Laws (3rd Edn.) 302 et seq.; and for cases see 25 Digest (Repl.) 11 et seq.

Action of trespass.

The plaintiffs brought an action against the defendant for breaking and entering their several oyster fishery in the Burnham river and for fishing and dredging for oysters in four specified places in the fishery. The second count charged the defendant with fishing and dredging for oysters in divers parts of the fishery between a certain place in the river called Clayclods and a certain other place in the river called Raysand. The last count was general, stating that the defendant broke and entered a certain other several oyster fishery, and also a certain free fishery of the plaintiffs. The defendant pleaded, first, the general issue; and secondly, after averring the different fisheries mentioned in the declaration to be the same, that the place in which the trespass was alleged to have been committed was a navigable river, and arm of the sea in which all the King's subjects had a right to fish and dredge for oysters. The plaintiffs in their replication to the last plea prescribed under the persons seised in fee of the manor of Burnham, for "the sole, several and exclusive liberty and privilege of fishing for, taking and carrying away all oysters and oyster spats in and upon the said several parts of the said fishery, in which, etc., in the said declaration particularly mentioned, as to the said manor belonging and appertaining."

Serjeant Shepherd, *Serjeant Best*, *Serjeant Onslow* and *Trower* for the plaintiffs. *Garrow*, *Marryat* and *Pooley* for the defendant.

An inquisitio post mortem and several other documents from the Tower of London were put in to show that in very early times there had been a fishery at the mouth of the Burnham river held by the Fitzwalters, the ancestors of the family now in possession, as parcel of the manor of Burnham; and three judgments were proved which had been obtained in the reigns of Charles I and Charles II by the

lords of the manor of Burnham in actions for breaking and entering their several fishery in the Burnham river. In further support of the prescriptive right, certain licences were offered in evidence which appeared on the court rolls of the manor and bore date from the year 1661 downwards to the end of the seventeenth century, whereby the lords of the manor, in consideration of certain rents, had granted the liberty of fishing and dredging for oysters in their several fishery in the Burnham river, reserving to themselves the exclusive right to all floating fish therein. Counsel for the defendant objected to the admissibility of the licences as evidence unless it should appear by bailiff's accounts, or otherwise, that rent had actually been paid under them; urging that, if they could be received without this, it would be easy to manufacture evidence which now, or at some future time, might establish an unfounded claim to the injury of some other individual, or to the exclusion of the public.

HEATH, J., said that he could not distinguish these licences from old leases, which were always received in evidence in favour of those claiming under the lessors. Nor did he think it necessary to prove payment under the licences, as they were of such an ancient date that it could not reasonably be supposed that evidence of such payments was still preserved. However, to give any weight to these licences, it must be shown that in later times payments had been made under licences of the same kind, or that the lords of the manor had exercised other acts of ownership over the fishery, which had been acquiesced in.

After the licences, a regular set of leases or agreements for leases of the oyster fishery during the whole of the last century were produced, and it appeared that for the last forty years rent had regularly been paid under them. It was likewise proved that, as far back as could be remembered by the oldest witnesses, when strangers came to dredge for oysters within the limits of the fishery they had constantly been driven off by a watchman kept for that purpose. The defendant then contended that a grant from the crown ought to have been produced, and that a several fishery in a navigable river could not pass as appurtenant to a manor.

HEATH, J., said there was no authority for this supposition, and that the fishery might well pass as an appurtenance of the manor.

The defendant then gave in evidence that all who chose had been accustomed to fish in the Burnham river for all sorts of floating fish, without any interruption. It was, therefore, contended on his part that this completely disproved the exclusive right claimed by the lord of the manor of Burnham. A fishery must be entire; and it appeared from the licences and leases that the lords of the manor set up exactly the same pretensions to the floating fish as they did to the ground fish. As it had been clearly proved that it was lawful for all the King's subjects to catch the former, so might they lawfully dredge for the latter. That was like the right of free warren. If that were claimed in a particular place and it appeared that hares and partridges (though not pheasants) had always been killed there in the same manner as over the rest of the country, it was impossible that the claim could be sustained.

HEATH, J.—A right of fishery and a right of free warren are not at all like each other. The one is divisible, the other is not. Part of a fishery may be abandoned and another part of more value may be preserved. The public may be entitled to catch floating fish in the river Burnham; but it by no means follows that they are justified in dredging for oysters which may still remain private property.

It was next contended that the plaintiffs must be nonsuited on account of a variance between the evidence and the pleadings. It appeared that for certain oyster layings on one of the places mentioned in the declaration the plaintiffs paid rent to the Earl of Winchelsea, and there was evidence of oysters being taken under a claim of right from another of these places by the occupier of the adjoining lands. On the supposition, therefore, that the exclusive right of the lords of the

manor of Burnham to the oysters in the two places last alluded to was negatived, it was insisted that the prescription, on which issue was joined, had not been made out as laid. The replication prescribed for "the sole, several and exclusive liberty and privilege of fishing for, taking and carrying away all oysters . . . in and upon the said several parts of the said fishery . . . in the said declaration particularly mentioned." But the part for which rent was paid to Lord Winchelsea and the part from which oysters had been taken by the occupier of the adjoining ground were particularly named in the first count of the declaration, and were comprehended within the limits mentioned in the second. As to those, the lord of the manor had no exclusive right and, therefore, the prescription failed. The plaintiffs had prescribed too largely; and if they were still to have a verdict and judgment, the consequence would be that this record would afterwards be evidence of a right which had been expressly disproved in the course of the trial.

HEATH, J., was of opinion that, although the prescription was more extensive than the evidence would establish, this was immaterial unless the trespasses had been committed in the excepted places; and the plaintiffs had a verdict.

[The Court of King's Bench being afterwards moved to set aside the verdict on account of a misdirection of the judge on this point, held that the prescription laid in the replication was negatived by the evidence, and ordered a new trial.]

CHRISTIE *v.* GRIGGS

[COURT OF COMMON PLEAS (Sir James Mansfield, C.J.), February 23, 1809]

[Reported 2 Camp. 79]

Carriage of Passengers—Safety of passengers—Duty of care—Soundness of vehicle—Breakdown of vehicle prima facie proof of negligence.

The plaintiff was injured when the stage coach in which he was travelling broke down. In an action for negligence against the defendant, the owner of the coach,

Held: proof of the breaking down of the coach was prima facie evidence of negligence on the part of the defendant, and it then lay on him to show that there was no negligence on his part and that the breakdown of the coach was purely accidental.

Notes. Distinguished: *Sharp* v. *Grey* (1833), 9 Bing. 457. Considered: *Readhead* v. *Midland Rail. Co.*, [1861–73] All E.R. Rep. 30. Distinguished: *Manzoni* v. *Douglas* (1880), 6 Q.B.D. 145; *Wing* v. *London General Omnibus Co.*, [1908–10] All E.R. Rep. 496. Applied: *Lilly* v. *Tilling and L.C.C.* (1912), 57 Sol. Jo. 59. Referred to: *Perren* v. *Monmouthshire Railway and Canal Co.* (1853), 11 C.B. 855; *Dawson* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1862), 5 L.T. 682; *Francis* v. *Cockrell* (1870), L.R. 5 Q.B. 184; *Hyman* v. *Nye*, [1881–5] All E.R. Rep. 183.

As to the duty of carriers of passengers to take care, see 4 HALSBURY'S LAWS (3rd Edn.) 174 et seq.; and for cases see 8 DIGEST (Repl.) 75 et seq.

Action of assumpsit against the defendant as owner of the Blackwall stage-coach on which the plaintiff, a pilot, was travelling to London, when the coach broke down, and he was greatly bruised.

The first count imputed the accident to the negligence of the driver; the second to the insufficiency of the carriage. The plaintiff having proved that the axle-tree

snapped asunder at a place where there was a slight descent from the kennel crossing the road, that he was, in consequence, precipitated from the top of the coach, and that the bruises he received confined him several weeks to his bed, there rested his case. A

Serjeant Vaughan and *Roberts* for the plaintiff.

Serjeant Best for the defendant, contended that the plaintiff was bound to proceed further and give evidence either of the driver being unskilful, or of the coach being insufficient. B

SIR JAMES MANSFIELD, C.J. I think that the plaintiff has made a prima facie case by proving his going on the coach, the accident and the damage he has suffered. It now lies on the other side to show that the coach was as good a coach as could be made, and that the driver was as skilful a driver as could anywhere be found. What other evidence can the plaintiff give? The passengers were probably all sailors like himself; and how do they know whether the coach was well built, or whether the coachman drove skilfully? In many other cases of this sort it must be equally impossible for the plaintiff to give the evidence required; but when the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption if it be unfounded; and it is now incumbent on the defendant to make out that the damage in this case arose from what the law considers a mere accident. C D

The defendant called several witnesses who swore that the axle-tree had been examined a few days before it broke without any flaw being discovered in it; and that, when the accident happened, the coachman, a very skilful driver, was driving in the usual track, and at a moderate pace. E

SIR JAMES MANSFIELD, C.J., said that, as the driver had been cleared of everything like negligence, the question for the jury would be as to the sufficiency of the coach. If the axle-tree was sound as far as human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier was answerable at all events; but he did not warrant the safety of the passengers. His undertaking as to them went no further than this, that as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune which he had encountered. F

The jury found a verdict for the defendant. G

Verdict for defendant.

PICKERING AND OTHERS *v.* DOWSON AND OTHERS

[Court of Common Pleas (Heath, Chambre and Gibbs, JJ.), May 8, 1813]

[Reported 4 Taunt. 779; 128 E.R. 537]

Sale of Goods—Misrepresentation—Liability of seller—Representation as to quality by seller before sale—Opportunity for inspection by buyer—Written contract containing no representation.

If a representation be made before a sale of the quality of the thing sold with full opportunity for the purchaser to inspect and examine the truth of the representation, and a contract of sale be afterwards reduced into writing in which that representation is not embodied, no action for deceit lies against the vendor on the ground that the article sold is not answerable to the representation.

Counsel—Queen's counsel and junior counsel—Queen's counsel differing in opinion from junior at trial.

If leading counsel at nisi prius takes one line of case, contrary to the opinion of his junior counsel, the court will not permit the junior counsel to obtain a new trial on the ground that he was prepared with evidence to support another line of case which his leader repudiated.

Notes. Applied: *Kain* v. *Old* (1824), 2 B. & C. 627. Explained: *Small* v. *Attwood* (1831), You. 407. Referred to: *Dobell* v. *Stevens* (1824), 5 Dow. & Ry. K.B. 490; *Freeman* v. *Baker* (1833), 5 B. & Ad. 797; *Cornfoot* v. *Fowke* (1840), 6 M. & W. 358; *Taylor* v. *Bullen* (1850), 16 L.T.O.S. 154.

As to implied terms as to quality or fitness of goods, see 34 Halsbury's Laws (3rd Edn.) 51 et seq.; and for cases see 39 Digest (Repl.) 537 et seq. As to Queen's counsel and junior counsel, see 3 Halsbury's Laws (3rd Edn.) 65, 66; and for cases see 3 Digest (Repl.) 366.

Cases referred to:

(1) *Baglehole* v. *Walters* (1811), post p. 500; 3 Camp. 154; 170 E.R. 1338, N.P.; 39 Digest (Repl.) 532, *688*.

(2) *Mellish* v. *Motteux* (1792), Peake, 115; 170 E.R. 113; N.P.; 39 Digest (Repl.) 532, *687*.

Also referred to in argument:

Parkinson v. *Lee* (1802), 2 East, 314; 102 E.R. 389; 39 Digest (Repl.) 559, *883*.

Motion by the plaintiffs for a rule nisi to set aside a nonsuit and for a new trial in an action on the case for a deceit in the sale of a ship.

In January, 1809, the defendants had purchased the ship *Margaret*, previous to which sale an inventory had been circulated containing the following description of her:

"The remarkably fast sailing ship *Margaret*, foreign built, and free, square stern, figure head, burthen 354 tons register measurement, has two flush decks, copper-fastened and sheathed, was coppered and underwent a thorough repair in Messrs. Young, Wallis, and Hawkes' dock in March last, shifts without ballast, and stows a large cargo, is completely sound in sails, cordage, and other stores, and may be sent to sea at a very trifling expense; has capital heights for the transport service, and is well adapted for the St. Domingo or South American trade; now lying in the London dock, where she has just discharged a cargo from Rio de Janeiro in excellent condition: height in the hold 12 feet; between decks 6 feet; extreme length 108 feet; breadth 27 feet 7 inches; hull, masts, yards, standing and running rigging, with all faults, as they now lie, anchors, etc. The vessel and her stores to be taken with all faults, as they now lie, without any allowance for weight, length, quality, or any other defect whatever."

When the defendants purchased the vessel, a copy of these particulars was delivered to them by the vendors. The defendants were preparing the vessel to go on a voyage to Demarara, had appointed a captain and posted the vessel at Lloyd's for freight, when the plaintiffs applied to them to sell her. The defendants answered that they would sell her if the plaintiffs would give a competent price.

In the course of the negotiation, the defendants permitted the plaintiffs to inspect the state of repair of the vessel which was then lying in a dock to receive repairs for the defendants' intended voyage, and the plaintiffs actually examined her. The defendants also permitted them to see the inventory by which they had themselves bought her. At length the parties signed an agreement, the material parts of which were as follows:

"January 20, 1809. W. D. Dowson, agent for W. T. Wood, sells, and Mr. Pickering, for account of Messrs. Blades, of Hull, buys the ship called the *Margaret*, foreign built, of the measurement of 354 tons, or thereabouts, now lying in the London dock, for the sum of £4,200. On payment, the ship, with what belongs to her, shall be delivered according to the inventory which has been exposed, but the said inventory shall be made good as to quantity only. The ship and stores shall be taken with all faults, in the condition they now lie, without any allowance for weights, lengths, qualities, or any defects whatsoever."

On Feb. 17, 1809, the parties executed bills of sale and completed the purchase.

In an action on the case for a deceit in the sale of the ship, the plaintiffs alleged that, knowing that the ship was rotten, ruinous, out of repair, unseaworthy and in great decay in her timbers and in a bad state and condition, the defendants, by means of a false, fraudulent and deceitful warranty (the inventory), induced them to buy the ship, with divers stores, for £4,200. For the plaintiffs it was proved that the ship was not copper-fastened, that the defendants knew that she was leaky, that the defendants had, after their purchase, offered her to the government to be employed in the transport service and that the agents for the government had rejected her. The plaintiffs made no complaint until after they had sent the vessel to sea on a voyage to South America, in the course of which she became leaky and was obliged to put into Lisbon to refit, after which she proceeded on her voyage and, again proving leaky, she returned to Lisbon, was surveyed, condemned as incapable of the voyage, sold by auction and broken up. GIBBS, J., was of opinion that the defendants were not in law liable in this action, and directed a nonsuit.

Serjeant Best and *Serjeant Marshall* for the plaintiffs, moved for a rule nisi to set aside the nonsuit and for a new trial. [During the course of the argument, *Serjeant Marshall* also relied on the circumstance that, at the trial, he had offered to call the surveyor employed by government when the ship had been tendered to the transport board, who directed a survey, and that he would have proved that a part of the ceiling being taken down in presence of one of the defendants, the ship's beams were found rotten.

GIBBS, J.—SERJEANT BEST, who led the cause, used his discretion at the trial and did not go on this line of case; if the counsel who leads the cause takes one line, and the judge and jury decide on the line taken by the leader, the junior counsel also must confine himself to the line taken by the leader. This matter was stated, and I repeatedly called for evidence of this sort, and, under the direction of the leader, none such was produced.]

HEATH, J.—If I could harbour any doubt on the question, I would grant a rule nisi. The defendants had recently purchased a ship and intended to send her to the West Indies. The plaintiffs apply to them to sell the ship; the defendants state to them: "Here is what we bought it for from the former vendor," and they sell it to them by a contract containing no representation whatsoever. It

A is in vain to reduce a contract to writing if you may afterwards refer to all that has passed by parol. The meaning of selling "with all faults" is that the purchaser shall make use of his eyes and understanding to discover what faults there are. I admit that the vendor is not to make use of any fraud or practice to conceal faults. I think that the representation is none; it is the mere delivering over of a paper which the defendants received from the former vendor. With respect to the B doctrine, I adhere to that of LORD ELLENBOROUGH in *Baglehole* v. *Walters* (1), without any difficulty. I subscribe to the doctrine of the DIGEST [lib. 4, tit. 3, s. 2: De dolo malo. Dolum malum a se abesse praestare venditor debet, qui non tantum in illo est qui dissimulat, sed et in illo qui fallendi causa insidiose obscure loquitor], but this is not an obscure or insidious contract, but plain and simple.

C **CHAMBRE, J.**—I am of the same opinion. When there is a written agreement and no difficulty as to the meaning, it is dangerous to depart from it without evidence of fraud. Where there is such, the courts of law will interfere; here I see none. That the defendants did not know the faults is manifest from the use they meant to make of the vessel. They deliver over all the papers. The party, after an inspection, agrees to purchase it with all its faults. There is no evidence D of any fraud at all; and under such circumstances, after examination had, and a contract made in writing which is made to bind the parties, it cannot be permitted that because the state of it turns out to be different from what was expected, the whole shall at a future time be rescinded. It would put an end to all contracts.

GIBBS, J.—LORD KENYON certainly did, in *Mellish* v. *Motteux* (2), receive some E such evidence as that which has now been referred to; but that case has since been expressly overruled in a subsequent nisi prius case in CAMPBELL [*Baglehole* v. *Walters* (1)], and that decision has never been questioned at the Bar. The ground on which that case ultimately went was that the one party covered the defects so that the other could not see them; but the evidence did not support the suggestion. I remember the case of the sale of a house in South Audley Square where the F seller, being conscious of a defect in a main wall, plastered it up and papered it over; and it was held that, as the vendor had expressly concealed it, the purchaser might recover. In this case, however, the plaintiffs did not in their opening state any concealment. This is a case regarding property of considerable value, but that is no reason for interfering to put the parties to further expense unless there is a rational ground of doubt.

G What are the facts of this case? The defendants had very recently purchased this ship under an inventory delivered to them, at the head of which was a representation from those of whom they purchased. They were about to send this ship to the West Indies and had actually appointed a captain. The plaintiffs apply to them to know if they will sell their ship; the answer is: Yes, if we get our price. The plaintiffs and several others are permitted to go and examine the ship H throughout. After this, the old inventory is handed over in which they see how the former vendors describe her, but the defendants do not repeat that as their present representation of her, and the parties have full liberty to examine her. They then come to an understanding, and reduce the contract to writing, By that alone they are afterwards to be bound, unless some fraud can be shown. Even if there had been a representation, it would not have availed. I hold that, if I a man brings me a horse and makes any representation whatever of his quality and soundness, and afterwards we agree in writing for the purchase of the horse, that shortens and corrects the representations; and whatever terms are not contained in the contract do not bind the seller, and must be struck out of the case. In this case, if there had been any fraud I agree that it would not have been done away by the contract; but there is no evidence of any fraud at all. The ship is afterwards conveyed by a bill of sale; that contains no warranty. I thought at the trial, and still think, that the parties were not now at liberty to show any representation

made by the sellers unless they could show that, by some fraud, the defendants prevented the plaintiffs from discovering a fault which they knew to exist.

I think that, on these grounds, the court must refuse the motion; but I go further, and think that, as to the evidence of the representation and as affecting the conduct of the defendants, the defendants only handed over the inventory for the sake of the plaintiffs' seeing the several articles which were to be sold with the ship, and not even with a view to show them what had been the representation made to themselves. That, however, was not the ground on which I went at nisi prius, where I proceeded on the ground that, after the written contract was made, parol evidence could not be admitted of former representations unless there were proof of such fraud as I have described.

Rule refused.

SOUTHCOTE *v.* HOARE

[Court of Common Pleas (Sir James Mansfield, C.J., and Lawrence, J.), July 4, 1810]

[Reported 3 Taunt. 87; 128 E.R. 36]

Contract—Parties—Joint and several promises—Death of one promisor—Right of survivor.

Executor—Property passing—Joint and several promises—Interest of deceased promisor—Right of survivor.

By an indenture made between A., B., and C., A., tenant for life, demised to C., and C. covenanted with B., a receiver, and other the receiver or receivers for the time being, and to and with such other person, who, for the time being should be entitled to the freehold, and to and with every of them. A. died.

Held: A.'s executrix could not maintain covenant for breach in the testator's lifetime, but the action was joint and survived to B.

A covenant with two and every of them is joint though the two are several parties to the deed.

Notes. Section 81, of the Law of Property Act, 1925 (20 Halsbury's Statutes (2nd Edn.) 604), now deals with the effect of covenant with two or more jointly. By s. 3 (4) of the Administration of Estates Act, 1925 (9 Halsbury's Statutes (2nd Edn.) 723), the interest of a deceased person under a joint tenancy where another tenant survives the deceased is an interest ceasing on his death.

Referred to: *James* v. *Emery and Cludde* (1818), 5 Price, 529.

As to construction of joint and several promises, see 8 Halsbury's Laws (3rd Edn.) 62 et seq.; as to construction of covenant affected by interests of covenantees, see 11 Halsbury's Laws (3rd Edn.) 451 et seq.; as to property which devolves on representative, see 16 Halsbury's Laws (3rd Edn.) 277 et seq.; and for cases see 12 Digest (Repl.) 36 et seq.

Cases referred to in argument:

Yates v. *Rolles* (1610), 2 Brownl. 207; 123 E.R. 900; sub nom. *Rolls* v. *Yate*, Yelv. 177; 12 Digest (Repl.) 36, *125*.

Slingsby's Case (1587), 5 Co. Rep. 18 b; Jenk. 262; 77 E.R. 77; sub nom. *Beckwith's Case*, 3 Leon. 160, Ex. Ch.; 12 Digest (Repl.) 32, *81*.

Duke of Northumberland v. *Errington* (1794), 5 Term Rep. 522; 101 E.R. 293; 12 Digest (Repl.) 31, *73*.

Anderson v. *Martindale* (1801), 1 East, 497; 102 E.R. 191; 12 Digest (Repl.) 32, *85*.

Demurrer to an action for breach of covenant to repair in which the plaintiff, the executrix of T. Southcote, deceased, the tenant for life, alleged breaches against the defendant, the lessee, and his assign, Thomas Andrews. The defendant denied the breaches alleged and pleaded that under the indenture of lease made between the tenant for life in his lifetime, Thomas Charlton, a receiver, and the defendant, the covenant was joint and survived to Thomas Charlton. The plaintiff entered a demurrer and the defendant joined in the demurrer.

The plaintiff, as executrix of the last will and testament of Thomas Southcote, deceased, declared in covenant against the defendant upon an indenture of lease of three parts, made between Thomas Southcote in his lifetime (therein described as tenant for life of the real estate of John Southcote, deceased) of the first part, Thomas Charlton (therein described as the receiver appointed by the High Court of Chancery of the rents and profits of the estates of John Southcote) of the second part, and the defendant of the third part, whereby, after reciting that John Southcote, by his last will, had given a leasing power, under the restrictions therein mentioned, to every person to whom any estate for life in the premises was thereby devised, when and as they should respectively be in the actual possession thereof, T. Southcote demised to the defendant the manor, farm, lands, and premises called Bruham Lodge, in the county of Somerset, therein particularly described, with the appurtenances, to hold the same unto the defendant for the term of sixteen years. The defendant thereby, for himself, his heirs, executors, and administrators, covenanted to and with Thomas Charlton, and other the receiver or receivers for the time being (and to and with such other person or persons as, for the time being, should or might be entitled to the freehold or inheritance, or to the rents and profits of the premises), and to and with every of them, by the indenture, among other things, to repair the premises, and the same so repaired, at the determination of that demise, to yield up to Thomas Charlton, or such future receiver or receivers, or other person or persons for the time being entitled as aforesaid; and not to suffer cattle to feed in the coppices demised, nor sell, damage, or dispose of any timber trees or saplings. By virtue of which demise the defendant entered and was possessed, and continued possessed until the death of T. Southcote, the reversion of and in the same premises with the appurtenances belonging to Thomas Southcote, as tenant for the term of his natural life, under and by virtue of the will, and Thomas Southcote during all that time being entitled to the freehold of the premises, to wit, as tenant thereof for the term of his natural life.

The plaintiff averred breaches in the lifetime of Thomas Southcote, in not repairing, in depasturing cattle in the woods, and in cutting and destroying timber, by the defendant himself, and the like breaches committed by Thomas Andrews, who was then and there the assign of the defendant, and so the defendant had not kept his covenants with the testator T. Southcote in his lifetime, or with the plaintiff, executrix as aforesaid, since his death; to the damage of the plaintiff, with a profert of the letters testamentary.

Serjeant Shepherd for the plaintiff, supported the demurrer.

Serjeant Best for the defendant, was not called on to support the plea.

SIR JAMES MANSFIELD, C.J.—It may be the practice of the Master's office to frame the covenants in this way, but I do not think it is. It is a strange thing. The demise is by the tenant for life. The Master's office is much puzzled upon this subject, but in practice, they usually cause the receiver to demise under the order of the court, who can convey no legal interest; but whenever they can, they get a tenant for life or a trustee of the legal estate to join. It is urged for the plaintiff, that to and with every of them, means with each of the two separately; but it would be very strange if it were so. It means, with every of the receivers and with the person entitled, jointly; and certainly it is important that the action should not be brought by a representative who pays no costs, but by someone that is liable to costs. Charlton must be taken to be receiver still.

LAWRENCE, J.—There is a great deal of difference between covenants where the parties covenant jointly and separately, and where they covenant with them and every of them: in the former case the covenantees clearly have separate actions.

Judgment for defendant.

BLUNDELL *v.* BRETTARGH

[Lord Chancellor's Court (Lord Eldon, L.C.), June 29, 30, 1810]

[Reported 17 Ves. 232; 34 E.R. 90]

Contract—Consideration—Terms to be fixed by arbitrator's award—Death of one party before making of award.

The plaintiff and B. entered into a contract on behalf of themselves, their heirs, executors, administrators and assigns, for the exchange of lands at values to be fixed by arbitrators, the award to be made in writing under the hands and seals of the arbitrators ready to be delivered to each party on or before July 1, 1803. In case of disagreement, the value was to be fixed by an umpire by Oct. 1. An award was made on June 24, but it bore date June 10. B. died on June 20. On a bill for specific performance filed by the plaintiff against B.'s executors, the defendants contended that the award was not binding on B.'s heir and was void. The court found that the award was not made until after B.'s death.

Held: under the contract the inference was that the terms must be settled while the parties to it were living because the death of one had the effect of revoking the power to make the award, and so, in the absence of any declaration against that inference or any part performance or acquiescence, the contract became void at law on the death of B.

Notes. Distinguished: *Pritchard* v. *Ovey* (1820), 1 Jac. & W. 396. Considered: *McDougall* v. *Robertson* (1827), 4 Bing. 435. Distinguished: *Brooke* v. *Mitchell* (1840), 8 Dowl. 392. Applied: *Morgan* v. *Milman* (1853), 3 De G.M. & G. 24.

As to specific performance of arbitrators' awards, see 36 Halsbury's Laws (3rd Edn.) 278 et seq.; and for cases see 40 Digest (Repl.) 16 et seq., 2 Digest (Repl.) 717, 718.

Cases referred to:

(1) *Milnes* v. *Gery* (1807), ante p. 369; 14 Ves. 400; 33 E.R. 574; 2 Digest (Repl.) 505, *513*.

(2) *Cooth* v. *Jackson* (1801), 6 Ves. 12; 31 E.R. 913; 2 Digest (Repl.) 552, *872*.

Bill for specific performance of arbitrators' award.

By indentures dated April 9, 1803, Edward Brettargh covenanted with the plaintiff, Henry Blundell, his heirs, executors, administrators and assigns, that, as soon as arbitrators therein appointed had made their award, he would convey to the plaintiff certain lands in fee simple at a price to be fixed by the award. The plaintiff covenanted that he, immediately after Brettargh had performed his covenants and had surrendered up and cancelled all leases granted by him to Brettargh of the said lands for such consideration as the arbitrators should fix, would grant to Brettargh, his heirs and assigns, certain other lands for lives.

The value of the lands to be conveyed by Brettargh to the plaintiff and the lands to be granted by the plaintiff to Brettargh should be fixed by Leigh and Alty as arbitrators. The award should be final to both parties and their heirs, executors, etc., if it were made in writing under their hands and seals ready to

be delivered to each party on or before July 1, 1803; and in case the arbitrators did not make their award by that date then the award of an umpire made in writing ready to be delivered to each party by Oct. 1, should be final.

The arbitrators' award as to costs should be final to both parties, their heirs, executors, etc.

The plaintiff further covenanted that he, his heirs, executors, etc., would pay to Brettargh, his heirs, executors, etc., all moneys whereby the lands conveyed by Brettargh should exceed in value those lands granted by the plaintiff, and Brettargh covenanted likewise. The parties each bound themselves in a penalty of £2,000.

Brettargh died on June 20, 1803, and the bill prayed a specific performance against his executors and devisees according to the award. The award dated June 10, determined the value of the various premises, etc., and stated that the excess to be paid by the plaintiff to Brettargh was £575, which sum the arbitrators awarded to be paid by the plaintiff, his heirs, etc., on Nov. 11, 1803; the demises and conveyances to be mutually executed by the plaintiff and Brettargh, or their heirs, etc., respectively, and the costs to be borne by them equally.

The answer, objecting to the award on the ground of partiality in the arbitrators in undervaluing the estates of Brettargh, submitted that it was void.

Leigh, one of the arbitrators stated by his depositions that the award was executed by him and, as he thought, before Brettargh's death. They agreed on it on June 2 and reduced it to writing; but he did not recollect their signing it. Alty, the other arbitrator, took the minutes with him to deliver to an attorney to draw out. They were in substance what the award was. A few days afterwards the attorney's clerk brought the deponent the award to sign. It appeared to be signed by Alty and varied from the minutes in one respect and on that account the deponent declined signing. Three days afterwards the clerk brought him the award, altered in that respect, which he executed. He did not recollect whether Alty had signed it or not.

Alty by his depositions stated that they agreed on an award on June 10. On May 14 they went over the premises and fixed on the value. On June 2 they met to fix on the terms of their award and fixed the value. He did not recollect who gave instructions for the award. It was prepared by Wright, an attorney. On June 10 the deponent believes he signed it. On June 23, on his return home, he found a letter from Leigh as to the mistake. On June 24 the deponent executed another deed setting that right. This award had been previously signed by Leigh.

The award was proved by the clerk of the attorney, stating that it was signed by Leigh on June 24. It was executed subsequently to the date it bore. On June 10 the deponent engrossed on a stamp the award from the draft produced. Afterwards Wright, to whom he was clerk, desired him to make the copy with alterations. He afterwards engrossed another award, from the copy without date. He inserted in the engrossment as the date, the day on which he finished it; but, referring to the back of the copy, he found it dated June 10, 1803. He, therefore, erased the first and put in the latter date as it now appeared. The alteration was previous to Leigh's execution; he executed before Alty. It was subsequent to June 10 but on what day the deponent cannot state, except that he believes it was on or previous to June 24. This and no other he believes to be the true reason of the award being dated on another day than that on which it was executed.

An objection was taken to the award; as not having the stamp required for a deed though it was executed as a deed.

LORD ELDON, L.C., overruled the objection, observing that the award was to be a writing under hand and seal; which, when signed and sealed, was constituted an award and delivery, which was of the essence of a deed, was not necessary to make the instrument an award.

Sir Samuel Romilly and *Bell* for the plaintiff: This is, in effect, an agreement for an exchange of estates according to the valuation of persons appointed by the

parties. This court will carry it into execution notwithstanding the death of one party, everything substantial having been previously completed, the judgment of the arbitrators exercised and out of the reach of any influence from that subsequent accident.

This case is not within *Milnes* v. *Gery* (1) which followed *Cooth* v. *Jackson* (2). The right of this plaintiff to the benefit of his contract depends on the common principle of specific performance, everything substantial being done. The objection to the valuation cannot be introduced without showing improper conduct in the arbitrators.

Hart and *Leach* for the defendant: If this contract cannot be enforced at law, this court will not perform it in the circumstances established by the evidence which prove the great injustice of this award by appreciating the estate of the defendant at little more than a moiety of its value. Whether that is produced by fraud, mistake, accident or any cause short of fraud, a court of equity will not give it effect.

The award was not executed on the day it bears date, and, when it was really executed, one of the parties on whom it imposes obligations, was not in existence. The accident of his death has as much effect as the death of the arbitrators or, as in *Milnes* v. *Gery* (1), their refusal to act. The award cannot bind the heir. There is no mutuality. Brettargh, if it had been favourable to him, could not have had the benefit of it. The execution on a particular day is as much an integral part of the award as the valuation. The period within which the authority of an arbitrator is to be exercised was never held to be immaterial. Considering it as defeated by mere accident, the agreement of the parties exposed them to that by an accident, to which it was from its nature subject; and if on that account the award is not binding at law, this court will not act on it.

Cur. adv. vult.

June 30, 1810. **LORD ELDON, L.C.**—In stating the language of this contract I mark the uniform use of the words "heirs, executors, administrators and assigns;" It is, however, a contract by and between the parties, that is, the two individuals contracting for themselves, their heirs, executors, administrators and assigns, that the value to be paid for the premises should be ascertained by the award of the arbitrators appointed; [such award] to be made in writing under their hands and seals, ready to be delivered to each party on or before July 1, or, in case they should not agree on their award the umpire was to fix the value by Oct. 1.

An award was actually made on June 24, bearing date June 10, and the material fact is that one of those, whom I shall for the present purpose call, in the terms of the execution, "the parties to these presents," died between June 10 and 24. The award, therefore, was not made until after his death.

As to the objection that this award cannot be read, as it is not on a deed-stamp, the question whether that is necessary may perhaps, notwithstanding a decision of the Court of King's Bench, admit some doubt. An award may be delivered without being in writing, but if it is to be delivered in writing on a day certain, more especially if the expression is, that it shall be ready to be delivered, though the contract might require that it should be delivered as a deed, the mere circumstance that it is in writing will not make it a deed. Supposing that not maintainable, on paying the penalty I think this point would not entitle the party to say that it was not an award on July 1 if the case turned on that.

Another ground taken is, that gross partiality is manifested by an undervalue in so great a degree that a court of equity ought to interfere. It is very difficult to make that out. It must go this length that this was not in a fair sense a valuation and, when that ground is taken, it must be considered as applied to the case of a contract, that an award shall be made.

The principal objection, however (to put the case as high as can be), is this: that prior to the death of Brettargh the arbitrators had, in a sense, made up their

minds; but their award was not actually made until after his death. In those circumstances the question is whether here is any contract, the terms of which were ascertained during the lives of these parties, that is, an agreement between them that will bind those who are entitled after their deaths. [On the other hand] whether this is not an agreement to sell at a price to be fixed by an award, or umpirage, at such a price as they, the arbitrators or umpire, should within a given time during the lives of the parties, appoint, there being no agreement if neither the arbitrators nor the umpire fixed the price. Such an agreement cannot be carried into execution if it has failed by the death of one of the parties, which cannot be considered as an accident against which this court would relieve.

As to the opinion expressed in *Cooth* v. *Jackson* (2), followed by *Milnes* v. *Gery* (1), if the terms of an agreement are to be ascertained by an award, that agreement being so ascertained, shall be performed in equity, if there is anything to be done in specie such as estates to be conveyed, etc. I have not met with any authority proving that, where parties have contracted that the value of their respective interests shall be ascertained by arbitrators or an umpire, if the acts done by those persons for the purpose of carrying that agreement into effect by an award are not valid at law as to the time, manner or other circumstances, this court will specifically perform that agreement unless there has been acquiescence, notwithstanding the variation of circumstances; or the agreement, evidenced by such an award, has been part performed. On a review of the cases I do not find any reason to alter that notion which I had of the general doctrine.

In *Cooth* v. *Jackson* (2) I stated that I was not aware of any case, at law, or that a court of equity had ever entertained this jurisdiction, that, where a reference has been made to arbitration, and the judgment of the arbitrators is not given in the time and manner according to the agreement, the court have substituted themselves for the arbitrators and made the award. I said that I was not aware that this had been done even in a case where the substantial thing to be done was agreed between the parties but the time and manner in which it was to be done, was that which they had put on others to execute; I should rather have said, "to prescribe." That was adopted by Sir William Grant, M.R., in *Milnes* v. *Gery* (1).

The question now before me is whether this is or is not a contract of that sort. I admit the full effect of the repeated occurrence of the words "heirs, executors, and administrators." However, if the whole instrument shows that the terms were to be settled by an award to be delivered to the parties, the only way of considering it is that they were contracting for themselves, their heirs, executors, etc., that they themselves shall execute all acts as such award, so delivered, shall prescribe; or if they do not live long enough after the terms have been so settled, that their heirs, executors and administrators, shall execute. I collect that inference, first, from the nature of the acts required to be done in order to settle the terms of the contract. If the mode and means of settling the terms are an award and umpirage, the terms must, unless otherwise contracted, be settled while the parties are living as the death of one has the effect of a revocation of the power to make the award.

Then is there any declaration against that inference from the nature and quality of the act by which the terms and nature of the contract are to be settled? On the contrary, in the passage by which they bind themselves, it is by the description of "parties to these presents;" and, speaking of the persons to whom the instrument is to be delivered, it is to be delivered to "each party."

Then was there a part performance or acquiescence? There is nothing of that sort. It is admitted, and there is no doubt that this instrument is void at law, the contract being that acts shall be done according to the award of arbitrators, to be made within a given time. That given time cannot be extended from the clause by which, if the arbitrators do not agree to make their award, an umpire shall determine also within a given period, those acts to be done by the parties, one of whom is dead and the terms not having been so settled. There is no instance where, the medium of arbitration or umpirage resorted to for settling the terms of a contract

having failed, this court has assumed jurisdiction to determine that, though there is no contract at law, there is a contract in equity and will specifically execute that contract to which the parties never agreed. My judgment, therefore, is that this bill cannot be supported.

Bill dismissed.

BAGLEHOLE *v.* WALTERS

[Court of King's Bench (Lord Ellenborough, C.J.), December 23, 1811]

[Reported 3 Camp. 154; 170 E.R. 1338]

Sale of Goods—Misrepresentation—Sale "with all faults"—Latent defects known to seller, but not disclosed—No active concealment.

If a chattel is sold "with all faults," the seller is not liable in respect of latent defects of which he knew, but which he did not disclose at the time of sale, unless he used some artifice to conceal them from the purchaser.

Notes. Section 14 of the Sale of Goods Act, 1893 (22 Halsbury's Statutes (2nd Edn.) 993) deals with implied conditions as to quality or fitness in certain cases.

Applied: *Pickering* v. *Dowson* (1813), ante p. 491; *Bywater* v. *Richardson* (1834), 1 Ad. & El. 508. Approved: *Ward* v. *Hobbs* (1878), 4 App. Cas. 13. Referred to: *Gorton* v. *Macintosh* (1882), 31 W.R. 232.

As to express agreement to take with all faults, see 26 Halsbury's Laws (3rd Edn.) 869; and as to general rule, caveat emptor, see 34 Halsbury's Laws (3rd Edn.) 47 et seq.; and for cases see 39 Digest (Repl.) 532 et seq. As to transfer of ships, see 35 Halsbury's Laws (3rd Edn.) 95 et seq.; and for cases see 42 Digest (Repl.) 633 et seq.

Case referred to:

(1) *Mellish* v. *Motteux* (1792), Peake, 115; 170 E.R. 113, N.P.; 39 Digest (Repl.) 532, *687*.

Action by the plaintiff, purchaser of a ship sold "with all faults," alleging fraud against the defendant seller, by concealing latent defects which were known to him and not disclosed to the plaintiff. The defendant pleaded the general issue.

The defendant in May, 1811, being about to sell the vessel in question, printed the following particulars of sale, a copy of which was delivered to the plaintiff.

"For Sale, The good brig *Iris*. Burthen per register 208 tons: will carry seventeen keels of coal and glass, or three hundred loads of timber: has lately delivered a cargo of sugar from the West Indies in excellent condition: is well found in all kind of stores which are in good condition. Hull, masts, yards, standing and running rigging, with all faults as they now lie."

The plaintiff then purchased two-thirds of the ship, which were conveyed to him by the defendant in the common form.

Sir Vicary Gibbs (with him *Garrow* and *Marryat*) for the plaintiffs, undertook to prove that at the time of the sale the ship had several secret defects in her; that these were known to the defendant, and that he did not disclose them to the plaintiff. He maintained that the defendant was bound to do so, although the ship was to be taken with all faults; and he relied on *Mellish* v. *Motteux* (1), where Lord Kenyon, C.J., under circumstances precisely like the present, held that the seller of a ship is bound to disclose to the buyer all latent defects known to him, observing "that the terms to which the plaintiff acceded of taking the ship with all faults, and

without warranty, must be understood to relate only to those faults which the plaintiff could have discovered, or which the defendants were unacquainted with."

Park and *Lawes* for the defendant.

LORD ELLENBOROUGH, C.J.—I cannot subscribe to the doctrine of *Mellish* v. *Motteux* (1), although I feel the greatest respect for the authority of Lord Kenyon, C.J., by whom it was decided. Where an article is sold with all faults, I think it is quite immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser. The very object of introducing such a stipulation is to put the purchaser on his guard, and to throw upon him the burden of examining all faults, both secret and apparent. I may be possessed of a horse I know to have many faults, and I wish to get rid of him for whatever sum he will fetch. I desire my servant to dispose of him, and instead of giving a warranty of soundness, to sell him with all faults. Having thus laboriously freed myself from responsibility, am I to be liable if it be afterwards discovered that the horse was unsound? Why did not the purchaser examine him in the market when exposed to sale? By acceding to buy the horse with all faults, he takes upon himself the risk of latent or secret faults, and calculates accordingly the price which he gives. It would be most inconvenient and unjust if men could not by using the strongest terms which language affords obviate disputes concerning the quality of the goods which they sell. In a contract such as this, I think there is no fraud, unless the seller by positive means renders it impossible for the purchaser to detect latent faults; and I make no doubt that this will be held as law when the question shall come to be deliberately discussed in any court of justice.

Sir Vicary Gibbs then said, he was instructed he should be able to show that when the defendant himself purchased this ship, her flooring was taken up, and her seams were open, so that he must have seen her floor timbers broken and her knees decayed; and that before exposing her to sale to the plaintiff, he purposely nailed down the flooring, and closed the seams, that these defects might not be discovered.

LORD ELLENBOROUGH, C.J., said that he would receive this evidence.

It appeared, however, that no artifice of this sort had been employed, and that while the ship was on sale, those who were in treaty for her had a full opportunity of examining her condition.

Whereupon *Sir Vicary Gibbs* submitted to a nonsuit.

Nonsuit.

KIRBY AND OTHERS *v.* DUKE OF MARLBOROUGH AND ANOTHER

[Court of King's Bench (Lord Ellenborough, C.J., and other judges), November 6, 1813]

[Reported 2 M. & S. 18; 105 E.R. 289]

Guarantee—Continuing guarantee—"All such sum or sums of money, not exceeding £3,000 at any time or times lent by creditors to C."

A bond entered into by A. and B. conditioned for the payment of all such sums not exceeding £3,000 which should at any time thereafter be advanced by the plaintiffs to A., **held** not to be a continuing guarantee to the extent of £3,000 made at any time, but to be only a guarantee for advances once made to the extent of £3,000.

Notes. Distinguished: *Woolley* v. *Jennings* (1826), 5 B. & C. 165. Considered: *Re Sherry, London and County Banking Co.* v. *Terry* (1884), 25 Ch.D. 692.

As to duration of surety; liability, see 18 Halsbury's Laws (3rd Edn.) 452 et seq.; and for cases see 26 Digest (Repl.) 93 et seq.

Cases referred to in argument:

Metcalfe v. *Bruin* (1810), 12 East, 400; 104 E.R. 156; 7 Digest (Repl.) 245, *837*.

Goddard v. *Cox* (1743), 2 Stra. 1194; 93 E.R. 1122; 12 Digest (Repl.) 542, *4107*.

Bloss v. *Cutting* (1730), cited in 2 Stra. at p. 1194; 93 E.R. 1123; 12 Digest (Repl.) 539, *4079*.

Hutchinson v. *Bell* (1809), 1 Taunt. 558; 127 E.R. 950; 35 Digest (Repl.) 69, *622*.

Newmarch v. *Clay* (1811), 14 East, 239; 104 E.R. 592; 12 Digest (Repl.) 546, *4147*.

Case for the opinion of the Court of King's Bench.

In an action of debt on a bond for £6,000, dated Mar. 11, 1811, the defendant Coburn pleaded bankruptcy, and the plaintiffs entered a nolle prosequi as to him. The defendant the Duke of Marlborough let judgment go by default. Whereupon the plaintiffs set forth the condition of the bond, reciting that Coburn, having occasion for divers sums of money not exceeding in the whole the sum of £3,000, had applied to the plaintiffs to advance the same at such times and in such parts and proportions as he might require, which they had agreed to advance on the duke's entering into the obligation jointly with Coburn (to which the duke, at the request of Coburn, had consented to enable Coburn to carry on the trade in which he was engaged, and to prevent the inconvenience that he would be put to if the advance were not made). It was, therefore, conditioned for the payment by Coburn and the duke or either of them, their or either of their heirs, executors or administrators, unto the plaintiffs, their executors, administrators or assigns, of all such sum or sums of money, not exceeding the sum of £3,000 with lawful interest, which should or might at any time or times thereafter be advanced and lent by the plaintiffs to Coburn, or paid to his use by his order and direction. The plaintiffs said that at divers times after the making of the condition and before the issuing the writ, they advanced and lent to Coburn and paid to his use divers sums of money, amounting, for money lent and advanced and for money paid to his use respectively, £2,500, and that the interest on and in respect of such sum amounted to £250, but that the defendants had not, nor had either of them, paid the same to the plaintiffs. A writ of inquiry was awarded, and at the trial a verdict was taken for £2,288 5s. 1d. and interest to the date of the final judgment, subject to the opinion of the court on the following Case.

The Case stated the condition of the bond, and that the plaintiffs, at the trial, put in an account with Coburn, the items of which, with their respective dates, were admitted by the duke to be correct, and which account was an account current of moneys paid and received by them to the credit of Coburn from Feb. 1, 1811, to

Feb. 15, 1813. Some of the payments on the credit side were made to them specifically on account of the bond. The only question between the parties was the amount of the balance due from the duke to the plaintiffs on the above account. The plaintiffs claimed a balance of £2,288 5s. 1d. with interest to the date of the final judgment, contending, first, that the object of the bond was to secure such balance as might be due from Coburn to them, not exceeding £3,000; and secondly, supposing the bond not to extend to any sums advanced to Coburn after the first £3,000 immediately following the execution of the bond, yet that the plaintiffs were at liberty to apply all payments made on Coburn's account, and not specifically appropriated, in liquidation of the debt due to them from Coburn prior to the execution of the bond, and also of any debt which might be due from Coburn to them independently of the bond. The duke contended first, that the condition of the bond did not extend to any sum advanced by the plaintiffs to Coburn before the execution of the bond; secondly, that the bond was a security only for the first sums advanced to the extent of £3,000, and not a continuing guarantee after money to the extent of £3,000 had been once advanced; thirdly, that however the matter might be as between the plaintiffs and Coburn, yet as between the plaintiffs and the duke, the latter had a right to have the sums of money paid by Coburn to the plaintiffs after the execution of the bond applied in his (the duke's) exoneration to the liquidation of the advances made on the bond, and that the plaintiffs could not, as against him, apply such sums of money to the payment of any debt antecedently due from Coburn. On those principles, the balance due from the duke would be £1,310 11s. 6d., taking up the account of the plaintiffs from the date of the bond, and making a stop therein at the time when the first £3,000 were advanced, and applying all the sums received by the plaintiffs since the execution of the bond to the satisfaction of the bond. The question for the opinion of the court was what balance, under the circumstances, the plaintiffs were entitled to recover.

Bosanquet for the plaintiffs.

W. E. Taunton for the defendant.

LORD ELLENBOROUGH, C.J.—Both sides contend for too much. This is a bond given by the surety as an indemnity for advances to a definite amount; it is the same as if the surety had expressed that the bankers might lend to the amount of £3,000, and when an advance was made to that amount the guarantee became functus officio and was not a continuing guarantee. On the other point the defendant should have inquired at the time when he executed the bond whether the account stood clear; it is not a matter for presumption.

[The court determined that the balance which the plaintiffs were entitled to recover was £1,870 2s. 1d., with interest.]

Order accordingly.

HIGINBOTHAM *v.* HOLME

[Lord Chancellor's Court (Lord Eldon, L.C.), July 31, 1811, May 6, 1812]

[Reported 19 Ves. 88; Mont. 479, n.; 34 E.R. 451]

Bankruptcy—Property available for distribution—Settlement—Settlor's life interest determinable on bankruptcy.

A provision in a marriage settlement or other disposition by which there is reserved to the owner of the property settled a life interest determinable on bankruptcy is void as against the settlor's trustee in bankruptcy, and the settlor's life interest will pass to his creditors.

Notes. Considered: *Whitmore* v. *Mason* (1861), 2 John. & H. 204. Applied: *Re Jeavons, Ex parte Mackay, Ex parte Brown* (1873), 8 Ch. App. 643. Explained: *Re Stephenson, Ex parte Brown* (1893), 4 Mans. 13. Distinguished: *Re Stephenson, Ex parte Brown* [1897] 1 Q.B. 638. Referred to: *Holmes* v. *Penney* (1856), 3 K. & J. 90; *Knight* v. *Browne* (1862), 9 W.R. 515; *Re Thompson, Ex parte Williams* (1877), 7 Ch.D. 138; *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505; *Re Halstead, Ex parte Richardson*, [1917] 1 K.B. 695.

As to interests determinable on bankruptcy, see 2 Halsbury's Laws (3rd Edn.) 413 et seq.; and for cases see 5 Digest (Repl.) 705 et seq.

Cases referred to:

(1) *Ex parte Winchester* (1744), 9 Mod. Rep. 471; 1 Atk. at p. 116; 88 E.R. 581; 4 Digest (Repl.) 290, *2642*.

(2) *Staines* v. *Planck* (1799), 8 Term Rep. 386; 101 E.R. 1448; 4 Digest (Repl.) 344, *3125*.

(3) *Re Murphy* (1803), 1 Sch. & Lef. 44; 4 Digest (Repl.) 292, **1155*.

Also referred to in argument:

Ex parte Hill (1786), 1 Cox, Eq. Cas. 300; 1 Cooke's Bankrupt Laws, 7th Edn., p. 238; 29 E.R. 1176; 4 Digest (Repl.) 291, *2655*.

Lockyer v. *Savage* (1733), 2 Stra. 947; 2 Eq. Cas. Abr. 260; 93 E.R. 959; 5 Digest (Repl.) 705, *6154*.

Re Meaghan (1803), 1 Sch. & Lef. 179; 4 Digest (Repl.) 293, **1160*.

Ex parte Cooke (1803), 8 Ves. 353; 32 E.R. 391, L.C.; 5 Digest (Repl.) 705, *6156*.

Dommett v. *Bedford* (1796), 6 Term Rep. 684; 3 Ves. 149; 101 E.R. 771; 5 Digest (Repl.) 710, *6188*.

Goring v. *Warner* (1724), 2 Eq. Cas. Abr. 100; 22 E.R. 86, L.C.; 31 Digest (Repl.) 435, *5621*.

Appeal from a decree of Sir William Grant, M.R., by which he dismissed a bill filed by the plaintiff wife praying that she was entitled to an annuity of £150.

By indentures of settlement previous to the marriage of the plaintiffs, the plaintiff William Mosley Higinbotham conveyed to trustees freehold estates of inheritance and leasehold estates for lives and years, to hold to them, their heirs, executors, etc., after the marriage to the use of the plaintiff, the husband, for life unless he should thereafter embark in any trade or business and in the lifetime of his intended wife should become bankrupt, and from and after his decease or his being declared a bankrupt, which should first happen, to the use that the plaintiff Sarah Higinbotham, if she should survive her husband, and Hannah Higinbotham should be then living, should receive an annuity of £150 during the several lives of Sarah and Hannah Higinbotham; but if Hannah Higinbotham should be dead at the decease or bankruptcy of the plaintiff husband, or should afterwards die in the lifetime of the plaintiff wife, then from and after such death or bankruptcy of the plaintiff husband and Hannah Higinbotham that the plaintiff wife should receive an annuity of £200 for her life, payable quarterly, the first payment to be made on the

first quarter day next after the death or bankruptcy of the plaintiff husband; the respective and successive annuities to be in bar and satisfaction of dower and other share and claim which the plaintiff wife would or might have had out of the real and personal estate of her intended husband; and if the annuities or either of them should become payable during the life of the plaintiff wife, the same to be paid into her proper hands, to and for her own separate use and benefit, free from the debts, control or intermeddling of her husband; and, subject to the annuities, from and after his decease or bankruptcy to the use of trustees for five hundred years as to the freehold estates of inheritance, and ninety-nine years as to the leasehold estates, on trust to pay the arrears of the annuities; and, subject thereto, to the use of the plaintiff husband, his heirs, executors, etc. The plaintiff husband was not at the time of his marriage indebted or engaged in trade, nor had he at that time any intention of that sort having been educated for orders; but in 1802 he entered into trade as a cotton manufacturer, and on Jan. 28, 1810, a commission of bankruptcy issued against him, Hannah Higinbotham being still living. The bill, praying a declaration that the plaintiff wife was entitled to the annuity of £150 was dismissed at the Rolls. The plaintiff appealed.

Sir Samuel Romilly and *Bell* for the plaintiff.
Wyatt for the defendants.

LORD ELDON, L.C.—The facts on which this decree has been pronounced at the Rolls are that the husband of the petitioner at the time of their marriage was not indebted and had no formed purpose of entering into trade; but, having been intended for the Church, he changed his purpose, entered into trade and became a bankrupt. The question is whether a provision of this sort can be sustained against creditors by charging his estate, as against their right under the commission, with this annuity to which she will on his death have an undoubted title.

With a strong wish to relieve the petitioner from the effect of this decree, I have endeavoured in vain to apply the principle of those cases which have turned on the fact that a man, not indebted or a trader at the time, made a settlement, without reference to debts to be contracted in future, and to the future event of bankruptcy. This case has no resemblance to those. This settlement looks forward to a change of intention, to the purpose of becoming a trader, and looks forward expressly to the possible consequences of that purpose; and so looking forward to such a change of purpose and to such consequences, it is a limitation, by the effect of which the estate would go to the creditors, that change being adopted with the express object of taking the case out of reach of the bankruptcy laws. As to the consideration from the covenant of the father which, though it may perhaps prove worth little or nothing, is to be regarded as a consideration with reference to all the provisions of the settlement, though undoubtedly an annuity might have been provided by the settlement for the wife in all events, yet it is not competent to a party giving a consideration for a contract that is a direct fraud on the bankruptcy laws to have the benefit of it. I cannot assimilate this to the case of the wife's property limited until the bankruptcy of her husband, that is, where she reserves a power over her own property; or to the case of a lease made determinable by the bankruptcy of the lessee: that is a reservation by the owner of the property of a power over it; or to *Ex parte Winchester* (1) and other cases where, as the contingency happened previous to the bankruptcy, the debt was proveable; or to the case put by Lord Kenyon in *Staines* v. *Planck* (2), and observed on by Lord Redesdale in *Re Murphy* (3), of a bond, payable immediately, given by a trader on his marriage to trustees to secure a provision for his wife and children. Therefore, having struggled much to sustain this provision, I must declare my opinion that the decision of Sir William Grant, M.R., is right; but this has been so reasonably made the subject of an appeal that they take the deposit back.

Appeal dismissed.

HAWKINS AND OTHERS *v.* KEMP

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), February 12, 1803]

[Reported 3 East, 410; 102 E.R. 655]

Power of Appointment—Exercise—Power exercisable by deed with formalities —Execution of deed during lifetime of donee of power.

Where an instrument conferring a power of appointment provides that the power shall be exercisable by deed which is to be executed with certain formalities other than those generally necessary for the validity of a deed the deed must be executed (a) in strict compliance with the requirements of the instrument creating the power, and (b) during the lifetime of the donee of the power.

Document—Construction—Document insufficient to accomplish object desired—Reference to other document.

Per Curiam: Where one deed is not sufficient to accomplish the object desired by the parties regard may be paid to the terms of another deed, the two deeds being read together, but not if it appears that the two instruments were not intended to operate together.

Notes. The provision in s. 159 (1) of the Law of Property Act, 1925 (20 Halsbury's Statutes (2nd Edn.) 427) that a deed attested by two witnesses constitutes the valid execution of a power of appointment notwithstanding that it is required that an instrument made in exercise of the power is to be executed or attested with some specified form of execution or attestation does not, by sub-s. (2), operate to defeat any direction in the instrument creating the power that (a) the consent of any particular person is to be necessary to a valid execution, (b) to give validity to an appointment some act is to be performed which has no relation to the mode of executing and attesting the instrument.

Referred to: *Wright* v. *Wakeford* (1812), 4 Taunt. 213; *Hallewell* v. *Morrell* (1840), 1 Scott, N.R. 309; *Cooke* v. *Crawford* (1842), 13 Sim. 91.

As to execution of deeds exercising powers, see 11 Halsbury's Laws (2nd Edn.) 352–354, and ibid. vol. 30, pp. 231–234. For cases see 37 Digest (Repl.) 265 et seq.

Cases referred to:

(1) *Earl of Leicester's Case* (1675), 1 Vent. 278; 86 E.R. 186; 17 Digest (Repl.) 307, *1145*.
(2) *Digges's Case* (1600), 1 Co. Rep. 173a.
(3) *Hall* v. *Winckfeild* (circa 1617), Hob. 195.
(4) *Shelley's Case*, *Wolfe* v. *Shelley* (1581), 1 Co. Rep. 93 b; Moore, K.B. 136; 1 And. 69; 76 E.R. 199; 49 Digest (Repl.) 844, *7930*.
(5) *Perryman's Case* (1599), 5 Co. Rep. 84a; 77 E.R. 181; 17 Digest (Repl.) 224, *248*.
(6) *Albany's Case* (1586), 1 Co. Rep. 110b; 76 E.R. 246; 37 Digest (Repl.) 395, *1265*.
(7) *Hynde's Case* (1591), 4 Co. Rep. 70b.
(8) *Perry* v. *Bowers* (1683), T. Jo. 196; sub nom. *Perry* v. *Bowes*, 1 Vent. 360.
(9) *Duke of Marlborough* v. *Lord Godolphin* (1750), 2 Ves. Sen. 61; 28 E.R. 41, L.C.; 37 Digest (Repl.) 237, *31*.
(10) *Lillingston's Case* (1607), 7 Co. Rep. 38a; 77 E.R. 466; sub nom. *Anon.*, 4 Leon. 235; 39 Digest (Repl.) 210, *863*.

Action to recover balance of purchase-money on a sale of land.

The plaintiffs declared that whereas they were seised in fee of certain premises in the parishes of Chilham, Sellinge, and Boughten, etc., in the county of Kent, and were about to sell part of the same by auction under certain printed conditions of sale, among others, that the purchaser should immediately pay a deposit of £20

per cent. on the purchase-money, and the remainder before Oct. 31, 1801, on having a good title made to him and prepare a conveyance, the defendant promised in case he became the purchaser to perform the said conditions. They then averred that a sale was made on July 3, 1801, at which the defendant became the purchaser of certain lots according to the printed particulars for the sum of £7,005, and paid a deposit of £1,400 for the use of the vendors in part payment, and, although the plaintiffs performed all the conditions of sale which as vendors they ought to have done and were ready to make a good title to the premises purchased by the defendant, and to convey the same according to the conditions of sale, yet the defendant refused to prepare any conveyance of the same (as required by the conditions of sale), and refused to pay the remainder of the purchase-money. To this the defendant pleaded non assumpsit. The cause was tried at the last sittings in Easter Term, 1802, before LORD ELLENBOROUGH, C.J., when a verdict was found for the plaintiffs, damages £5,605, subject to the opinion of the court upon the following Case.

The premises in question were put up to sale by auction, as stated in the declaration, on July 3, 1801, under the conditions and according to the particulars therein stated. The defendant became the purchaser of the lots in question at the sale for £7,005, and paid the plaintiff £1,400 as a deposit and in part payment of the purchase-money for those lots. The plaintiffs delivered in due time an abstract of title comprising the after-mentioned deeds and assurances as and for a good title to the lots, and offered to execute a conveyance thereof to the defendant, and in all other respects complied with the several conditions of sale. The defendant refused to complete the purchase, objecting, first, that the title comprised in the abstract was not a good title, and, secondly, that no valid conveyance could be executed by the plaintiffs alone without the execution of James Broadhurst, one of the devisees in trust named in the will of Thomas Hawkins hereinafter mentioned, or the appointment of a new trustee in his place, notwithstanding the deed of renunciation dated April 20, 1801, hereinafter set forth. The defendant refused to complete his purchase.

By an indenture of bargain and sale dated May 12, 1770, enrolled in the Court of Common Pleas, and made between John Hawkins and Susannah his wife, who were seised of the premises therein and hereinafter mentioned for their lives, and their eldest son and heir apparent Thomas Hawkins, who was seised thereof in tail of the first part, John Bradshaw and Mary Bradshaw spinster of the second part, William Wilby of the third part, E. T. H. Gower and N. Tuite of the fourth part, and R. Tuite, James Bradshaw, H. Darell, and E. Pitts of the fifth part, it was witnessed, that for the reasons therein mentioned and for barring all estates tail and all remainders and reversions expectant thereon of and in the manor lands, and hereditaments thereinafter mentioned, and also in consideration of 10s., John Hawkins, Susannah his wife, and Thomas Hawkins did grant, bargain and sell to W. Welby, his heirs, etc., the premises in question, among divers lands in the county of Kent, and the reversion and remainder, and all the estate, to hold to the use of W. Welby, his heirs, etc., to the intent that he might become tenant of the freehold for suffering a common recovery of the same in which E. T. H. Gower and N. Tuite should be demandants, W. Welby tenant, John Hawkins and Susannah his wife first vouchees, and Thomas Hawkins second vouchee, declaration that the recovery should enure until the intended marriage to the then uses, and after the marriage to the use and intent that John Hawkins and Susannah his wife might during their joint lives and the life of the survivor receive such annuity as therein mentioned, remainder to the use of the said R. Tuite, F. Bradshaw, H. Darell, and E. Pitts, for the term of 500 years from the intended marriage, without waste, for securing the several sums of money therein mentioned, and after the expiration or sooner determination of the same term, and in the meantime subject thereto and chargeable as aforesaid, to the use of Thomas Hawkins and his assigns for life, without waste, remainder to the use of E. T. H. Gower and N. Tuite, etc., to preserve the

contingent remainders, remainder to the use, intent, and purpose, that Mary Bradshaw, and her assigns might after the decease of Thomas Hawkins receive thereout for her life a yearly rentcharge, and subject thereto to the use of the first and every other son and sons of the body of Thomas Hawkins on the body of Mary Bradshaw to be begotten severally and successively in tail male, remainder to the use of the first and other sons of Thomas Hawkins by any after-taken wife successively in tail male, remainder to the use of Henry Hawkins, third son of John Hawkins, for life, without waste, remainder to the use of E. T. H. Gower and N. Tuite, to preserve contingent remainders, remainder to the use of the first and other sons of Henry Hawkins successively in tail male, remainder to the use of John Hawkins for life, without waste, remainder to the use of Gower and Tuite, to preserve contingent remainders, remainder to the use of the first and every other son of John Hawkins by any after-taken wife successively in tail male, remainder to the use of all and every the daughter and daughters as well of Thomas Hawkins as of Henry Hawkins, in equal shares as tenants in common in tail, with cross-remainders in tail between them, if more than one, and if all such daughters except one should die without issue, or there should be but one such daughter, then to the use of such surviving or only daughter in tail, remainder to the use of the right heirs of John Hawkins for ever.

Among other provisoes there was the following:

"It shall be lawful for the said Thomas Hawkins, at any time or times thereafter, by any deed or deeds, instrument or instruments in writing, to be duly executed by him in the presence of and attested by three or more credible witnesses, and to be enrolled in one of His Majesty's courts of record at Westminster, by and with the consent and approbation in writing of the said Mary Bradshaw, John Hawkins, John Bradshaw, E. T. H. Gower, N. Tuite, R. Tuite, James Bradshaw, H. Darell, and E. Pitts, or the survivors or survivor of them, or the executors or administrators of such survivor, but not otherwise, to revoke, make void, alter, or change, all and every or any of the uses, estates, trusts, powers, provisoes, limitations, declarations, and agreements respectively thereinbefore mentioned of or concerning all or any of the said thereby bargained and sold premises; and by the same or any other deed or deeds, instrument or instruments in writing, so executed and attested, and with such consent, and so to be enrolled respectively as aforesaid, and not otherwise, any new or other use or uses, estate or estates, trust or trusts of or concerning all or any of the said premises whereto any such revocation as aforesaid should extend, to declare, limit, or appoint, with or without power of revocation and new appointment, or otherwise howsoever, as to the said Thomas Hawkins with such consent and approbation as aforesaid should seem meet, anything thereinbefore contained to the contrary notwithstanding."

This was executed by John Hawkins, Susannah Hawkins, Thomas Hawkins, John Bradshaw, Mary Bradshaw, William Welby, E. T. H. Gower, N. Tuite, R. Tuite, Jas. Bradshaw, H. Darell, and E. Pitts, in the presence of two witnesses, and a receipt by T. Hawkins for the sum of £10,000 endorsed thereon. In Easter Term, 1770, a recovery was duly suffered in pursuance of the before-mentioned deed. By deed poll or letter of attorney dated April 14, 1790, under the hand and seal of Robert Tuite, reciting the hereinbefore abstracted indenture of bargain and sale of May 12, 1770, and the common recovery suffered thereof, and the hereinbefore abstracted power of revocation and new appointment contained in the same, Robert Tuite did by the now abstracting deed poll nominate and appoint Thomas Hawkins his lawful attorney for him and in his name in writing to consent to and approve of his (Thomas Hawkins) revoking, or changing all and every or any of the uses, estates, and trusts, respectively in the indenture mentioned concerning all the premises thereby bargained and sold, and also to consent to and approve of his the said Thomas Hawkins limiting any new or other uses, estates or trusts, of or concerning

the same, with or without power of revocation and new appointment, or otherwise howsoever, as to the said Thomas Hawkins should seem meet, and likewise for him (R. Tuite) and in his name to execute any deed or instrument in writing, necessary for declaring his, Robert Tuite's, consent and approbation in writing to or of any such revocation, new limitation, or appointment to be made by Thomas Hawkins, and generally to execute any other act, deed, matter, or thing whatsoever, for effectuating the intent aforesaid, as fully and absolutely as R. Tuite himself might do. This was executed by R. Tuite in the presence of two witnesses.

By a deed poll, dated July 17, 1791, enrolled in the Common Pleas in the lifetime of Thomas Hawkins, and endorsed upon the said hereinbefore abstracted indenture of May 12, 1770, and executed by Thomas Hawkins, and also by Thomas Hawkins as the attorney of R. Tuite, and enrolled in the Court of Common Pleas in 1791, reciting that soon after the date and execution of the last-mentioned indenture the marriage between Thomas Hawkins and Mary his wife was solemnised, that John Hawkins, John Bradshaw, E. T. H. Gower, N. Tuite, James Bradshaw, and E. Pitts, were dead, and that Thomas Hawkins was desirous and had agreed, with the consent and approbation of Mary Hawkins, R. Tuite, and H. Darell, to execute in manner thereinafter mentioned the powers of revocation and new limitations granted, limited and reserved to him by the indenture of bargain and sale of May 12, 1770, it was by the now abstracting deed poll made known that by force and virtue of the power and authority in the last-mentioned indenture for that purpose contained, and of all and every the powers and authority enabling him in that behalf, and in exercise and execution thereof, and in part performance of the agreement aforesaid, he Thomas Hawkins, with the consent and approbation in writing of the said Mary Hawkins, R. Tuite, and H. Darell, testified by their severally executing the same, did by that deed or instrument in writing, duly executed by him in the presence of and attested by three credible witnesses, and to be enrolled in His Majesty's Court of Common Pleas at Westminster, revoke and make void all and every the uses, estates, trusts, powers, provisoes, limitations, declarations, and agreements, respectively in the indenture of bargain and sale mentioned, concerning all the manor, lands and premises in the county of Kent in that indenture mentioned and described, bargained and sold, and he, Thomas Hawkins, with such consent and approbation and so to be enrolled respectively as aforesaid, did thereby limit and appoint all and singular the messuages, lands, and premises, and the reversion, to the use of such person and persons for such estate and estates, upon such trusts, and for such intents and purposes, as he at any time during his life, by any deed or instrument, with or without power of revocation, to be sealed and delivered by him in the presence of and attested by two or more credible witnesses, or by his last will or any codicil to be signed and published by him in the presence of and attested by three or more credible witnesses, should limit, direct or appoint; and in default of such direction, limitation or appointment, and in the meantime and until such limitation, direction, or appointment should be made, and also subject to any such limitation, direction or appointment, where the same should happen not to be a complete and entire appointment of the whole estate and interest in the said premises, to the use of him, Thomas Hawkins, in fee. Thomas Hawkins did thereby also declare that the common recovery since perfected and all other assurances of the manor and premises should enure, and that the recoveror named and his heirs should stand and be seised of the manor and premises to the uses, upon the trusts, and for the intents and purposes hereinbefore declared. This was executed by Thomas Hawkins, Mary Hawkins, and by R. Tuite by Thomas Hawkins, his attorney, and H. Darell, in the presence of three witnesses, Mary Hawkins, Robert Tuite, and Henry Darell, being the then only surviving trustees named in the deed of May 12, 1770.

By an indenture, dated Dec. 4, 1798, between Thomas Hawkins, of the first part, Mary Hawkins, his wife, of the second part, and H. Darell and Robert Tuite

of the third part, reciting the indenture of bargain and sale of May 12, 1770, and the recovery suffered in pursuance thereof, and also the first abstracted deed poll, and also the lastly abstracted deed poll of July 17, 1791, and also reciting that the deed poll of July 17, 1791, was executed by Robert Tuite to Thomas Hawkins as his attorney, in pursuance of or under a certain deed poll dated April 14, 1790, and that upon that account doubts had been entertained whether the deed poll of July 17, 1791, was a valid execution of the power of revocation by the indenture of May 12, 1770, reserved to Thomas Hawkins as before mentioned, it was, therefore, for obviating all such doubts, by the now abstracting indenture witnessed that by force and virtue and in execution of the power or authority to Thomas Hawkins for that purpose reserved by the indenture of bargain and sale, and of every other power and authority enabling him in that behalf, he Thomas Hawkins, with the consent and approbation of Mary his wife, H. Darell, and R. Tuite, testified by their severally being parties to and executing the same, did by the now abstracting deed, duly executed by him in the presence of and attested by the three credible persons, whose names were intended to be thereupon endorsed as witnesses attesting the due execution thereof by him the said Thomas Hawkins, and intended to be enrolled in one of His Majesty's courts of record, revoke all and every the uses, estates, trusts, etc., in the said in part recited indenture expressed and contained, of and concerning all the messuages, lands, and other the thereby bargained and sold premises, and he, Thomas Hawkins, with the like consent, did thereby declare, limit, and appoint that the manor, lands and premises should thenceforth be and continue, and the recovery so suffered, and all other assurances in the law, should operate and enure to the use of such person and persons, and for such estate and estates, upon such trusts, and for such intents and purposes, as he, Thomas Hawkins, at any time during his life, by any deed, etc., with or without power of revocation, to be executed by him in the presence of and attested by two or more credible witnesses, or by his last will, or any codicil, executed and published in the presence of and attested by three or more witnesses, should limit or appoint, and in default of such limitation or appointment, and in the meantime and until such limitation or appointment should be made, and also subject to any such limitation or appointment when the same should happen not to be complete, to the use of him, Thomas Hawkins, in fee. This was executed by Thomas Hawkins, Mary Hawkins, H. Darell, and R. Tuite, in the presence of three witnesses, but the execution thereof by R. Tuite was some months subsequent to the execution thereof by Thomas Hawkins.

The Case then set the will of Thomas Hawkins, dated Feb. 14, 1800, properly executed and attested in the presence of three witnesses, whereby after several specific bequests to his wife Mary Hawkins and his three daughters Mary, Ann, and Eleanor the testator, in exercising every power enabling him in that behalf did appoint and devise all the manors and lands comprised in his marriage settlement, and all other the manors and lands, of which he or any persons in trust for him was or were seised, or of which he had power to dispose by will (except those vested in him upon trust or by way of mortgage), to the use of his wife and to John and James Bradshaw, three of the plaintiffs, J. Broadhurst and C. Butler the other plaintiffs, upon trust that they should with all convenient speed after his decease sell and dispose of and convey the property and should stand and be possessed of the money arising from the sale upon the trusts thereinafter mentioned. The testator appointed his wife and the other trustees last named executors of his will and guardians of his children. By a codicil to the will, dated Feb. 14, 1800, and executed by the testator in the presence of three witnesses, he made some alteration in the trusts of the moneys to arise from the sale of his estates, and in all other respects confirmed his will. The testator died in September, 1800, leaving four daughters, and also leaving his brother John named in the settlement of May 12, 1770, him surviving. The indenture of Dec. 4, 1798, was not enrolled

in the lifetime of Thomas Hawkins. On Oct. 16, 1800, a fiat for the enrollment thereof was granted by the then Chief Justice of the Court of Common Pleas in the following words:

"Let this deed be enrolled in His Majesty's Court of Common Pleas at Westminster: ELDON."

In pursuance of this fiat the indenture was enrolled. A memorandum of the enrollment was made and signed by the proper officer of the court on the back thereof in the following words: viz., "Enrolled in His Majesty's Court of Common Pleas at Westminster of the Term of the Holy Trinity in [1800]." By indenture, dated April 20, 1801, between James Broadhurst, of the one part, Mary Hawkins (the widow of Thomas Hawkins), John Bradshaw, James Bradshaw and C. Butler, of the other part, after reciting the will of Thomas Hawkins and the said devise to the trustees of his real estate, and that the testator bequeathed all his personal estate and effects, not otherwise specifically disposed of, unto his said wife and the other trustees named, upon the trusts, in the will expressed, noticing the appointment of his wife and the trustees to be his executors and guardians of his children and also noticing the codicil to his will and reciting that Thomas Hawkins died in September, 1800, and, James Broadhurst having declined to act, and being desirous to renounce the executorship and the trusts of the will, they, Mary Hawkins, John Bradshaw, James Bradshaw, and Charles Butler had alone proved the will and codicil of Thomas Hawkins. It was witnessed that James Broadhurst, with the privity and upon the acceptance of Mary Hawkins, John Bradshaw, James Bradshaw, and Charles Butler, testified as therein mentioned, did by the now abstracting indenture absolutely and irrevocably disclaim unto the said Mary Hawkins, John Bradshaw, James Bradshaw, and C. Butler, all the real and personal estates, trusts, and authorities whatsoever by the will of Thomas Hawkins devised. This was executed by James Broadhurst, and duly attested. Mary Hawkins, John Bradshaw, James Bradshaw, and C. Butler, four of the five trustees named in the will, were the plaintiffs in the present action.

The question for the opinion of the court was whether the plaintiffs were entitled to recover in the said action, and that question was agreed between the parties to depend on the following questions: (i) whether the uses limited by the deed of May 12, 1770, had been well revoked by all or any of the subsequent deeds and the will of Thomas Hawkins so that the devisees named in the will could make a good title to the purchaser; and (ii) whether it were necessary that James Broadhurst should join in a conveyance to a purchaser?

Serjeant Williams for the plaintiffs.
Abbott for the defendant.

Cur. adv. vult.

Feb. 12, 1803. **LORD ELLENBOROUGH, C.J.,** delivered the following judgment of the court.—This was an action of assumpsit brought to recover the unpaid remainder of a sum of £7,005, the purchase-money of certain parts of an estate which had been sold by the plaintiffs by auction and purchased by the defendant thereat under certain conditions of sale, whereupon the defendant had paid £1,400 by way of deposit. The plaintiffs in their declaration aver that they were ready and willing to make out, and did make out, a good title to the parts of the estate sold by them according to the conditions of sale, and were also ready and willing to execute a conveyance and to deliver possession accordingly, but that the defendant dispensed with their so doing, discharged them therefrom, and refused to pay the remainder of the purchase-money. The defendant pleaded the general issue non assumpsit. The case came on to be tried before me, and a verdict was found for the plaintiff, subject to the opinion of the court on a Case disclosing the whole transaction. The question for the opinion of the court was whether the plaintiffs were entitled to recover, and that question was agreed between the parties

to depend on the following questions: (i) whether the uses limited by the deed of May 12, 1770, have been well revoked by all or any of the subsequent deeds and the will of Thomas Hawkins so that the devisees named in the said will could make a good title to a purchaser; (ii) whether it were necessary that James Broadhurst should join in a conveyance to a purchaser. The latter of these questions was properly abandoned by the defendant's counsel as not capable of being contended for with effect on the part of his client.

The question which remains for determination is whether the uses limited by the deed of 1770 have been revoked by all or any of the subsequent deeds and by the will of Thomas Hawkins. In the first place, the deed poll of July 17, 1791, executed by Thomas Hawkins as attorney for Robert Tuite, may be laid out of the question inasmuch as it is a deed which is neither competent to revoke the old uses of the indenture of May 12, 1770, nor to declare new uses. The consent and approbation of Robert Tuite (amongst others) was by the indenture of 1770 made necessary to the revocation of the old uses and the declaration of new uses by Thomas Hawkins. It was so made necessary for the purpose of erecting an independent check and control in Robert Tuite and the other trustees over the disposition of this property by Thomas Hawkins. Indeed, the validity of the revocation and appointment executed under the authority of the power of attorney appeared to the counsel for the plaintiffs so little maintainable, that it was, upon an intimation from the court of what would probably be its opinion upon that head, at an early period of the argument, abandoned, at least as to its being of itself a substantive and effectual deed of revocation and appointment. But the enrollment which that deed of 1791 received was afterwards endeavoured in argument to be transferred and handed over to the deed of 1798, in order to obviate the want of enrollment in the life of Thomas Hawkins under which that deed laboured. In support of this attempt *Earl of Leicester's Case* (1) was relied on. There Lord Leicester, having a power by writing indented, subscribed by his hand, and sealed, to revoke uses, covenanted by writing sealed and subscribed by his hand to levy a fine to other uses, which fine was afterwards levied, and although neither instrument was of itself sufficient to revoke the old uses, Lord Hale held that conjointly they would do it, observing upon that occasion quæ non prosunt singula juncta juvant. But that authority will not assist the plaintiffs in this case, for there it was the intention of Lord Leicester that the covenant and fine should revoke the uses, but in this case there is no intent that the two deeds conjointly should revoke the uses and that the enrollment of the first should be applied to, or be in any way connected with, the second. On the contrary, the deed of 1798, in the body of it, takes notice of the enrollment as an act to be done in respect of the then executing deed, thereby not only adverting to the necessity of actual enrollment, but virtually disclaiming the benefit (if, indeed, in any shape such benefit could have been derived from it) of the enrollment of the former inefficacious deed of revocation and appointment of July 17, 1791.

Before I proceed to consider the arguments on which the deed of Dec. 4, 1798, was contended to be a good execution of the power, I will state what the terms of that power require, it being remembered that the only objection is that this deed was not enrolled until after Mr. Hawkins' death. The terms required that the revocation should be by a deed or instrument in writing, executed in the presence of and attested by three credible witnesses, and enrolled in one of His Majesty's courts of record at Westminster, and with the consent and approbation of Hawkins' wife, his father, father-in-law, the trustees of a term of 500 years in the settlement of 1770, and also of the trustees to support contingent remainders, being in all nine persons. Every one of these required circumstances is in itself perfectly arbitrary, and (except only as it is in fact required) unessential in point of effect to the legal validity of any instrument by which the old uses should be revoked, or new uses declared. It is in itself immaterial whether the instrument in writing purporting so to revoke and declare the uses, should be by deed, whether

such deed should be executed in the presence of what and how many witnesses, whether it should be afterwards attested by the witnesses and ultimately enrolled in any court of record, and whether it should be sanctioned by the consent and approbation of the several trustees named for that purpose. It might (if it had so pleased the parties creating the power) have been done by any writing of the persons so authorised, unsealed, unattested, unenrolled, and unsanctioned by any consent or approbation whatsoever. If these circumstances be non-essential and unimportant, except as they are required by the creators of the power, they can only be satisfied by a strictly literal and precise performance. They are incapable of admitting any substitution, because these requisitions have no spirit in them which can be otherwise satisfied; incapable of receiving any equivalent because they are in themselves of no value. Indeed, in this case the enrollment has been considered on both sides as a thing necessary to be done at some time or another, which, after *Digges's Case* (2), could not be denied. The question on this part of the case is only whether it can have any effect, as it was not done in Thomas Hawkins's lifetime. This question depends upon what shall be a fair construction of the clause giving the power, in making which the court is to decide according to what they shall judge to be the intention of the parties, not restraining or lessening the power by a narrow and rigid construction, nor by a loose and extended interpretation dispensing with the substance of what was meant to be performed. Looking at the question in that light, we are of opinion that this power has not been well executed.

Counsel for the plaintiffs, who argued that it was well executed, contended that the deed of revocation was perfect without enrollment, that it was a mere ceremony, something collateral, which might be done at any time, and that there was nothing personal in the enrollment; and in the course of his argument pointed our attention to some of the differences between conveyances at common law and by the Statute of Uses, citing in support of the points he contended for, among other cases, *Hall* v. *Winckfeild* (3), which was the case of the enrollment of a recognisance; *Shelley's Case* (4), where an execution on a common recovery taken out after the death of the tenant in tail suffering the recovery was held to vest the uses in Richard Shelley, and to take the estate from the heir of Edward Shelley, to whom it had descended, and *Perryman's Case* (5), where, the custom of a manor being that every alienation of lands within it should be presented at some court within a year, it is laid down that the presentment may be made after the death of the feoffor or feoffee, and reasoning from the analogy which he conceived to subsist between the case at Bar, and surrenders of copyholds and exchanges where the title may be perfected by entry after the death of either party. On the other side it was contended that the enrollment, according to the general doctrine of powers, ought to have been in the life of Thomas Hawkins, that the mischief would be enormous of allowing an enrollment at any period, as no time is limited by the deed, that the relation contended for would operate to the destruction of a lawful estate vested in Thomas Hawkins's daughters, and to make good void acts of the parties, which cannot be. In support of these propositions, *Albany's Case*, *Hynde's Case* (7), and *Digges's Case* (2), *Perry* v. *Bowers* (8), *Duke of Marlborough* v. *Lord Godolphin* (9), and other cases were cited.

To some of the propositions on which counsel for the plaintiffs rested his argument we do not agree. There is a fallacy in laying it down that the deed of revocation was perfect without enrollment. For as the power of revocation depends entirely on those steps being pursued which the persons creating the power have prescribed, the point is not whether a deed, which may be one of the things necessary to work a revocation has all the circumstances belonging to it which the law requires to give validity to a deed, as such, but the question is whether it be perfect, as that particular instrument which is required for the purpose of effecting a revocation. A deed, qua deed, certainly requires no enrollment to give it validity; that is not a thing which arises from or is connected with the nature

of the instrument itself. But if an instrument, attended with all the circumstances necessary to the perfection of a deed, will not operate to effect a revocation from the omission of certain other circumstances which have been required by the authors of the power, those omitted circumstances are on that account most unquestionably necessary to the validity of that instrument, which is to effect the revocation. In such case the enrollment becomes as essential to such instrument as the sealing and delivery thereof. If there were no sealing and delivery there would be no deed; and if enrollment be wanting, though there be a sealing and delivery, the prescribed instrument of revocation is not completed, and, if not complete, cannot be valid and effectual for that purpose.

Another proposition of counsel for the plaintiffs with which we cannot agree is that there was in the enrollment nothing personal. If by that it had been only meant that the act of enrollment need not be by the hands of Hawkins himself, of that there can be no doubt, but there can be no question but that every step of the revocation, excepting the consent of the persons named for that purpose, rested entirely with Mr. Hawkins; that he might stop where he pleased; and that, if he had resolved to leave the revocation imperfect by not pursuing it through all the necessary steps, it was entirely with him so to do. An enrollment could not have been made without his authority. One object of the enrollment might be to afford a period for consideration after all other steps to revoke the old uses and appoint new ones had been taken, and, if that were the object, could a stranger during his life, after all those steps had been gone through, be allowed to enroll the deed and to do that which remained and was necessary to complete the revocation, without Thomas Hawkins's authority, or even against his will? This would be the case, if there were nothing personal in the enrollment.

The difference between conveyances by the Statute of Uses and at common law are unquestionably very great, and much may be done in the one way which could not be effected by feoffment, grant, and the other modes of transferring property which obtained prior to the statute. But the matters alluded to, such as limiting estates of freehold in futuro, the defeating estates either wholly, or partially, in favour of others than the grantor and his heirs, etc., are questions of a very different description from that now before us. We are not now considering what effect an instrument properly executed may have by means of the Statute of Uses, but whether an instrument intended to defeat uses already created and to raise new ones has or has not been executed with the formalities and in the manner required. How far it may operate, and in what way differently from a conveyance at common law, are questions dependent on the Statute of Uses, but they are questions which cannot arise until it shall be settled whether the deed to limit or revoke be or be not well executed. In *Shelley's Case* (4) the question whether the execution vested the state in the recoveror was a question at common law, depending upon a rule of law that every execution had relation to the judgment: *Lillingston's Case* (10); not at all upon the Statute of Uses. Upon that principle, though Edward Shelley died before the execution, yet inasmuch as it related back to the recovery which was in his lifetime, the uses of the recovery were held to be executed in him, and Richard his son to be in, in the course of descent. The same doctrine as to the relation of the execution would have held if the proceeding had been adverse. This observation, therefore, does not distinguish this from the cases of feoffment and no livery, and of grants and no attornment, before the feoffor's and grantor's death, which cannot be completed for want of the existence of one of those, who must be a party, and consenting to the act necessary to complete the conveyance. The question before us is not, as I have observed, what may be the operation of the Statute of Uses upon an incomplete act becoming complete, but, whether that act, without which no use can arise, could be completed after Thomas Hawkins's death. There has been no distinction pointed out between conveyances at common law, and those by the Statute of Uses as to the consummation of the deed which in the one case is to convey the estate and in the

A other to ascertain the uses, but the distinction is as to the effects of such different instruments after they are consummate and perfect.

The case of a recognisance, *Hall* v. *Winckfeild* (3), is very distinguishable from this case. The objection here is that the whole which was required of Thomas Hawkins to revoke the uses of his marriage settlement was not performed. But in *Hall* v. *Winckfeild* (3) there was no question whether the cognisor had anything B further to do. The acknowledgment before the judge gave the recognisance the force of a record. The cognisor had done all he had to do; nothing further was wanting on his part to bind himself or his lands, though the enrollment was necessary for the testification and perpetuating of it. This was an act which might be done in invitum. This distinction applies to some other of the cases cited for the plaintiffs. In *Perryman's Case* (5) the feoffor had done all he had to do; C after that feoffment he had no control over the estate, nothing further was wanting on his part, nor was his assent necessary to the presentment which the custom required: the procuring that to be done was for the feoffee, and not for the feoffor: so says the book, "Caveat emptor; and he at his peril is to perfect all that is requisite to the assurance." So in the case of a surrender of a copyhold, the admittance is not the act of the surrenderor; there is nothing personal in it as to D him; the surrenderee is to procure himself to be admitted, which the surrenderor has no power to prevent. The same observation holds as to the case of an exchange. However these several instances may prove the doctrine of relation under the circumstances attending them, they all fail of proving anything to support the plaintiffs' case, unless it had been previously shown that the enrollment in this case was an act with which Hawkins was not concerned, and which might have E been done without his consent. The question is not so properly a question of relation as whether the enrollment can have any effect without Hawkins's authority which necessarily determined with his life.

Digges's Case (2), relied on by the defendant's counsel, is a very material case to show that the enrollment could not be after the death of Hawkins. There F Christopher Digges being tenant for life, remainder over, with a power by deed indented to be enrolled in any of the Queen's courts to revoke any of the uses and limit new ones, by deed indented and enrolled in the Court of Common Pleas, declared that for the payment of his debts, etc., from the time of the enrollment of that deed in Chancery all the uses should be void. Afterwards he levied a fine of the lands to other uses, and after the levying of such fine the deed of revocation G was enrolled in Chancery. It was held (by the third resolution) that until that indenture was enrolled, there was no perfect revocation, and (by the fourth resolution) that the fine levied before the enrollment had extinguished the power of revocation. See how that case applies to this. If the enrollment be a mere ceremony which may be done at any time, and if, where nothing remains to be done but that the party executing the power has done all that he has to do, that ceremony H in which, according to counsel for the plaintiffs, there could be nothing personal in Christopher Digges, might have been done by anybody. But the resolution of the court was otherwise, for they held that the fine extinguished the power of revocation, that is, that it destroyed all authority in C. Digges to do that which remained to be done in order to complete the revocation, and nothing then remained to be done but to make the enrollment. Had it been a mere circumstance, there- I fore, in which there was nothing personal in Christopher Digges, there would have been no power remaining in him to be extinguished by the fine, but which power was so extinguished because it was not collateral, but savoured and tasted of the land and could only be executed by him who had the estate and interest on which the power was dependent and under whom, as the donor, the person must come in to whom the new uses should be limited. If then the power of completing the revocation by enrollment were destroyed in that case by parting with the estate, the consequences must be the same whatever may be the means by which such a

separation may happen, and in this case the death of Thomas Hawkins has had that effect.

This being the light in which the question strikes us, it will not be necessary to go into other parts of the argument respecting the doctrine of relations or the various other questions which have been made in the cause, and which it cannot be necessary to discuss unless the revocation were completed by the enrollment made after Mr. Hawkins's death. Therefore, without giving any opinion on those points, we think upon the grounds already stated that there should be judgment for the defendant.

Judgment for defendant.

Re SCOTT. Ex parte BELL AND OTHERS

[Court of King's Bench (Lord Ellenborough, C.J., Le Blanc, Bayley, and Dampier, JJ.), July 7, 1813]

[Reported 1 M. & S. 751; 2 Rose, 136; 105 E.R. 280]

Bankruptcy—Proof—Debt—Debt provable—Debt founded on illegal contract.

A debt incurred in the furtherance and execution of an illegal contract is not provable in bankruptcy.

Notes. At the time of the decision in this case partnerships for underwriting were illegal.

Considered: *Simpson* v. *Bloss* (1816), 2 Marsh. 542; *McCallan* v. *Mortimer* (1842), 9 M. & W. 636. Referred to: *Crowe* v. *Lysaght* (1861), 4 L.T. 744.

As to debts provable in bankruptcy, see 2 Halsbury's Laws (3rd Edn.) 464 et seq.; and for cases see 4 Digest (Repl.) 276 et seq.

Cases referred to:

(1) *Sullivan* v. *Greaves* (1789), cited in Park on Insurance.
(2) *Mitchell* v. *Cockburne* (1794), 2 Hy. Bl. 379.
(3) *Aubert* v. *Maze* (1801), 2 Bos. & P. 371; 126 E.R. 1333; 25 Digest (Repl.) 437, *188*.
(4) *Booth* v. *Hodgson* (1795), 6 Term Rep. 405; 101 E.R. 619; 12 Digest (Repl.) 302, *2324*.
(5) *Lacaussade* v. *White* (1798), 7 Term Rep. 535.
(6) *Howson* v. *Hancock* (1800), 8 Term Rep. 575; 101 E.R. 1555; 25 Digest (Repl.) 431, *127*.
(7) *Steers* v. *Lashley* (1794), 6 Term Rep. 61; 101 E.R. 435; 6 Digest (Repl.) 139, *1003*.
(8) *Petrie* v. *Hannay* (1789), 3 Term Rep. 418; 100 E.R. 652.
(9) *Faikney* v. *Reynous* (1767), 4 Burr. 2069; 1 Wm. Bl. 633.

Case for the opinion of the Court of King's Bench directed to be stated by the Lord Chancellor.

J. Bell, R. G. Beasley, Walter and William Bell, deceased, carried on business in partnership as factors in London the firm of William and John Bell & Co. William Bell was the only partner resident in London, and the concerns of the partnership there were solely managed by him. On Jan. 1, 1809, William Bell and Scott, a bankrupt, verbally agreed to become interested in partnership as to profit and loss on policies of insurance on marine risks to be subscribed by Scott in his own name. On Jan. 1, 1810, it was further verbally agreed between them that such partnership should be extended as well to policies to be subscribed by Scott for William Bell, as to policies to be subscribed by Scott in his own name. For some

time previously to the year 1809 William Bell had been in the habit of advancing money out of the funds of Bell & Co. to Scott for his accommodation. The sums so advanced in 1808 amounted to £5,503 16s. 9d. and the balance due from Scott to Bell & Co. on account of such advances at the end of that year amounted to £314 14s. 11d. In the course of the years 1809 and 1810 Scott continued to apply to William Bell from time to time for advances of money, in consequence of which applications William Bell in 1809 advanced money to Scott from time to time out of the funds of Bell & Co., to the amount of £10,592 17s. 3d., which amount was reduced by repayments in the course of that year, leaving a balance at the end of 1809 due from Scott to Bell & Co., on account of such advances, of £5,077 12s. 10d., including therein £317 14s. 11d. remaining due at the end of 1808. In 1810, before Aug. 31 in that year (on which day William Bell died), William Bell advanced money to Scott from time to time out of the funds of Bell & Co. to the amount of £6,280 6s. 10d., which amount was reduced by repayments from time to time, leaving a balance on Aug. 31 due from Scott to Bell & Co. of £4,418 3s. 7d., making, together with the balance due at the end of 1809, the sum of £9,495 16s. 5d. Of the moneys so advanced to Scott in 1809 and 1810 the whole, except the aforementioned sum of £317 14s. 11d. was on account of payments to be made on policies of insurance underwritten by Scott on the partnership account between him and William Bell in pursuance of the verbal agreements so made between them, but no specific sum was applied for by Scott or advanced to him for any specific loss or payment on any particular policy. The advances of money were all made by William Bell by drafts in the firm of Bell & Co. on their bankers. No profits accrued upon the underwriting of such policies.

The question for the opinion of the court was whether under the circumstances above stated J. Bell, R. G. Beasley and Walter Bell, as surviving partners of William Bell were, or R. G. Beasley as administrator of the estate and effects of the said William Bell was, entitled to prove under the commission of bankruptcy issued against William Scott the whole or any and what part of the sum of £9,495 16s. 5d., the balance remaining unpaid of the moneys advanced by William Bell to Scott.

Wetherell, for the parties claiming to prove under the commission, as to the balance of £317 14s. 11d. said that it could not be affected by the illegality of the contract between William Bell and Scott, having been incurred before the existence of that contract. As to the remaining balance he said it would be hard to implicate the other partners in the transaction because one of the partners made the advances out of the partnership funds for the purposes of his own private speculation. He urged that there was no case like the present where the money had been held not recoverable by the other partners. In *Sullivan* v. *Greaves* (1), *Mitchell* v. *Cockburne* (2), *Aubert* v. *Maze* (3), and *Booth* v. *Hodgson* (4), it would be found that the actions were brought either for the recovery of losses paid or of profits arising out of the illegal partnership so that in those cases to have permitted the plaintiffs to recover would have been to have enforced those very agreements which the law had prohibited. But this claim was not to enforce the agreement. It was collateral to it, and it had never been decided that a loan of money, the object of which was only in an executory sense for illegal purposes, might not be recovered back. If, indeed, a specific sum had here been lent on a specific policy for the payment of a loss accrued under it, that might have been different, but the Case negatived that, and showed that the loan was a floating loan for general purposes. It was not even stated that it was applied to those purposes. But granting that some part of it was so applied, the parties claiming would be entitled to the residue. Suppose A. had advanced £10,000 to B. on an illegal concern between them, and B. expended only £5,000, would it not be against conscience to allow B. to retain the residue? Or suppose A. had advanced the money partly on a legal and partly on an illegal concern, could B. refuse to account for the whole?

In *Lacaussade* v. *White* (5) it was held that money paid upon an illegal consideration might be recovered back, and though in *Howson* v. *Hancock* (6) the court resolved otherwise, that was because there the money had been paid over by consent. In *Steers* v. *Lashley* (7), where LORD KENYON would not permit the plaintiff to recover on a bill of exchange given for the differences paid in a stock-jobbing transaction, yet he said that

> "if the plaintiff had lent this money to the defendant to pay the differences, and had afterwards received the bill in question for that sum, then according to the principle established in *Petrie* v. *Hannay* (8) he might have recovered,"

thereby recognising the possibility of a contract's existing collateral to the illegal contract. In *Mitchell* v. *Cockburne* (2), EYRE, C.J., adverting to *Faikney* v. *Reynous* (9) observes:

> "that those cases were one step removed from the illegal contract itself, and did not arise immediately out of it."

That is the description of the present case; it is a contract collateral to, or rather independent of, the original transaction.

Puller, contra, was stopped by the court.

LORD ELLENBOROUGH, C.J.—If there were any possibility of separating the guilty from the innocent partner, the court would gladly have caught hold of any circumstance for that purpose. This, however, must be considered as if the claim were instituted in the name of all the partners for the benefit of the delinquent partner as well as the rest.

The question, then, comes to this, whether these advances could be recovered from Scott, the party to the illegal adventure. How was the money advanced? If, as it has been contended, this were a loan of money on account generally, there would have been much in the argument, but it was not an advance for general purposes. It was for the very purpose of carrying into effect this illegal traffic and concern between the partners. It was argued as if the purpose for which the money was first advanced was equivocal, that it was only upon Scott's account and for his accommodation, but the latter part of the Case expressly states that the whole, except the sum of £317 14s. 11d., was on account of payments to be made on policies underwritten by Scott on the partnership account between himself and William Bell, although no specific sum was applied for or advanced to Scott in respect of loss or payment on any particular policy. I take it for granted that this is the usual way in which one partner makes advances to another, and this was not a transaction, as it has been put in argument, of a mixed nature, combining a legal as well as an illegal object to the former of which these advances might be ascribed, but the whole was illegal. Nor does this case fall within *Petrie* v. *Hannay* (8), and *Faikney* v. *Reynous* (9), as they were described by EYRE, C.J., as being one step removed from the illegal contract; it is to carry into effect the illegal contract itself. Under these circumstances I think an action could not be maintained to recover back these advances.

It is unnecessary to go through *Mitchell* v. *Cockburne* (2) and *Aubert* v. *Maze* (3). This is clearly an attempt to recover back money advanced for the furtherance and in the very execution of an illegal contract. If it were recoverable, so might be money advanced for the purpose of carrying on a smuggling transaction. These remarks do not apply to the sum of £317 14s. 11d., which was advanced before this illegal partnership was entered into.

LE BLANC, J.—The single fact stated puts an end to the argument, for it is stated that the advances were on account of payments to be made on policies of assurance, which amounts to the same thing as if they had been made on a particular policy.

THE COURT sent the following certificate: This case has been argued before us by counsel. We have considered it, and are of opinion that J. Bell, R. G. Beasley,

and Walter Bell, as surviving partners of William Bell, are entitled to prove for £317 14s. 11d., and no more, of the balance remaining unpaid of the money advanced by William Bell to W. Scott, under the commission issued against W. Scott, and that R. G. Beasley, as administrator of the estate and effects of William Bell, is not entitled to prove anything under the said commission.

KNOWLES *v.* HAUGHTON

[Rolls Court (Sir William Grant, M.R.), July 7, 1805]

[Reported 11 Ves. 168; 32 E.R. 1052]

Partnership—Account—Partnership engaged in illegal transactions—Action for account—Competency.

An action will not lie for an account of the profits of a partnership engaged in illegal transactions, e.g., underwriting a partnership to carry on which was formerly illegal under a statute of 1719, since repealed.

Notes. Considered: *Ewing* v. *Osbaldiston* (1837), 2 My. & Cr. 53. Referred to: *Wallworth* v. *Holt* (1841), 4 My. & Cr. 619.

As to illegal partnerships, see 28 Halsbury's Laws (3rd Edn.) 494–497; and for cases see 36 Digest (Repl.) 450, 451.

Cases referred to:

(1) *Watts* v. *Brooks* (1798), 3 Ves. 612; 30 E.R. 1181, L.C.; 29 Digest (Repl.) 562, *3790.*

(2) *Sullivan* v. *Greaves* (1789), Park on Insurance.

(3) *Mitchell* v. *Cockburne* (1794), 2 Hy. Bl. 379.

Bill to establish a partnership between the plaintiff and the defendant in the business of brokers and underwriters, praying an account and payment of a moiety of the profits.

The plaintiff adduced evidence to prove the partnership, which was denied by the answer, the defendant stating that the plaintiff was merely employed as a clerk though the defendant allowed him half the profits of the underwriting business and that the insurance business was conducted in the sole name of the defendant, and insisting that the partnership, as underwriters, could not legally subsist, and, if a loss should be incurred in that business, the defendant could not charge the plaintiff with, or compel payment of, a moiety of the loss. The plaintiff admitted that it was understood between them that he would be answerable for a moiety of the losses, if any, upon that account.

Richards and *Leach*, for the plaintiff, cited *Watts* v. *Brooks* (1), and argued that the object of the statute (6 Geo. 1, c. 18, s. 12), was only to avoid the contract as against the assured, and, that the statute was satisfied by the appearance of only one name against whom alone the action could be brought.

Romilly and *Hart*, for the defendant, denied the law of that case upon the authority of *Sullivan* v. *Greaves* (2), and *Mitchell* v. *Cockburne* (3), contending that there could be no distinction upon the statute between law and equity.

SIR WILLIAM GRANT, M.R., expressed his approbation of the late cases, observing, that he had always found it difficult to reconcile the distinction in *Watts* v. *Brooks* (1) to his mind. As to the circumstance that the name of the defendant

alone appeared, if the other insurers could compel a contribution, the assured had the security of their capital, and any other construction would do away the effect of the statute in favour of the companies.

Decree dismissing so much of the bill as sought an account of the profits of the underwriting business.

FREELAND AND ANOTHER *v.* GLOVER

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), June 9, 1806]

[Reported 7 East, 457; 6 Esp. 14; 3 Smith, K.B. 424; 103 E.R. 177]

Insurance—Marine insurance—Policy—Validity—Full disclosure by assured of all material circumstances—Request by underwriters for further information.

In all cases of marine insurance it is necessary that there should be a full and fair disclosure of all the material circumstances affecting the actual state and condition of the ship at the time of the insurance effected. Reference to previous documents or other matters may place on the underwriters the need to make further inquiries and ask for further information, and, if they fail to do so, the court may take the view that there has been no concealment of anything material.

Notes. As to avoidance of a policy for non-disclosure, see 22 Halsbury's Laws (3rd Edn.) 110–121; and for cases see 29 Digest (Repl.) 191 et seq.

Case referred to:

(1) *Haywood* v. *Rodgers* (1804), 4 East, 590; 102 E.R. 957; sub nom. *Heywood* v. Rodgers, 1 Smith, K.B. 289; 29 Digest (Repl.) 197, *1370.*

Action on a policy of insurance on goods on board the ship *Neptune* "lost or not lost, at and from 24 hours after her arrival at her place of trade on the coast of Africa, during her stay and trade on the coast of Africa and African islands, and at and from thence to Liverpool:" at a premium of 25 guineas per cent.

The declaration contained the usual averment that the ship, with the cargo, was, after twenty-four hours from her arrival at her first place of trade on the coast of Africa, to wit, on June 16, 1800, in good safety at a place authorised for the ship to be at within the risk and meaning of the policy. It then stated a loss by the perils of the sea in the course of the insured voyage homewards. The cause was tried at Guildhall before Lord Ellenborough, C.J., when a verdict was found for the plaintiffs. A rule nisi having been obtained for setting aside the verdict and having a new trial, the only question was whether at the time of the insurance effected material information had been concealed from the underwriters.

It appeared that the *Neptune* sailed from Liverpool on a general trading voyage to the coast of Africa in June, 1799, and arrived at Gaboon on that coast on Aug. 7 following. On Feb. 15, 1800, Skelton, the master, wrote the following letter, dated Bimbia, to Tipping one of his owners, the suppression of which as well as of information of the time when the ship first arrived on the coast from the knowledge of the underwriters was the subject of complaint:

"Sir, I am sorry to inform you of the melancholy circumstance that happened on board the *Neptune* off Cape St. John's, close to the river Danger. Captain Fisher, finding all the ship's crew in a very bad fever, thought it proper to stand inshore and get some stock for the sick. Three canoes came off, and we bought fowls, etc., but the blacks began to be very impudent. The blacks took a

A cutlass from the captain and killed him on the spot, and stabbed him in twenty places. They killed the steward and one of the landsmen: the rest of the people all very much wounded. There were a good many of the blacks killed on the deck by the boatswain and two of our men; all the rest of our men were in a very dangerous fever. The second mate died four days after of a fever and his wound together. At this time only six hands are left alive. Our condition is to B be pitied. We were fourteen days at sea before we reached Bimbia where the *Neptune* is lying. I have buried the boatswain since my arrival here. I am sorry to inform you that there are only five left alive in the ship, and I cannot get one man here, nor in Calabar, nor at Camaroons, and what to do I do not know. We are all very sickly. We have on board at present about 6 tons of ivory, 6 puncheons of palm oil, 2 puncheons of pepper, 2 casks of beeswax, till C I get to Gaboon where our wood is. The blacks plundered the ship of all our clothes and several other things which I cannot mention: and our cabin stores are all done; but that I do not mind, if I only had men to get the ship to Gaboon, to get our wood. (Signed G. Skelton.)"

The following letter was the only intelligence communicated to the underwriters D at the time of effecting the insurance in September, 1800. It was from Skelton to Mr. Tipping, dated Gaboon River, April 21, 1800.

"Sir, This comes to inform you that we arrived in Gaboon River on Mar. 24, and have only got on board one-third of our red-wood, and the most part by our long boat. The natives on shore, finding us weakly handed and our goods taken from us, do as they please. I have nine men on board now; but our provisions E run very low. You may think the trouble and fatigue I have with the natives on shore; and I do not expect to get all my wood till the latter part of next month: then you may expect my sailing. The wood in general is in very small billets. The ivory, palm oil, beeswax, and pepper, I made mention of in my last letter. I got 5,000 billets of choice wood from Prince William side, every billet as big as four of the billets at Batavia side. It is a very hurt to me staying F so long here; but I do my endeavour to get the wood off. (Signed G. Skelton.)"

Sir Vicary Gibbs and *Littledale*, for the plaintiffs, showed cause against the rule, and argued that the last letter, containing the latest intelligence, was the most material to be shown to the underwriters, as the question was whether a true representation of the state of the property at the time of the insurance effected, as far as G it was known to the assured, was made and not whether information of prior difficulties or dangers which had been overcome and were passed had been suppressed. There was a reference in the last to the former letter, which was sufficient notice to the underwriters to enable them to call for that letter if they wished for further information respecting the ship.

Park and *Morice*, for the defendant, supporting the rule, contended that the H suppression of the first letter was material, not only because it explained all the causes of the distress represented generally in the second letter, but because it might be inferred from the latter that the ship had first arrived on the coast on Mar. 24 instead of having been there many months before. It was not enough that it referred to a former letter, for that might have been written after the ship's arrival in Gaboon River on Mar. 24, and it was the first letter only which referred I to prior transactions. Of these it was important that the underwriters should be informed, as the policy was to take effect from an antecedent time, and average losses might have been incurred. The second letter did indeed mention the ship being weakly handed, but it said nothing as to the murder of the captain and several of the crew, the sickliness of the rest, and the difficulty of getting more hands, all of which enhanced the future danger and would have made the ship almost uninsurable. At least the underwriters ought to have had an opportunity of exercising their judgment upon it. This case was not like *Haywood* v. *Rodgers*

(1), where it was ruled that, there being an implied warranty by the assured of sea worthiness in every assurance, it was not necessary for him to disclose any facts, unless demanded, which formed an ingredient in seaworthiness.

LORD ELLENBOROUGH, C.J.—In every case of this sort it is necessary that there should be a full and fair disclosure of all the material circumstances affecting the actual state and condition of the ship at the time of the insurance effected. The question is whether that has not been made in this case, taking it for granted, as we must, that the underwriter was before cognisant of the course of the trade which was the subject of insurance. No underwriter is so little conversant with the African trade as not to know that it consists in truck and that the ships engaged in it always continue for some time upon the coast, in some instances, as we learn from cases which have come before the courts for above a year.

Here the assured laid before the underwriters the latest account of the ship in a letter dated from Gaboon Rover on April 21, 1800, by which it appeared that the ship arrived in Gaboon River on Mar. 24 preceding, and had then on board part of her homeward cargo. It was open to them to inquire, if they thought it material, whether that were her first arrival, or how long before she had arrived on the coast, for the insurance was during her stay and trade there, but the fair inference from the letter is that she had been upon the coast for some time before, for the writer refers to different articles of the cargo of which he had made mention in his last letter. It is not even said his first letter, so that there might have been several written before, but at least it referred to the other letter, the letter in question. Then the writer states that the natives on shore, finding them weakly handed, did with them as they pleased. It must be collected from this that they were at the mercy of the natives, and consequently that the risk was hazardous, and this indeed is evinced to have been the feeling of the underwriters by the largeness of the premium. Then the writer says, that he has nine men on board "now," but that their provisions run very low. What is that but contrasting the then number of his crew, as if greater than it had been before, with the present low state of his provisions. He then discloses the continuing differences with the natives, and afterwards refers to the mention he had made in his last letter of different articles of his homeward cargo, importing that he had in that letter made a full disclosure of all that related to it.

If then the underwriters wished for further information as to prior circumstances, they should have asked for that letter, of the existence of which they thus had notice, and if, when demanded, it had been withheld from them, the observation made in *Haywood* v. *Rogers* (1) might have applied. Here, however, the assured disclosed everything which he knew as to the existing state of the ship at the time. It was a true statement of its then actual situation; and it suggests a former communication so as to put the underwriters upon further inquiry if they thought it material. The ship was stated to be weakly-handed, which was the material fact, and whether that had been before occasioned by the sabre or by sickness could not then signify. The former letter would not have communicated in substance more than the underwriters had information of. There was, therefore, no concealment of anything material.

GROSE, J.—The policy is impeached upon the ground of concealment of material information from the underwriters, but it is admitted that the letter which was shown to them disclosed the actual state of the ship at the time it was written and refers to a former letter as showing its former different condition. The writer mentions that the natives "finding them weakly-handed and their goods taken from them" (which evidently alludes to some former communication), did as they pleased with them, and he says that he has nine men "now," which, contrasted as it is with the then low state of their provisions, shows that their condition in respect of the number of the crew was better than it had been. The underwriters might have seen the former letter referred to, if they had thought proper to call for it. I cannot say,

A therefore, that there has been any unfair concealment, when the letter which was communicated to them contained a fair account of the then state of things, and they had, or might have had, if they had thought it material, the account of the prior condition of the ship.

LAWRENCE, J.—On the first reading of the letter shown to the underwriters I B thought it implied that the ship had only arrived on the coast on Mar. 24, but on looking again at it no such inference can be drawn from it. It certainly cannot be necessary in order to effect an insurance to detail to the underwriters all the previous proceedings of the ship, but it is sufficient that the letter shown to them represented truly the then state of the ship and referred to the former letter. [He here commented upon the terms of the second letter as showing its reference in different C parts to a former account, and particularly from its stating the arrival of the ship at Gaboon River (not saying "on the coast") on Mar. 24; that their provisions were so much reduced; that the several articles of lading enumerated had been taken in; and that they expected to sail homewards at the end of the next month, which was supposing that their stay and trade on the coast would not be above two months; that the underwriters must have collected that the letter was written D towards the latter end of such a voyage, which is known to be of several months duration; and that they could not have understood that the first arrival of the ship on the coast of Africa was on Mar. 24.] If, then, the underwriters wished for further information as to the time when she first arrived, or of the circumstances which had occurred to place her in the condition described in the second letter, it was their own fault that they did not call for it, when the letter they saw referred E to a former letter.

LE BLANC, J. The ground of the motion for a new trial was that, as the underwriters were to be upon the policy twenty-four hours after the ship's arrival on the coast of Africa, it became material to them to know whether they had been a twelvemonth upon the policy, or only from Mar. 24 preceding the insurance in September. The policy, however, was not at and from the river Gaboon, but at and F from the ship's arrival on the coast of Africa, and, therefore, the mention of the ship's arrival in that river on Mar. 24 did not imply that it was her first arrival on the coast, and the comments which have been made on the contents of the second letter show that the underwriters could not have collected that from it. As that letter referred to the former one, the underwriters, if they wished to know particularly when the ship had arrived on the coast, might have called for the former letter, G though it was fairly to be inferred from the circumstances mentioned in the letter which was shown to them that the ship had arrived on the coast before Mar. 24.

Rule discharged.

LINDSAY *v.* LYNCH

[Lord Chancellor's Court in Ireland (Lord Redesdale, L.C.), June 7, 1804]

[Reported 2 Sch. & Lef. 1]

Equity—Statute of Frauds—Relaxation of provisions—Policy of court.

Decisions tending to relax the provisions of the Statute of Frauds ought not to be carried further by courts of equity: per Lord Redesdale, L.C. (Ire.).

Specific Performance—Contract—Uncertainty as to terms—Refusal of decree.

If there be uncertainty as to the terms of an agreement, the court will not make an order for its specific performance.

Notes. The Statute of Frauds, 1677, has been partly repealed, but some of its provisions have been re-enacted by, e.g., ss. 53 to 55 and s. 40 of the Law of Property Act, 1925 (20 Halsbury's Statutes (2nd Edn.) 551–554, 500).

As to the equitable jurisdiction of specific performance, see 14 Halsbury's Laws (3rd Edn.) 472; and for cases see 44 Digest (Repl.) 6 et seq.

Cases referred to:

(1) *Mortimer* v. *Orchard* (1793), 2 Ves. 243; 30 E.R. 615, L.C.; 30 Digest (Repl.) 440, *822.*

(2) *Brodie* v. *St. Paul* (1791), 1 Ves. 326; 30 E.R. 368; 30 Digest (Repl.) 440, *821.*

Bill praying specific performance of an agreement to make a lease to the plaintiff of the farm of Carrowkeel, for three lives.

The plaintiff had held the lands under an agreement with the defendant's father at a rent of £21 per annum, for a term of thirty years which expired in November, 1789, and the bill stated that in September, 1789, the defendant (who had become entitled to the reversion and inheritance) entered into a parol agreement with the plaintiff to grant him a lease for three lives at the annual rent of £47 4s., under which the plaintiff had ever since enjoyed and paid rent. The agreement was proved by John Blake, who deposed that

"at a fair in September, 1789, he had been present, at the instance of plaintiff and the defendant, at a conversation between them, the substance of which was that the defendant was to give a lease to the plaintiff for three lives, at the rent of 16s. per acre; that in the course of their agreement they had a difference of 2s. per acre, and that the deponent proposed to them to split the difference, upon which they closed and struck hands. No further agreement took place in the deponent's presence, but, he afterwards having gone to the defendant as a mutual friend with some rent from the plaintiff concerning which there was some dispute, the defendant alleged that his father advised him not to give a longer term than the plaintiff's own life, whereupon the deponent replied: 'Could you think of breaking your solemn agreement?' The brother-in-law of the defendant, who was present at the conversation cried shame of the defendant, and the defendant then declared he would confirm the agreement, and wrote a letter by the deponent to the plaintiff to that effect."

This letter was proved:

"February 15, 1791. Dear Sir, I send a receipt by Mr. Blake for the money he gave me, and am ready when Mr. Lawlor my attorney, comes from Dublin, to execute the lease according to our agreement, having the improvements made, or a note to be given for the amount stopped for them till they are made."

The plaintiff, satisfied with this, proceeded to make the improvements, which consisted of a wall or fence of a particular description which ought to have been made during his former term and for which he had had an allowance. The plaintiff

again applied for a lease on which defendant wrote a note to the plaintiff enclosing a copy of the agreement which he had sent to Lawlor with instructions to prepare leases, and which contained these words:

> "I have agreed with Mr. Lindsay for the farm of Carrowkeel at 16s. per acre. On his asking a lease of three lives from the first day of November, have promised him his own absolutely, but would not promise him more without consulting my father and having his approbation thereof."

The bill stated that this was an evasion and misrepresentation of the agreement, that the agreement was absolute and unequivocal, and that the life of plaintiff was not at all mentioned nor in contemplation of the parties.

On Feb. 10, 1801, the plaintiff filed his amended bill, still insisting on the agreement for three lives, and putting in issue other letters of the defendant. In one of them, dated May 17, 1791, he said:

> "I do not recollect that I have undertaken to get Mr. Lawlor to fill the leases; nor should I think it proper in me to get him to do so until you were present: but the moment he comes here, if you authorise me I shall with the greatest pleasure get them ready."

Another, dated Oct. 23, 1791, contained these words:

> "Mr. Lawlor informed me you were speaking to him about the leases at Galway, and that you mentioned that the walls would be completed within a month from that time. Mr. Lawlor desires me to inform you that he will be in readiness to fill them any day from Kilmaine fair until Nov. 2 that you please to appoint."

The amended bill charged that the walls and fences were finished as far as it was practicable, and it prayed a specific execution of the agreement for a lease for three lives, as was prayed by the original bill, or if the plaintiff should not appear under the circumstances of the case entitled to a lease for three lives, it prayed that he might be decreed to a lease for the term of his own life.

The answers both to the original and the amended bill denied that any agreement for a lease for three lives had ever been made. They admitted a promise for a lease for the life of the plaintiff, and alleged that the defendant had offered to execute such a lease upon the plaintiff's performing what he had agreed on his part to do, but, he having refused to accept such lease, the defendant insisted that he was totally exonerated and discharged from any claim of the plaintiff on account of the agreement; and he relied on the Statute of Frauds. The answer stated that Mr. George Lawlor Lynch had been present, as well as Mr. Lawlor, at the conversation at the fair in September, 1789, and Mr. Lynch, being examined as to that conversation, deposed that the defendant proposed to the plaintiff to agree to execute a lease of the lands in question for his, the plaintiff's, life, or for that of his son (the witness not being sure whether it was for one or both of the said lives), and that the proposal was accepted by the plaintiff, and a mutual agreement then took place. Lynch further deposed that he was present some time in the year 1791 when the defendant offered to execute a lease to the plaintiff for the term of his own life, which plaintiff refused to accept.

Bunston, *Ball* and *Williams* for the plaintiff.
Ponsonby and *Conmee* for the defendant.

LORD REDESDALE, L.C.—I am not disposed to carry the cases which have been determined on the Statute of Frauds any further than I am compelled by former decisions. That statute was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest to any person who has been in the habit of practising in courts of equity than that the relaxation of that statute has been a ground of much perjury and much fraud. If the statute had been rigorously observed, the result would probably have been that few instances of parol agreements would have occurred. Agreements would, from the necessity of the case,

have been reduced to writing, whereas it is manifest that the decisions on the subject have opened a new door to fraud, and that under pretence of part-execution, if possession is had in any way whatever, means are frequently found to put a court of equity in such a situation, that without departing from its rules it feels itself obliged to break through the statute, and I remember it was mentioned in one case in argument as a common expression at the Bar, that it had become a practice "to improve gentlemen out of their estates." It is, therefore, absolutely necessary for courts of equity to make a stand and not carry the decisions further and this is a strong case for adherence to that principle.

The circumstances of the present case are these. Lindsay, the plaintiff, was in possession, and was under an engagement which bound him to make a fence and wall of a particular description for which he was to have an allowance. They ought to have been made during the term of the lease which he had, but they were not completed during the term. The allowance was made notwithstanding, and a treaty was clearly entered into for a further term. On the part of the plaintiff it is alleged that this ended in an agreement for a lease for three lives at a rent of 16s. per acre, and the defendant says that it ended in an agreement for a lease for one life and he did not agree for three lives. Mr. Blake's deposition was an answer to an interrogatory which required him to state all the particulars on the subject. There is also the evidence of Lawlor Lynch on the same subject. He was present in September, 1789, when the defendant offered to give a lease for one or two lives, which was accepted by the plaintiff. Lynch is as well deserving of credit as Blake, and it is evident that he did not understand that there was any positive agreement for three lives. The defendant positively denies such an agreement, though he admits that he did make an agreement for one life, and says he would not do more without his father's consent. Is not the fair result of all this that the lives were not positively agreed on?

[His Lordship went through the written evidence, observed that it amounted to no more than proof of an agreement in general, but not of an agreement for a lease for three lives, and continued:] It is clear from the evidence of Lawlor Lynch, who was present at the time of the conversation stated by Blake, that he never understood the lease was to be for three lives. His evidence is of an agreement for one life, the plaintiff's or his son's, or both, he was uncertain which, and further that at some time in 1791 he was present when the defendant offered to execute a lease to the plaintiff for the term of his own life which the plaintiff refused to accept. It is clear, therefore, that at this time the defendant insisted that his contract was for a lease for one life only, and that Lawlor Lynch did not conceive him to have agreed to a lease for three lives, and it is sought by the parol testimony of Blake to compel him to execute a lease for three lives in contradiction to his answer and the evidence of Lawlor Lynch. This shows the great wisdom of the statute, and the danger of ever departing from it.

If there had been acts of considerable expenditure, I could do no more than was done in *Mortimer* v. *Orchard* (1), for the result of all this evidence is that, as far as we may judge from the impression on the mind of Lynch, he never made an agreement for more than one life, and the evidence of Blake is too loose to set up against the oath of the defendant corroborated by the oath of Lawlor Lynch. When a plaintiff applies to the oath of a defendant, the latter has a right to have that circumstance taken into consideration. At the utmost it would amount to this, that it was uncertain what were the terms of the agreement, and if there be an uncertainty, an agreement even though reduced to writing cannot be carried into execution. In *Brodie* v. *St. Paul* (2), the whole agreement was reduced into writing, but there was a reference to certain terms contained in another paper, and it was uncertain whether the whole of that paper had been read to the plaintiff, which uncertainty was sought to be supplied by parol evidence. It being matter of uncertainty, it is not a case in which the court can say that the defendant had no right in conscience to protect himself by the Statute of Frauds, because it is

A the very case in which the legislature meant that he should so protect himself, that is, from being by parol evidence obliged to execute an agreement into which he did not mean to enter.

The statute puts it completely out of the power of the court to execute the agreement for a lease for three lives, which is the agreement set up. What is the ground on which a plaintiff is allowed to give parol evidence of an agreement, it B appearing clearly that that very agreement was in part executed. Here, it is beyond doubt, it is admitted by the defendant, that there was an agreement for a lease for one life, and payment of rent, which is the only circumstance of part execution, is perfectly consistent with that agreement. That being so, there is no case to admit proof of a further agreement. Therefore, the Statute of Frauds prohibits my entering into the evidence of Blake on the subject, because it is not necessary that C that evidence should be received in order to avoid doing injustice to the plaintiff. His possession has been a lawful possession, not that of a trespasser, and it is not pretended that the rent was of that description that it would not have been given except for a lease for three lives. Under these circumstances, therefore, I am clearly of opinion that that part of the bill which prays a lease for three lives must be dismissed.

D [His Lordship dealt with a point of pleading which does not now call for report, and said that the Bill would be dismissed.]

Bill dismissed.

E

LEWIS AND ANOTHER *v.* MADOCKS

F [Lord Chancellor's Court (Lord Eldon, L.C.), February 9, 10, 1803]

[Reported 8 Ves. 150; 32 E.R. 310]

Specific Performance—Contract—Covenant to settle after-acquired property—Change in character of property.

The court will decree specific performance of a covenant to settle after- G acquired property even where the character of the property mentioned in the settlement has been altered, as where a covenant in a marriage settlement related to the settlement of personalty and the personalty was afterwards employed in the purchase of realty.

Notes. Considered: *Re Clarke, Coombe* v. *Carter* (1887), 35 Ch.D. 109; *Re Bendy, Wallis* v. *Bendy*, [1895] 1 Ch. 109; *Churston* v. *Buller* (1897), 77 L.T. 45; H *Finlay* v. *Darling*, [1897] 1 Ch. 719. *Re Dowdings' Settlement Trusts, Gregory* v. *Dowding*, [1904] 1 Ch. 441. Applied: *Re Reis, Ex parte Clough*, [1904] 2 K.B. 769. Referred to: *Fortescue* v. *Hennah* (1812), 19 Ves. 67; *Logan* v. *Wieholt* (1833), 7 Bli. N.S. 1; *Wellesley*, v. *Wellesley*, [1835–42] All E.R. Rep. 223; St. *Aubyn* v. *Humphreys* (1856), 22 Beav. 175; *Fyfe* v. *Arbuthnot* (1857), 3 Sm. & G. 547; *Ford* v. *Tynte* (1865), 34 L.J.Ch. 452; *Re Clint, Ex parte Bolland* (1873), I L.R. 17 Eq. 115; *Tailby* v. *Official Receiver*, [1886–90] All E.R. Rep. 486; *Re Clutterbuck's Settlement, Bloxam* v. *Clutterbuck*, [1905] 1 Ch. 200; *Mackenzie* v. *Allardes*, [1905] A.C. 285.

As to contracts of which specific performance will be granted, see 36 Halsbury's Laws (3rd Edn.) 276–280; and for cases see 44 Digest (Repl.) 115 et seq.

Cases referred to:

(1) *Randall* v. *Willis* (1800), 5 Ves. 262; 31 E.R. 577; 40 Digest (Repl.) 524, *344.*

(2) *Jones* v. *Martin* (1798), 5 Ves. 266, n.; 6 Bro. Parl. Cas. 437; 8 Bro. Parl. Cas. App. I 242; 31 E.R. 582, H.L.; 40 Digest (Repl.) 528, *382.*

(3) *Turner* v. *Morgan* (1803), 8 Ves. 143; 32 E.R. 307, L.C.; 36 Digest (Repl.) 410, *13.*

Bill for a declaration that the first plaintiff was entitled in equity to certain estates and other relief.

Richard Madocks, before his marriage with Ann Mathews, executed a bond, dated Dec. 30, 1770, in the penalty of £5,000, reciting the intended marriage and that Madocks was to receive the sum of £100, together with certain goods, household stuff and furniture, therein mentioned, as the marriage portion. These goods, household stuff, and furniture, with certain clothes and wearing apparel of Ann Mathews, it was agreed should at her decease be disposed of as therein mentioned. It was further recited that the said sum of £100, the marriage portion of Ann Matthews, so given by her father, should, if there should be no issue, remain to Richard and Ann Madocks, the survivor, and the executors, administrators, and assigns, of the survivor for ever. It was agreed that towards the support and maintenance of Ann Mathews, if she should survive her husband, as also for making a better provision for the issue of her body by Richard Madocks, he, Richard Madocks, his executors and administrators, would by deed or will convey, give, devise, and assure, all and singular his ready money, goods, chattels, personal estate and effects to and for the use and behoof of him, Richard Madocks, and Ann, his said intended wife, and the survivor of them, for ever, subject nevertheless to the payment of the sum of £300 immediately upon the decease of the survivor of them to and among such child or children of the body of Ann, as should be then living, in shares and proportions as such survivor should by deed or will limit, direct, or appoint. The condition of the obligation was, among other things, that, if Richard Madocks should deliver goods, etc., and pay sum of £100, as therein mentioned and if he should well and sufficiently devise, convey, or assure, all and singular such goods, chattels, personal estate and effects, that he should at any time during the joint lives of him, Richard Madocks and Ann, his then intended wife, be possessed of, to and for the use and behoof of him, Richard Madocks, and Ann, and the survivor of them both, for ever, but subject and liable and charged and chargeable with the payment nevertheless of the sum of £300 immediately upon the decease of the survivor of them both to and among such child and children of the body of said Ann by Richard Madocks begotten, as should be then living, in such shares and proportions as Richard Madocks and Ann should by deed or will appoint, then the said bond should be void.

The marriage took place soon afterwards. Richard Madocks at the time of the marriage had no real estate. In 1778 he contracted for the purchase of real estates for the sum of £1,600, which estates were by indentures of lease and release, dated Feb. 2, 1779, conveyed to a trustee in trust for Richard Madocks, his heirs and assigns for ever. Of the purchase-money £600 was his own money. The rest was borrowed, which debt he reduced by degrees so that only £521 remained due from him at his death on that account. He also laid out about £600 in erecting a dwelling-house, and in lasting improvements on the estates so purchased. He died in July, 1793, intestate and without issue. His widow obtained administration, and took possession of the estates purchased by her husband. In 1799 she married William Lewis. The brother and heir-at-law of Richard Madocks brought an ejectment, upon which the bill was filed praying that it might be declared that the plaintiff Ann Lewis, having survived Richard Madocks, was entitled in equity to the estates, and that the trustees might be directed to convey accordingly, or, if the court should be of opinion that the plaintiff was not absolutely entitled to the estates, that it may be declared that they were subject to and charged with the amount of the money laid out by Richard Madocks or the plaintiffs since his death in the purchase or improvement thereof. The bill alleged that the plaintiff

Mrs. Lewis had laid out £200 in improvements and had purchased other estates in the same parish.

The defendant Madocks by his answer claimed as heir-at-law of his brother, insisting that he was not precluded from purchasing real estate and leaving it to descend to his heir or otherwise disposing of it, but if he was by the bond precluded from converting such personal estate as he then had into real, yet it was competent to him to purchase real estate with any savings he might make and to leave such real estate to descend to his heir or otherwise dispose of it. He also claimed as a creditor of his brother, insisting that, before the plaintiffs could retain any part of the personal estate, they must discharge the debts, and he submitted that they were not entitled to any money laid out in repairs or improvements since the death of Richard Madocks.

Richards and *Roupel* for the plaintiffs.
Romilly and *Bonsall* for the defendant.

Feb. 11, 1803. **LORD ELDON, L.C.**—I have looked into the cases, and have not found any like this. *Randall* v. *Willis* (1), which is principally referred to, involved a good deal of difficulty, and some of a species that I do not perfectly understand how the decree has disposed of. That was a case in which the articles were to have effect by attaching trusts upon that which was the personal estate at the date of the articles or which should be the personal estate at the end of three months after the marriage. It rested under those articles upon covenant but, being upon marriage, this court looked at it as if executed by an absolute conveyance and assignment. A settlement was executed after marriage, but it did not contain any covenant to prevent the husband from laying out such personal estate as was in his own dominion in land. I do not find that those subjects of property which would be comprised under the general description of all and singular his personal estate, of which he was possessed at the execution of the articles, were described by schedule or otherwise in any manner, so that they could be traced. It is reasonably clear that, when it was once actually determined that the property which was laid out in land was a part of the subject assigned by the settlement, there could be no difficulty in saying that personal estate at least must be called back, as clothed with a trust created by those articles or that settlement.

The course of the argument took quite a different turn, viz., that there ought to have been a covenant that whatever personal estate should be laid out in land that land should be considered as personal estate. In the cases upon the custom of London it is very familiar, for the purpose of avoiding questions whether personal estate is laid out in land in fraud of the custom, to have an express covenant that what is laid out in land shall be considered as personal estate to be disposed of according to the custom and statute law together direct. But that is a case of a different sort from *Randall* v. *Willis* (1), for the covenant there attaches from time to time upon all the husband acquires from the marriage to death. In that case the personal estate he had at the date of the articles was expressly made the subject of trusts in the settlement, bound, therefore, by the settlement, and the question did not at all attach upon that personal estate to be acquired between the date of the settlement and the death of the testator. Suppose the trustee there had got his hand upon the stock and all the other personal estate and retained them, they would be possessed by him as trustee for the uses of the articles and settlement, and there never could have been any question whether any creditors of the author of the settlement could touch it, being personal estate in the hands of the trustee, bound by the articles or settlement and not in any sense his personal estate. From the manner in which the decree is framed as to the account directed of the debts, I cannot collect whether those debts, when the account was taken, were to attach only upon such personal estate as was not included in the settlement, or, on the other hand, upon that personal estate also that was subjected to the uses of the settlement: viz., that, which he had at the time of the settlement.

But it is reasonably clear that, the court having once traced it and ascertained the subject of the settlement, that personal estate could not be available to creditors, particularly upon debts accruing afterwards.

Jones v. *Martin* (2) was of quite a different nature, one of those loose cases of a covenant to leave to one child an equal share of the personal estate, and it was held by the House of Lords to mean only to leave the covenantor fully at liberty to dispose, providently or improvidently, of his personal estate, such as it was, or might be till his death, provided he disposed of it absolutely as against himself, but if he did not strip himself absolutely of the interest in the property, he could not by reserving an interest for life and giving to some one favourite child defeat the covenant. That it would be a fraud upon it.

That case and *Randall* v. *Willis* (1) do not bear upon this, for this is that case which in the discussion of *Randall* v. *Willis* (1) was looked upon as one that in all probability never would occur, viz., a covenant to settle all the personal estate he should at any time be possessed of, attaching upon each article that he had and that from time to time he should become possessed of. It is very strong for a court of equity to say that, because it is difficult to execute the covenant in particular cases that may occur, therefore it shall not be executed [see *Turner* v. *Morgan* (3)]. The same objection was taken there: is it to attach upon every chair and table, and so on? That difficulty occurred equally in *Randall* v. *Willis* (1), but it was got over thus, that if the court finds a solid subject of personal property, they would attach it rather than render the covenant perfectly nugatory though they did not know what to do with the argument showing the absurdity of it. This case affords another difficulty which made me wish to understand more correctly *Randall* v. *Willis* (1), that is the manner of purchasing by contracting a debt. Who is to satisfy the claim of the creditor in a question between the wife and the heir? Suppose the husband, possessing £600, had borrowed £600, bought an estate of the value of £1,200, and died at that moment. If the former sum is to answer for the money borrowed, the wife gets nothing by the covenant under such circumstances. I incline to think that the money borrowed must be considered personal estate, of which he was possessed. At least that point is fit for discussion, that, having borrowed the money he became possessed of it, that all which he had possessed became subject to the uses of the settlement, but as personal estate, and then she would with propriety be called upon to pay the £600, for she would have the other for her own benefit. I shall, therefore, direct an inquiry, something like that in *Randall* v. *Willis* (1).

Declared that the personal estate of which the husband was possessed during the coverture, was liable to the bond. An inquiry directed whether any and what part of the personal estate whereof he was possessed was laid out in any and what lands, and under what circumstances, and whether, if it appeared that any part of the money advanced upon any such purchases was borrowed, the husband in his life paid off the whole, or any and what part; what debts he owed at his decease, and what, if any, remained unsatisfied; what personal estate he left at the time of his death, and, what money had been laid out by the plaintiff since she had been in possession; distinguishing what had been laid out in lasting and substantial improvements.

ANTROBUS *v.* SMITH

[Rolls Court (Sir William Grant, M.R.), August 7, 1805]

[Reported 12 Ves. 39; 33 E.R. 16]

Gift—Incomplete gift—Revocation—Power of donor to revoke at any time.

So long as a gift is incomplete, e.g., for want of delivery, the donor has a locus poenitentiae and may revoke the gift at any time.

Gift—Incomplete gift—Completion—Holding donor to be trustee for donee.

The court will not assist in completing an incomplete gift by holding that the alleged donor is a trustee for the alleged donee unless it is clearly established that the donor intended to make himself a trustee.

Notes. Considered: *Edwards* v. *Jones* (1836), 1 My. & Cr. 226; *Airey* v. *Hall* (1856), 3 Sm. & G. 315. Referred to: *Cotteen* v. *Missing* (1815), 1 Madd. 176; *Dillon* v. *Coppin* (1839), 4 My. & Cr. 647; *McFadden* v. *Jenkyns* (1842), 1 Hare, 458; *Meek* v. *Kettlewell*, [1843–60] All E.R. Rep. 1109.; *Kekewich* v. *Manning* (1851), 1 De G.M. & G. 176; *Bridge* v. *Bridge* (1852), 16 Beav. 315; *Voyle* v. *Hughes* (1854), 2 Sm. & G. 18; *Parnell* v. *Hingston* (1856), 3 Sm. & G. 337; *Cheale* v. *Kenward* (1858), 3 De G. & J. 27; *Pearson* v. *Amicable Assurance Office* (1859), 27 Beav. 229; *Gilbert* v. *Overton* (1864), 4 New Rep. 420; *Moore* v. *Moore* (1874), L.R. 18 Eq. 474; *Re Shield*, *Pethybridge* v. *Burrow* (1885), 53 L.T.S.

As to incomplete gifts, see 18 Halsbury's Laws (3rd Edn.) 396–400; and for cases see 25 Digest (Repl.) 580 et seq.

Cases referred to:

(1) *Bonham* v. *Newcomb* (1684), 2 Vent. 364; 1 Vern. 232; 86 E.R. 488; sub nom *Newcomb* v. *Bonham*, 1 Eq. Cas. Abr. 313; affirmed (1689), 1 Vern. 233, n., H.L.; 35 Digest (Repl.) 408, *1036*.

(2) *Colman* v. *Sarel*, *Sarel* v. *Colman* (1789), 3 Bro. C.C. 12; 1 Ves. 50; 29 E.R. 379, L.C.; 44 Digest (Repl.) 11, *41*.

Also referred to in argument:

Tate v. *Hilbert* (1793), 2 Ves. 111; 4 Bro. C.C. 286; 30 E.R. 548, L.C.; 25 Digest (Repl.) 600, *346*.

Miller v. *Miller* (1735), 3 P. Wms. 356; 2 Eq. Cas. Abr. 575; 24 E.R. 1099; 25 Digest (Repl.) 610, *439*.

Ward v. *Turner* (1752), 1 Dick. 170; 2 Ves. Sen. 431; 21 E.R. 234, L.C.; 25 Digest (Repl.) 606, *404*.

Disher v. *Disher* (1712), 1 P. Wms. 204; 24 E.R. 356; 20 Digest (Repl.) 395, *1158*.

Ward v. *Lant* (1701), Prec. Ch. 182; 2 Eq. Cas. Abr. 283; 24 E.R. 88; 47 Digest (Repl.) 126, *919*.

Ayliffe v. *Tracy* (1722), 9 Mod. Rep. 3; 2 P. Wms. 65; 2 Eq. Cas. Abr. 19, 50; 88 E.R. 277; 20 Digest (Repl.) 491, *2003*.

King v. *Cotton* (1732), 2 P. Wms. 674; 24 E.R. 912; 40 Digest (Repl.) 596 *997*.

Bill for an order to assign securities.

Gibbs Crawfurd, being entitled to ten shares of £100 each in the Forth and Clyde Navigation, wrote upon the receipt of one of the subscriptions, and signed, the following endorsement, dated Oct. 4, 1790:

"I do hereby assign to my daughter Anna Crawfurd all my right, title, and interest of and in the enclosed call and all other calls of my subscription in the Clyde and Forth Navigation."

Anna Crawfurd afterwards married John Antrobus, and died on June 18, 1793. Her father died in October in the same year, and her husband in April, 1794. Anna Crawfurd, the widow of Gibbs Crawfurd and mother of Mrs. Antrobus, died in 1797, and a short time after her death the elder of her two sons, both of whom

under the execution of a power of appointment given to her by the will of her husband took the residue of his personal estate, searching a closet in the country house of his father in Sussex, found the receipt above mentioned with the endorsement in a pocket-book which had belonged to his mother with other papers relating to his father's personal estate and securities for money due to him. A

This bill was filed by the brother and personal representative of John Antrobus praying that a proper assignment of the canal share might be executed, and that the receipts given on that account might be delivered up. The two sons of Mr. Crawfurd, by their answer, stated, and it was proved, that after the date of the endorsement on the receipt their father considered himself as owner of that share, and in 1791 and 1792 sat constantly as one of the committee and as a director, having no other interest in the navigation except that share or subscription. They also represented that the portion of £10,000 given by Mr. Crawfurd upon the marriage of his daughter was intended to be in lieu of all claims and demands whatsoever by her or her husband. They suggested that if the receipt, with the endorsement, was ever delivered to Anna Antrobus, some agreement, engagement or undertaking was entered into previously to or at the time of her marriage to replenish her right under it. B C

The plaintiff, by his answer to a cross-bill, stated that he was informed by his brother that in a conversation respecting the canal share Anna Antrobus said to her father: "You know, father, you gave me £1,000 of that stock," upon which he answered: "Yes: but you will recollect that I have since given you £10,000, which has done that away." One Silverlock, by his deposition, stated that he was employed to prepare the settlement upon the marriage of Mr. and Mrs. Antrobus, when it was agreed that Mr. Crawfurd should give £10,000 as a marriage portion which should be accepted by her in full of all her other claims upon his estate and property. The deponent had been informed by Mr. Crawfurd that he had given his daughter a share in the Forth and Clyde Navigation, and at the time the settlement was preparing he informed the deponent that he considered £10,000 as a large portion, but it was to be in lieu of that and every other claim of his daughter under the settlement or deed of appointment or otherwise. D E F

Romilly and *Cooke*, for the plaintiff, contended that a voluntary conveyance, although defective, would be executed if intended as a provision for a child. They referred to the concluding passage in *Bonham* v. *Newcomb* (1) (2 Vent. at p. 365), a passage in *Colman* v. *Sarel* (2) (3 Bro. C.C. at p. 14), and the cases where a defective execution of a power or the want of a surrender has been supplied. G

Piggott, *Whishaw*, *Newbolt* and *Heys* for the defendants: The court has never proceeded upon a voluntary instrument, kept in the possession of the party, to perfect a merely inchoate act, that never was completed. The intention ought to be clear, direct, and unequivocal, and, if manifested by writing, that writing ought to have been delivered. There is no evidence that this paper was ever in any other possession than that of Mr. Crawfurd. Every presumption is against the fact of delivery. A gift without consideration is good, but is revocable before delivery: JENKINS' EIGHT CENTURIES OF REPORTS, p. 109. H

SIR WILLIAM GRANT, M.R.—I do not see how this assignment can be decreed. The facts of this case are in great obscurity. That must operate unfavourably to the plaintiff, for this paper comes out of the possession of the executrix of Mr. Crawfurd. The presumption, therefore, is either that it has always remained in his possession, or, that if ever parted with, it had been delivered back to him. Upon the latter supposition, taken with the provision made upon the marriage, there is an end of the plaintiff's case. Upon the supposition that this paper never was out of Mr. Crawfurd's possession, a strong argument arises against this claim, for there is a probability that, having been once out of his possession, it might have got back to his representative. Can I presume the fact of delivery? The utmost is absence of all proof. I cannot raise that presumption in opposition to I

A the prima facie inference from the custody in which this paper was found, a custody in which, upon the supposition of delivery and continued possession, it ought not to have been found, for upon that it ought to have been among the papers of the husband. It does not rest merely upon the absence of evidence. Upon the answer to the cross-bill it appears that this paper could never have been delivered into the possession of the daughter, at least not subsequently to the marriage, B for the conversation relative to the gift was after the marriage, and yet according to the plaintiff's belief the husband remained until his death ignorant of this endorsement. The husband knowing that a gift had been made and not knowing the fact of the endorsement, that is evidence that the receipt with the endorsement could not have been in his wife's possession, and the presumption is that it must have been in the possession of her father. On the other side, it is true that upon C the supposition that it remained in his possession he must have told his daughter what he had done. Perhaps he showed her the endorsement, but I should think he went no further, and that he never put her in actual possession of it.

When there is a voluntary and imperfect gift of this kind, the party reserving the instrument in his own power during his whole life, it is possible after his death to enforce a specific performance of the engagement which that instrument D contains, or to enforce a legal execution of that assignment which it purports to make, taking into consideration that the parent did not die without having expressed an intention upon his part not to carry into execution that gift, for it is evident, that Mr. Crawfurd himself never would, unless compelled, have acted upon this assignment, and that he never would have done anything to perfect it. That appears from his declarations to his daughter and to Silverlock, both purport- E ing that he considered this gift as completely at an end as done away by the provision made upon her marriage. Has a case ever occurred in which a court of equity has interfered to give effect to an instrument attended with these two circumstances—(i) that there is no evidence that the parent ever parted with the possession of it; (ii) a declared intention by him not to act upon that instrument or to give effect to it, and he having died with the conception that he was owner F of the property which he at one time intended to give away?

There have been some cases in which a voluntary conveyance, kept in the possession of the party during his life and in his possession at the time of his death, has been held to operate against his will. But in those cases there was a complete conveyance, a transfer in law, of the property and nothing requisite to add to the validity of it. The instrument was permitted to remain uncancelled, G and all the court was called upon to say was that a will, a mere voluntary act as much as the deed, should not be a revocation of the deed, but that the deed should operate against the will, that is, that the court would not deny to the deed its legal effect and operation. But this instrument of itself was not capable of conveying the property. It is said to amount to a declaration of trust. Mr. Crawfurd was no otherwise a trustee than as any man may be called so who professes to H give property by an instrument incapable of conveying it. He was not in form declared a trustee, nor was that mode of doing what he proposed in his contemplation. He meant a gift. He says that he assigns the property. But it was a gift, not complete. The property was not transferred by the act. Could he himself have been compelled to give effect to the gift by making an assignment? There is no case in which a party has been compelled to perfect a gift which in the mode I of making it he has left imperfect. There is locus pœnitentiæ, as long as it is incomplete, and Mr. Crawfurd did repent, that is, he changed his mind upon what he thought a sufficient motive, not merely from caprice, but the situation of his daughter was no longer that under which he made this imperfect disposition in her favour. For it to have any effect, he must have been compelled to give it effect by suit in this court. This is not a case in which nothing was done during the life of the party showing an alteration of intention.

Where the gift is not testamentary, but is to operate inter vivos, except in the

instance of a defective execution of a power, have executors ever been called upon to do any act to perfect it? The ordinary case is that of supplying the surrender of a copyhold. There the court says that the representative shall not contest the will of the testator in those particularly favoured and excepted cases. His will was that the estate should pass. He omitted the formality that would make it pass legally, but it shall not fail in favour of those who represent him. But this is not legatory. For that purpose probate must be obtained. I cannot therefore consider this as having any operation that a will would have. I do not see upon principle how the court could have acted against Mr. Crawfurd himself, nor, considering his declared change of intention, how it can act against the representatives upon the notion of compelling them to comply with his will. It was not his will. No case being cited in which this was ever done, I do not see how I can make the precedent. If this is to be executed now under these circumstances I do not see why it should not have been executed against Mr. Crawfurd himself, why his daughter could not have filed a bill against him to compel him to execute a legal assignment. Has that ever been done? It would now be doing just as strong a thing, this paper having remained in his possession until his death. Unless an instance can be produced, the bill must be dismissed.

No further proceeding.

LANGSTAFFE *v.* FENWICK
FENWICK *v.* LANGSTAFFE

[Rolls Court (Sir William Grant, M.R.), February 14, 1805]

[Reported 10 Ves. 405; 32 E.R. 902]

Mortgage—Mortgagee—Receipt of rents of mortgaged property—Right of mortgagee to remuneration.

A mortgagee is not entitled to charge the mortgagor for his services in receiving the rents of the mortgaged property, although he may have a receiver appointed at the expense of the mortgagor.

Notes. Considered: *Barrett* v. *Hartley* (1866), L.R. 2 Eq. 789. Referred to: *Sayers* v. *Whitfield* (1829), 1 Knapp, 133.

As to the rights and liabilities of mortgagees, see 27 Halsbury's Laws (3rd Edn.) 273 et seq.; and for cases see 35 Digest (Repl.) 447 et seq.

Bills for redemption of a mortgage and foreclosure.

The mortgagee was the attorney of the mortgagor, and in account settled between them had charged poundage for having received the rents. In this respect the account was impeached.

Bell, for the mortgagor in the first cause, as to that charge, insisted upon the general rule not to allow it to a mortgagee, especially in the case of attorney and client.

Richards and *Roupell*, for the mortgagee, contended that, admitting the general rule, it could not prevent parties, when settling accounts, making this allowance. A mortgagee was not bound to receive the rents for the mortgagor, but was entitled to have a receiver at his expense. In the present case the rents were very small, and the collection troublesome. The consequence, therefore, of an objection must have been the appointment of a receiver. They also relied upon acquiescence, distinguishing between the effect of ignorance of the fact and of the law as an excuse for that.

SIR WILLIAM GRANT, M.R.—Upon a good deal of this reasoning, if well founded, the rule must in many cases operate unjustly, for the court does not permit a man to get out of the rule by showing that he was in a situation in which it would have been justifiable to have had a receiver appointed. He is not permitted to show that that case did exist. Nothing is considered as evidence that the appointment of a receiver was necessary but that appointment itself, and the court takes the circumstance that a receiver was not appointed as evidence that a receiver was not necessary. As to the acquiescence, whatever may be the effect of acquiescence in general, the relation of these parties prevents it in this instance —the one an attorney, and not only an attorney, but the attorney of the other party. The former was acquainted with the rule of the court; the other was not. It was the duty of the attorney to inform his client that he was not to allow that charge if another person had been the mortgagee, informing him also that the appointment of a receiver would be the consequence, but that was for the consideration of the client, so informed. In this case that information was not given to the client. The mortgagee claimed this allowance as of right, not stating the objection. The mortgagor allowed it, not aware of the objection. In that article, therefore, the account is impeached as erroneous. I do not enter into the distinction between the cases of an article allowed from ignorance of the law and one allowed from ignorance of the fact. The reason of the admission is not material. He has not given his assent, that is, what the court holds a binding assent. I do not mean to say generally that ignorance of the law will open an account, but, as between these parties, standing in this relation to each other, liberty must be given to surcharge and falsify.

CROSBY *v.* WADSWORTH

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), July 1, 1805]

[Reported 6 East, 602; 2 Smith, K.B. 559; 102 E.R. 1419]

Trespass—Action—Competency—Contractual right of plaintiff to cut and carry away standing crop—Prevention by other party to contract.

Land—Interest in land—"Lease, estate, interest of freehold, or term of years, or uncertain interest in land"—Contract for sale of growing crop—No force and effect of lease or estate at will.

Sale of Land—Interest in land—Need for contract to be in writing—Growing crop—Grass to be cut and removed.

By a verbal contract dated June 6, 1804, between the plaintiff and the defendant the plaintiff undertook to buy from the defendant a standing crop of grass then growing in a close belonging to the defendant, the grass to be mowed and made into hay by the plaintiff. In July the defendant told the plaintiff that he could not have the grass and locked the gate of the close to prevent the plaintiff entering.

Held: (i) as the plaintiff was entitled under the contract to the exclusive enjoyment of the growing crop he could maintain trespass against the defendant for the violation of his right.

(ii) the interest of the plaintiff created by the contract was not a "lease, estate, interest of freehold, or term of years, or an uncertain interest of, in, to or out of any lands created by parol" within s. 1 of the Statute of Frauds [see now Law of Property Act, 1925, ss. 53, 54, 55] so as to have the force and effect of a lease or estate at will only.

(iii) the agreement was a contract or sale of an interest in, or, at least, concerning, land within s. 4 of the Statute of Frauds [see now Law of Property Act, 1925, s. 40], and so, it not being in writing, no action could be brought on it.

Notes. Explained and Distinguished: *Parker* v. *Staniland* (1809), 11 East, 362. Distinguished: *Warwick* v. *Bruce* (1813), 2 M. & S. 205. Explained: *Evans* v. *Roberts*, [1824–34] All E.R. Rep. 534; *Strickland* v. *Maxwell* (1834), 2 Cr. & M. 529; *Carrington* v. *Roots* (1837), 2 M. & W. 248. Considered: *Washbourn* v. *Burrows* (1847), 1 Exch. 167. Applied: *Roads* v. *Trumpington Overseers* (1870), L.R. 6 Q.B. 56. Distinguished: *Hand* v. *Hall* (1877), 2 Ex. D. 318. Explained: *Coverdale* v. *Charlton* (1878), 26 W.R. 867. Considered: *Maddison* v. *Alderson*, [1881–5] All E.R. Rep. 742. Referred to: *Jones* v. *Flint* (1839), 10 Ad. & El. 753; *Leroux* v. *Brown* (1852), 12 C.B. 801; *Richards* v. *Davies*, [1920] All E.R. Rep. 144; *Back* v. *Daniels*, [1924] All E.R. Rep. 789.

As to what constitutes trespass to land, see 38 Halsbury's Laws (3rd Edn.) 739–747, and as to sale of growing crops, see ibid., vol. 1, pp. 445–447. For cases see 2 Digest (Repl.) 34–40; 46 Digest (Repl.) 356 et seq. For the Law of Property Act, 1925, see 20 Halsbury's Statutes (2nd Edn.) 427.

Cases referred to:

(1) *Wilson* v. *Mackreth* (1766), 3 Burr. 1824; 97 E.R. 1119; 46 Digest (Repl.) 362, *91*.

(2) *Waddington* v. *Bristow* (1801), 2 Bos. & P. 452; 126 E.R. 1379; 2 Digest (Repl.) 35, *162*.

(3) *Poulter* v. *Killingbeck* (1799), 1 Bos. & P. 397; 216 E.R. 973; 2 Digest (Repl.) 35, *158*.

Case for opinion of the court in an action for trespass tried at Lincoln Assizes before Chambre, J., when a verdict was found for the plaintiff, with damages 40s., subject to the option of the court on the Case.

The declaration stated that the defendant on July 9, 1804, and on divers other days, broke and entered a certain close whereof the plaintiff was then lawfully possessed, trod down the plaintiff's grass and hay, cut down the plaintiff's grass then growing in the close, and took and carried away the same, and also took and carried away the plaintiff's hay which was on the close and disposed thereof to his own use. The defendant denied liability.

On June 6, 1804, the plaintiff agreed by parol with the defendant for the purchase of a standing crop of mowing grass then growing in a close of the defendant's situate for 20 guineas. The grass was to be mowed and made into hay by the plaintiff, but the parties did not fix upon any time at which the mowing was to be begun. No earnest was given, nor was any note, memorandum, or writing, signed by either of the parties or by any person on their behalf, nor was possession of the close given to the plaintiff, it being retained by the defendant. On July 2 the defendant told the plaintiff he should not have the grass, and later on that day he sold it to W. Carver for 25 guineas. On July 12 the plaintiff tendered to the defendant 20 guineas for the crop, which the defendant refused to accept. The plaintiff went next morning to the defendant's close, and, finding the gate unlocked, sent in to mow the grass a person who cut near half of the close. On July 15 the defendant brought a letter from his attorney to the plaintiff, forbidding him to enter the close, and discharging him from mowing the grass. A lock was then fixed upon the gate by the defendant, and Carver, by his direction, carried away the grass which had been mowed and afterwards cut and carried away the remainder of the crop. The question for the opinion of the court was whether the plaintiff was entitled to recover.

Rough for the plaintiff.

Reader for the defendant.

Cur. adv. vult.

A **LORD ELLENBOROUGH, C.J.**—As the plaintiff appears to have been entitled (if entitled at all under the agreement stated) to the exclusive enjoyment of the crop growing on the land during the proper period of its full growth and until it was cut and carried away, he might in respect of such exclusive right maintain trespass against any persons doing the acts complained of in violation thereof, according to the authority of Co. Litt. 4 b., the authorities cited from Brooke B and Fitzherbert, and *Wilson* v. *Mackreth* (1), which fully maintain this position.

This brings us to the question whether the plaintiff had, under the agreement and circumstances stated, any legal title to this growing crop at the time when the injury complained of was done, or whether his supposed title thereto was not wholly void as being created by parol, under any and which of the provisions in the Statute of Frauds, or on any and what other account? In the outset I feel myself C warranted in laying wholly out of the case the provision contained in s. 17 of the statute as not applicable to the subject-matter of this agreement, which cannot be considered in any proper sense of the words as a sale of goods, wares, or merchandises, the crop being at the time of the bargain (with reference to which time I agree with Heath, J., in *Waddington* v. *Bristow* (2), that the subject-matter must be taken) an unsevered portion of the freehold, and not movable goods or D personal chattels.

The next question is: Is it a

"lease, estate, interest of freehold, or term of years, or an uncertain interest of, in, to, or out of lands, created by parol,"

within the meaning of s. 1 of the statute, so as to have the effect only of a lease E or estate at will, the agreement not having been put in writing? I think, collecting the meaning of s. 1 by aid derived from the language of s. 2 and the exception therein contained, that the leases, etc., meant to be vacated by s. 1 must be understood as leases of the like kind with those in s. 2, but which conveyed a larger interest to the party than for a term of three years, and such also as were made under a rent reserved thereupon, neither of which circumstances are to F be found in this agreement for the growing crop. Supposing it, therefore, on this construction of the statute, not falling within s. 1, it then comes to be considered under s. 4 of the Act whether this purchase of the growing crop be "a contract or sale of lands, tenements or hereditaments, or any interest in or concerning them." If it be so, then, is this action of trespass "an action brought to charge the defendant on such contract or sale," within the meaning of the statute?

G Upon the first of these questions I think that the agreement stated, conferring as it professes to do an exclusive right to the vesture of the land during a limited time and for given purposes, is a contract or sale of an interest in, or, at least, an interest concerning lands. But the statute does not expressly and immediately vacate such contracts if made by parol; it only precludes the bringing of actions H to enforce them by charging the contracting party or his representatives on such contract and some supposed breach thereof, which description of action does not properly apply to the one now brought, viz., a general action of trespass complaining of an injury to the possession of the plaintiff, however acquired, by contract or otherwise. But, although the contract for this interest in or concerning land may not be in itself wholly void under the statute merely on account of its being by I parol so that if the same had been executed the parties could have treated it as a nullity, yet, it being executory, and as for the non-performance of it no action could have been by reason of the provisions of s. 4 maintained, we think it might be discharged before anything was done under it which could amount to a part execution of it. This discharge, unfortunately for the plaintiff, appears to have been given in the present instance on July 2 by the countermand and refusal of the defendant of that date, before the plaintiff had done any one act towards carrying the agreement into effect. On this latter ground, therefore, viz., that this

parol executory contract, supposing it to have been otherwise valid, was competently discharged by parol, we feel ourselves obliged to say that the plaintiff is not entitled to recover.

The case suggested at the close of the argument, *Poulter* v. *Killingbeck* (3), has no material application in favour of the plaintiff. That was an action of indebitatus assumpsit and quantum meruit for moieties of crops of wheat sold by the plaintiff to the defendant, and, accordingly, reaped for his, the defendant's, own use and benefit, and upon a count for money had and received. The case was that the plaintiff had let to the defendant land without rent from which he was to take two successive crops, and to render to the plaintiff a moiety of the crops in lieu of rent. Afterwards the value of the crops was ascertained by appraisement, and the defendant became liable for the moiety of the value of the crops which he took to his own benefit instead of a moiety of the crops themselves. It was objected that the agreement was within the Statute of Frauds, first, as relating to land, and secondly, as not being to be executed within a year. As to the first objection, the contract, if it had originally concerned an interest in land, after the agreed substitution of pecuniary value for specific produce no longer did so. It was originally an agreement to render what would have become a chattel, i.e., part of a severed crop in that shape, in lieu of rent, and by a subsequent agreement it was changed to money instead of remaining a specific render of produce. So that one wonders rather how it should ever have been thought an interest in land than that it should have been decided not to be so. The subsequent agreement relieved the case also from the second objection.

Judgment for defendant.

LIVERPOOL WATERWORKS CO. *v.* ATKINSON AND ANOTHER

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), June 18, 1805]

[Reported 6 East, 507; 2 Smith, K.B. 654; 102 E.R. 1382]

Guarantee—Fidelity bond—Period of surety's liability—Terms of condition general—Specific period of employment stated in recitals.

Where the condition of a fidelity bond is general as to the period of the surety's liability, but a recital states the appointment of the employee in respect of whom the bond is given as being for a specific period, the condition is controlled by the recital and the liability of the surety is restricted to the specific period named.

Notes. Followed: *St. Saviour's* v. *Bostock* (1806), 2 Bos. & P.N.R. 175. Distinguished: *Sansom* v. *Bell* (1809), 2 Camp. 39; *Leadley* v. *Evans* (1824), 2 Bing. 32. Considered: *Oswald* v. *Berwick-upon-Tweed Corpn.* (1856), 5 H.L. Cas. 856. Referred to: *Hassell* v. *Long* (1824), 2 M. & S. 363; *Aurego* v. *Keen* (1836), 1 M. & W. 390; *Berwick* v. *Murray* (1850), 14 Jur. 659; *Kitson* v. *Julian* (1855), 24 L.J.Q.B. 202; *Danby* v. *Coutts* (1885), 29 Ch.D. 500.

As to the duration of the liability of a fidelity guarantor, see 18 Halsbury's Laws (3rd Edn.) 454–457; and for cases see 26 Digest (Repl.) 55, 99.

Cases referred to:

(1) *Lord Arlington* v. *Merrick* (1672), 2 Saund. 411; 3 Keb. 45, 59; 85 E.R. 1221; 7 Digest (Repl.) 188, *214*.

(2) *Barker* v. *Parker* (1786), 1 Term Rep. 287; 99 E.R. 1098; 26 Digest (Repl.) 178, *1323*.

(3) *Stoughton* v. *Day* (1647), Aleyn. 10; Sty. 18; 82 E.R. 887; 26 DIGEST (Repl.) 55, *392*.

Also referred to in argument:

Wright v. *Russel* (1774), 3 Wils. 530; 2 Wm. Bl. 934; 95 E.R. 1195; 26 Digest (Repl.) 178, *1321*.

Action of debt on a bond.

By their declaration the plaintiff company stated that the bond on which they sued, which was dated Jan. 1, 1802, recited that the defendant had agreed with the company to collect and receive the rents and other revenues of their works at Liverpool from time to time for twelve months from the date thereof, and that, they, having required security for the due performance of the office of receiver in the manner and to the effect after mentioned, T. Harpley had agreed to join with the defendant in the bond for that purpose upon the condition thereunder written. The condition was, that if the defendant should from time to time, and at all times thereafter during the continuance of such his employment, use due diligence in collecting and receiving all rents and sums of money which should annually become due to the company at Liverpool, from and in respect of their works, and should, as often as requested by the company pay and account for to the company at Liverpool to their satisfaction all such sums as he, the defendant, should have received from any person to the company's use, and render to the company from time to time a true account in writing of all sums by him received on account of the works for the rents and other revenues thereof, or on account of the company, for which he ought to be charged or chargeable, and would also deliver up to the company all books of account, vouchers, etc., belonging to the company then in his custody, and also if the defendant should, so long as he should continue and be employed by the company from time to time, observe and perform the orders of their committee as far as the same should concern his employment, and justly and truly in all other respects behave himself in the office or employment of receiver of the rents and other revenues, and duly account for the same, then the said writing-obligatory was to be void or else to be in full force.

The plaintiffs averred that the defendant was employed by the company as receiver for a long time after the making of the writing-obligatory, viz., from the date thereof, until Sept. 14, 1804, and during that time received divers sums from divers persons to the company's use, amounting in the whole to £400, they then assigned as a breach the not accounting for and paying the same. There were other general counts in debt for so much received to the use of the company, and upon an account stated. The defendant pleaded that for twelve months from the date of the obligation he did collect and account, and pay to the company all sums received by him during the said twelve months to the use of the company, and so pleaded performance of the condition. Replication, that the defendant, after making the writing-obligatory, and after the expiration of twelve months from the date thereof, and during the time that he continued and was employed in the office of receiver, received the sums in the declaration mentioned, and broke the condition in manner and form as complained of. To this there was a general demurrer and joinder. There were similar pleadings in the other action against Harpley the surety.

Richardson, for the plaintiff company, in support of the demurrer.

J. Clarke for the defendants.

LORD ELLENBOROUGH, C.J.—The case of *Lord Arlington* v. *Merrick* (1) [see note post p. 540] runs on all fours with the present. The words there used, which were as general as these, were construed to be restrained by the recital stating an appointment for a specific time, and that case was decided by HALE, C.J., and other judges on great consideration. With a decided case exactly in point, it would be extraordinary if we were to apply a different rule of construction, though, if it were

to be decided now for the first time, I should think that decision right. The case immediately in judgment, which is that of the principal in the bond, must be considered as if it were the next case of the surety, for they both engage in the same words and we cannot put a construction upon them against the principal which would be injurious to the rights of the surety.

The condition of the bond recites that the defendant had agreed with the company to collect their revenues from time to time for twelve months from the date of the bond, and that the company had required security for the due performance of the said office (i.e., for twelve months), in the manner and to the effect after mentioned, and then it prescribes the manner and effect of the duty to be performed. Then follow the general words "during the continuance of such his employment." The word "such" is a word of reference, and by leaving it out and inserting instead thereof the words to which it refers, that is "for twelve months from the date of the obligation" the time stipulated for, the whole will be made clear and consistent. These words might have been added with a view to the possible determination of the employment by consent within the year. So the word annually, as used, means no more than that the defendant should account during those twelve months for all the rents and sums of money which should annually grow due. As to the word "successors," it was certainly useless to add it, as the company are a corporation; and nothing can be inferred from its insertion. There is, therefore, nothing to distinguish this case from *Lord Arlington* v. *Merricke* (1). It is different from the case cited from 2 ROLLE'S ABRIDGMENT, 247, tit. Parols, pl. 7, where the subsequent words of the condition extended the obligation to pay the money not only after the return of the ship to any port in England as mentioned in the recital, but also "or elsewhere where she made her right discharge." That is an extreme case, which seldom fails to be cited on these occasions.

GROSE, J.—*Lord Arlington* v. *Merricke* (1), which is the leading case on this subject, must govern the present case, to which it closely applies. There is good sense in it, independent of its authority, for any man called upon as a surety to subscribe to the obligation would naturally understand, on reading the condition, that he was only to answer for his principal for twelve months.

LAWRENCE, J.—*Lord Arlington* v. *Merricke* (1) is the leading case, and was recognised by BULLER, J., in *Barker* v. *Parker* (2). The recital in the condition clearly limits the obligation to twelve months from the date, and the subsequent words, "during the continuance of such his employment," and "so long as he should continue to be employed," were intended to confine the responsibility to the time that he should be in office, not exceeding twelve months.

LE BLANC, J.—The contracting parties first stipulated for the defendant's employment in the office of collector and receiver for twelve months; the subsequent stipulations by the defendant to account, etc., during the continuance of his employment and for so long time as he should continue to be employed by the company refer to the original employment in point of time.

Judgment for defendant.

NOTE.

The case of *Lord Arlington* v. *Merricke* (1) was debt on bond, the condition of which was, that whereas the plaintiff, who was Postmaster-General, on April 30, 1667, appointed one Jenkins to be his deputy-postmaster of the stage of Oxon in the county of Oxon, to execute the said office from June 24 next for the term of six months following, if the said Jenkins should, for and during all the time that he should continue deputy-postmaster of the said stage, faithfully execute and perform all the duties belonging to the said office, then this obligation to be void. The replication assigned a breach on the last day of September, 1770, until which time Jenkins continued deputy-postmaster of the said stage according to the condition. On demurrer, it was held by HALE, C.J., and the rest of the court that the condition should refer to the recital only, by which the defendant was not to be responsible for Jenkins for a longer time than six months. TWYSDEN, J., cited *Horton* [*Stoughton*] v. *Day* (3) (2 Saund. at p. 414), where in the condition of an obligation it was recited that the sheriff had appointed the defendant bailiff of a hundred within his county, if, therefore, the defendant should duly execute all warrants to him directed, then, etc. It was adjudged that the words "all warrants" should be intended to be only all warrants which were directed to the defendant as bailiff of the said hundred, and not other warrants.

A

DRAKE *v.* MITCHELL, AND OTHERS

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), February 1, 1803]

[Reported 3 East, 251; 102 E.R. 594]

B *Judgment—Merger of cause of action—Transit in rem judicatam—Validity of collateral security.*

The principle transit in rem judicatam relates only to the particular cause of action in which the judgment is recovered. A judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the successful plaintiff, and, therefore, till then it C cannot operate to preclude any collateral security which the plaintiff has taken.

Notes. Applied: *Bell* v. *Banks* (1841), 3 Man. & G. 258. Considered: *Bermondsey Vestry* v. *Ramsey* (1871), L.R. 6 C.P. 247; *Re Davison, Ex parte Chandler* (1884), 13 Q.B.D. 50. Distinguished: *Cambefort* v. *Chapman* (1887), 19 Q.B.D. 229. Followed: *Wegg-Prosser* v. *Evans*, [1895] 1 Q.B. 108. Referred to: D *Goldrei, Foucard & Son* v. *Sinclair and Russian Chamber of Commerce in London*, [1916–17] All E.R. Rep. 898.

As to the merger of a cause of action in a judgment, see 15 Halsbury's Laws (3rd Edn.) 188–191; and for cases see 30 Digest (Repl.) 192–194.

Cases referred to in argument:

E *Macdonald* v. *Bovington* (1792), 4 Term Rep. 825; 100 E.R. 1323; 6 Digest (Repl.) 365, *2632*.

Branthwait v. *Cornwallis* (1627), Cro. Car. 85; 79 E.R. 675; 12 Digest (Repl.) 584, *4514*.

Higgens' Case (1605), 6 Co. Rep. 44b; 77 E.R. 320; 12 Digest (Repl.) 584, *4513*.

Basset v. *Wood* (1627), cited in Litt. at p. 17; 12 Digest (Repl.) 574, *4395*.

Broome v. *Wooton* (1605), Yelv. 67; 80 E.R. 47; sub nom. *Brown* v. *Wootton*, F Cro. Jac. 73; Moore, K.B. 762; 7 Digest (Repl.) 243, *808*.

Ashbrooke v. *Snape* (1591), Cro. Eliz. 240; 78 E.R. 496; 21 Digest (Repl.) 275, *496*.

Pyers v. *Turner* (1592), Cro. Eliz. 283; 78 E.R. 537; 26 Digest (Repl.) 22, *110*.

Pudsey's Case, cited in 2 Leon. 110.

Parker v. *Amys* (1669), 1 Lev. 261.

G **Action** on a covenant in a lease of mines.

The plaintiff declared in covenant against three defendants upon an indenture of demise, whereby on April 27, 1797, he leased to the defendants certain coal mines at Blackhill, in the parish of Halifax in the county of York, for the term of one hundred years, with liberty to work the same and carry away the coals for their own use, and sink shafts, etc., habendum to the three defendants, their executors, etc., H without paying any rent or consideration for the same to the plaintiff other than the sum of £917 10s. 9d. thereinafter covenanted to be paid to him by the defendants. The defendants covenanted with the plaintiff that they would pay to the plaintiff the £917 10s. 9d. for the purchase of the demised coals, mines, etc., by six instalments of £152 18s. 5½d., the first on July 13, 1798, the second on the second Thursday in July, 1799, and so on. The declaration then stated that the defendants I entered by virtue of the demise and became possessed of the premises, and alleged a breach by the non-payment of the second instalment.

The defendants pleaded that as to £41 16s. 2½d., part of the £152 18s. 5½d., they had paid the same to the plaintiff, and as to £111 2s. 3d., the residue, they said that for the payment and in satisfaction thereof, John Mitchell, the first defendant, on July 10, 1800, made his promissory note in writing and then and there delivered it to the plaintiff, by which note he, Mitchell, promised to pay, six weeks after date, to the plaintiff or order, £111 2s. 3d. value received, at Messrs. B., etc., London.

The plea then set forth a bill of exchange given by Mitchell to the plaintiff for the same sum, which, when presented, was refused payment by the drawers. The defendants said that the plaintiff, for the recovery of the damages which he had sustained by reason of the non-performance of the said promises and undertakings, afterwards sued Mitchell in an action on the case on promises, and recovered against him £136 10s. for the damage which he had sustained as well by the non-performance of the said promises and undertakings as for his costs, which verdict still remained in force and effect.

The replication took issue on the part-payment of the £41 16s. 2½d. in the plea mentioned, and as to the residue of the plea relating to the sum of £111 2s. 3d. the plaintiff demurred generally; on which there was joinder.

Dampier, for the plaintiff, supported the demurrer.
Wood for the defendants.

LORD ELLENBOROUGH, C.J.—I have always understood the principle of transit in rem judicatam to relate only to the particular cause of action in which the judgment is recovered operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party, and, therefore, till then it cannot operate to change any other collateral concurrent remedy which the party may have. If, indeed, one who is indebted upon simple contract give a bond, or have judgment against him upon it, the simple contract is merged in the higher security. So one may agree to accept of a different security in satisfaction of his debt, but it is not stated here that the note and bill were accepted in satisfaction, and in themselves they cannot operate as such until the party has received the fruits of them. Then, although they were not originally given in satisfaction of the higher demand, yet, ultimately producing satisfaction, it would be a bar to so much of the present demand. But here they are neither averred to have been accepted as satisfaction, nor to have produced it in themselves, and, therefore, the matter pleaded is no bar to the action.

GROSE, J.—The note or bill, not having been accepted as satisfaction for the debt, could only operate as a collateral security, and though judgment has been recovered on the bill, yet not having produced satisfaction in fact, the plaintiff may still resort to his original remedy on the covenant.

LAWRENCE, J.—Nothing has happened to alter the situation of the parties in respect of the plaintiff's original remedy on the covenant. It is clear that the bill and note when first given were no satisfaction, and the judgment recovered on the bill is in itself no satisfaction until payment be obtained upon it.

LE BLANC, J.—The giving of another security, which in itself would not operate as an extinguishment of the original one, cannot operate as such by being pursued to judgment, unless it produce the fruit of a judgment.

Judgment for plaintiff.

STOCKLEY *v.* STOCKLEY

[Lord Chancellor's Court (Lord Eldon, L.C.), November 14, 16, 1812]

[Reported 1 Ves. & B. 23; 35 E.R. 9]

Family Arrangement—Transaction regarded with favour by court—Reasonable agreement—Court leaning towards carrying it into execution.

If a doubt is raised between persons as to their rights in family matters and they come to a reasonable agreement the court will go a long way to carry it into execution even where the persons in question erroneously assume a knowledge of their rights and deal with the property accordingly and not on the principle of compromising doubts.

Notes. Considered: *Clifton* v. *Cockburn*, [1824–34] All E.R. Rep. 181; *Reynell* v. *Sprye*, *Sprye* v. *Reynell* (1849), 8 Hare, 222; *Hoghton* v. *Hoghton* (1852), 15 Beav. 278; *Williams* v. *Williams* (1865), 2 Drew & Sm. 378. Referred to: *Stewart* v. *Stewart* (1839), 6 Cl. & Fin. 91; *Ashurst* v. *Mill*, *Mill* v. *Ashurst* (1848), 7 Hare, 502.

As to the formalities required for a family arrangement, see 17 Halsbury's Laws (3rd Edn.) 219, 220; and for cases see 24 Digest (Repl.) 1120 et seq.

Cases referred to:

(1) *Pullen* v. *Ready* (1743), 2 Atk. 587; 26 E.R. 751, L.C.; 24 Digest (Repl.) 113, *147*.

(2) *Cory* v. *Cory* (1747), 1 Ves. Sen. 19; 27 E.R. 864, L.C.; 24 Digest (Repl.) 1127, *96*.

(3) *Stapilton* v. *Stapilton* (1739), 1 Atk. 2; 26 E.R. 1, L.C.; 24 Digest (Repl.) 1122, *49*.

(4) *Cann* v. *Cann* (1721), 1 P. Wms. 723; 24 E.R. 586, L.C.; 35 Digest (Repl.) 101, *50*.

Appeal from a decree of Sir William Grant, M.R.

William Stockley was seised under three freehold leases from the Earl of Derby: one, dated in 1768, of a farm called Gore's Tenement; another, dated in 1771 of a farm called Stockley's, consisting of a messuage and several pieces of land, among which were two meadows called Long-Shoot and Rush-Hey; and the third, dated in 1772, of moss lands, afterwards improved and divided into six closes, called the Moss Closes. By his will dated Sept. 3, 1782, Stockley disposed of his property in the following terms:

> "I give and devise to my son Benjamin, when he comes to the age of twenty-one years all that my messuage or tenement now in the possession of Edward Foster, as farmer thereof: [subject to certain annuities] I give and devise to my son Thomas all that my messuage and tenement wherein I now live [subject also to certain annuities]."

The testator died in September, 1782. At the time when he made his will, he occupied the farm called Gore's Tenement, the two meadows called Long-Shoot and Rush-Hey, and two of the Moss Closes, and he resided in the house, being part of Gore's Tenement. The residue of the property comprised in the lease of 1771, together with the four remaining moss closes and a house thereon, was held by Edward Foster.

In January, 1787, a meeting took place at which the executors and widow of the testator, the plaintiff Thomas Stockley, the defendant Benjamin Stockley and Benjamin Stockley the elder, their grandfather, were present in order to settle the affairs of the testator. At that meeting Stockley, the grandfather, stated to the plaintiff and the defendant that, as the two closes called Long-Shoot and Rush-Hey were comprised in the lease of 1771, it would be more convenient that

the defendant should have them, and should give in exchange the four closes of moss land demised to Foster. He added that the latter were not so valuable as the former, but that he would make amends to the plaintiff. To this proposal the plaintiff, who was then an infant, and the defendant, then adult, agreed. It was also agreed that during Foster's lease the defendant should pay the plaintiff a certain rent. The defendant was soon after put in possession of the two closes called Long-Shoot and Rush-Hey and had ever since continued in possession. He also paid the rent to the plaintiff until the expiration of Foster's lease in February, 1789, when the plaintiff was put into possession of the four moss closes and had ever since continued in possession of them, as also of the other two moss closes and of the messuage and premises called Gore's Tenement comprised in the lease of 1768. No conveyance had ever been executed by the plaintiff or defendant either of the four moss closes or of Long-Shoot and Rush-Hey.

The defendant commenced an action of ejectment to recover the four closes of moss land and the house thereon. The plaintiff then filed his bill, insisting that, if any doubt could arise on the construction of the will, he was entitled to an execution of the agreement upon part performance and acquiescence for nearly nineteen years, and improvements by him, that Stockley, the grandfather, had left the defendant a moiety of an estate in Burscough, which he would not have done, had he suspected that the defendant would have endeavoured to set aside the agreement, which estate the defendant now enjoyed. The plaintiff prayed specific performance of the agreement with the consequential directions for mutual conveyances.

In his answer the defendant contended that the testator by the words of his will bequeathed to the plaintiff only the messuage or tenement where he then lived, and that the lands belonging to Stockleys, at that time in the occupation of the testator, were not included, but only such lands as were usually held with Gore's Tenement. The defendant admitted the meeting, but stated that on his objecting to the proposal made by his grandfather the latter in a threatening manner said that he would force the defendant to be quiet or would leave him worse. From this the defendant apprehended that his grandfather would alter his will, by which, as the defendant had reason to believe, the whole of the estate in Burscough was given to him, and, therefore, because he stood very much in awe of his grandfather, he forbore to urge his claim any more. The defendant denied the agreement, and the alleged acts of part performance, but he admitted that the plaintiff had got into possession of the four closes of moss land, and was still in possession of them, the defendant being restrained by the threats of his grandfather, who died in 1805, from sooner asserting his right to the moss closes. He further stated that he was, under the original will made by his grandfather, to have taken the whole of his estates, and that his grandfather, by revoking that will and giving the defendant only a moiety of the estates, the whole of which were at the meeting promised to him absolutely, had deceived and disappointed him. He, therefore, submitted that he was no longer bound to acquiesce in the proposed arrangement. The defendant also insisted upon the Statute of Frauds in bar to the relief sought by the bill.

The decree made at the Rolls on June 27, 1809, which, it was admitted, had not been drawn up according to the intention of the court, directed that the bill should be retained for twelve months, and that the defendant should be at liberty to bring an ejectment for the recovery of the property and proceed to trial, and on the trial the plaintiff was not to set up the Statute of Limitations. The injunction which had been granted restraining the defendant from proceeding at law was continued, and all further directions were reserved, with liberty to apply in the meantime. From this decree the plaintiff appealed to the Lord Chancellor.

Sir Samuel Romilly and *Bell* for the plaintiff.
Martin and *Heys* for the defendant.

Nov. 16, 1812. **LORD ELDON, L.C.**—If this cause can be determined, assuming that these two closes did not pass by the will to the plaintiff but that a court of equity ought to determine them to be his, the expense of a trial at law must be regretted. It is true that in family arrangements this court has administered an equity which is not applied to agreements generally. One very strong instance is *Pullen* v. *Ready* (1), where legacies were given to be forfeited by marriage without consent and one of the legatees did marry without consent. A family arrangement took place giving that legatee the benefit of the legacy. That arrangement, it was suggested, was under a mistake of the law that the condition was only in terrorem, which under the circumstances it was not, and it was contended that the parties were not bound. But LORD HARDWICKE said that there was the will before them, and if they chose to construe it, taking upon themselves the knowledge of the law, he would hold them bound. That case, with the passage in *Cory* v. *Cory* (2), which is certainly very strong, that an agreement to settle disputes in a family and a reasonable agreement, should be enforced against a party who was drunk at the time, and *Stapilton* v. *Stapilton* (3), which, with all the able reasoning in it, is also an extremely strong case, lead me to the opinion that in these family arrangements the court does not quite go the length of denying relief upon the principle that prevails between strangers.

I had a doubt whether what is in *Stapilton* v. *Stapilton* (3) represented as falling from LORD MACCLESFIELD in *Cann* v. *Cann* (4), could have been his language. If a doubt is raised between parties as to their rights, and adverting to that doubt, they come to an agreement, and that is a reasonable agreement, in family matters the court goes a long way to carry it into execution. But my difficulty was that there might be a supposition of right without a doubt upon it, that it would be too much to execute an agreement entered into upon such supposition, if unfounded, and the words of LORD MACCLESFIELD, instead of "a supposition of right," might have been, "a doubtful right," but I observe in a manuscript note that I have, the same words are represented as those of LORD MACCLESFIELD.

I should be sorry to decide this upon a view of the case that was not much pressed at the Rolls. The decree is admitted not to be drawn up as the Master of the Rolls intended, and must, therefore, be altered, but I do not hesitate to express a strong opinion that the defendant was bound under the circumstances. This family meeting taking place after the testator's death, it is impossible to deny that there was a fair question whether the two closes did or did not pass under the description of "the messuage or tenement in the possession of Foster;" also, whether they passed according to the intention of the testator. It appears, at least at that conversation that a third person, to whom both these parties profess to pay attention, must have taken for granted Thomas was entitled to these two closes; that such a belief was generated in the mind of that third person, as he says: "Benjamin shall have that which Thomas gives up; and Thomas shall have that which Benjamin gives up." That is an assertion by a third person speaking of the interests of the two others, importing what he thought at least. If he makes that statement and Benjamin admits that at that moment his conception was quite otherwise, and that Thomas was not entitled under the devise, there are cases in equity of a third person dealing about the interests of two persons as to whom he interposes, asserting their interests to be as he describes them, and another person, who, conceiving them to be otherwise, remains silent.

It is clear, also, that the grandfather intimated to both parties at least that, with regard to this arrangement proposed by him and understood by him to be acceded to, he meant to make some disposition of his own property, observing that Thomas would have the worst of it, but he (the grandfather) could set that right by his own property. He is permitted, therefore, to act upon the supposition that an agreement had taken place, with regard to which he was to do something. Suppose then Thomas was entitled to those two closes, and the grandfather had given him nothing, could Thomas after the lapse of nineteen years say that he had

acquiesced under the expectation of the grandfather's making up to him that difference, and desire, as he had been disappointed in that expectation, to be discharged? He would have great difficulty in maintaining that. Benjamin, on the other hand, by his answer says that the grandfather promised to give him the Burscough estate, and as he acted under the expectation of receiving a greater bounty than has been given to him, therefore, he shall take that half of the estate which is given to him, and shall take back his own estate also. It would be very difficult for him to establish that claim.

On two grounds, therefore, I have a strong opinion, that the defendant is bound: first, that enough was before them to induce a doubt upon the question as to the legal operation of the will; secondly, the actual intention, and if they had a right to determine by compromise with regard not only to the legal effect of the will, but the actual intention, there is enough of that to support the agreement, but, if not, yet under the effect of what passed in the grandfather's presence, and must have had an effect upon his intention through his life, and what appears from the conduct of the defendant to have been his conception of the grandfather's intention during his whole life, there is enough to bind him.

Decree accordingly.

DOE d. LEICESTER AND OTHERS *v.* BIGGS

[Court of Common Pleas (Sir James Mansfield, C.J., Heath, Lawrence and Chambre, JJ.), June 21, 1809]

[Reported 2 Taunt. 109; 127 E.R. 1017]

Deed—Will—Construction—Repugnancy between provisions.

If there be a repugnancy, the first words in a deed, and the last words in a will, prevail.

Notes. Applied: *Sherratt* v. *Bentley*, [1824–34] All E.R. Rep. 613. Explained: *White* v. *Parker* (1835), 1 Bing. N.C. 573. Considered: *Morrall* v. *Sutton* (1845), 1 Ph. 533. Distinguished: *Re Tanqueray-Willaume and Landau* (1882), 20 Ch.D. 465. Referred to: *Tenny d. Gibbs* v. *Moody* (1825), 3 Bing. 3; *Doe d. Gratex* v. *Homfray* (1837), 6 Ad. & El. 206; *Baker* v. *White* (1875), L.R. 20 Eq. 166; *Re Allsop and Joy's Contract* (1889), 61 L.T. 213; *Re Lashmar, Moody* v. *Penfold*, [1891] 1 Ch. 258; *Re Brooke, Brooke* v. *Brooke*, [1894] 1 Ch. 43; *Re Adams and Perry's Contract*, [1899] 1 Ch. 554.

As to the construction of deeds and wills when the provisions of the document are repugnant, see 11 Halsbury's Laws (3rd Edn.) 413–416, and ibid., vol. 29, p. 980. For cases see 17 Digest (Repl.) 357–360; 48 Digest (Repl.) 473–476.

Cases referred to:

(1) *Silvester d. Law* v. *Wilson* (1788), 2 Term Rep. 444; 100 E.R. 239; 47 Digest (Repl.) 198, *1660*.

(2) *Garth* v. *Baldwin* (1755), 2 Ves. Sen. 646; 28 E.R. 412, L.C.; 49 Digest (Repl.) 863, *8112*.

(3) *Bagshaw* v. *Spencer* (1748), 1 Ves. Sen. 142; 2 Atk. 577; 1 Wils. 238; 27 E.R. 944, L.C.; 49 Digest (Repl.) 849, *7970*.

(4) *Lady Jones* v. *Lord Say and Seal* (1728), 8 Vin. Abr. 262, L.C.; affirmed sub nom. *Lord Say and Seal* v. *Lady Jones* (1729), 3 Bro. Parl. Cas. 113; 1 E.R. 1212, H.L.; 47 Digest (Repl.) 198, *1666*.

(5) *Harton* v. *Harton* (1798), 7 Term Rep. 652; 101 E.R. 1181; 47 Digest (Repl.) 210, *1755*.

(6) *Kenrick* v. *Lord William Beauclerck* (1802), 3 Bos. & P. 175; 127 E.R. 96; 47 Digest (Repl.) 201, *1684*.

(7) *Jeffreson* v. *Morton* (1670), 2 Wm. Saund. 6.

(8) *Shapland* v. *Smith* (1780), 1 Bro. C.C. 75; 28 E.R. 994, L.C.; 47 Digest (Repl.) 198, *1659*.

(9) *Symson* v. *Turner* (1700), 1 Eq. Cas. Abr. 383, n.; 21 E.R. 1119; 38 Digest (Repl.) 867, *800*.

Rule Nisi obtained by the defendant to set aside the verdict and enter a nonsuit in an action of ejectment to recover premises in Middlesex.

Josiah Cole, being seised in fee of the premises, by his will dated Mar. 31, 1770, devised them to John Moore and Joseph Skinner and the survivor of them, to hold to them and the survivor, his heirs and assigns, on trust to permit and suffer the testator's wife to have, receive, and take the rents, issues, and profits thereof, during her life, for her own absolute use and benefit, and from and after her decease, if the testator's niece Ann Cole should be then living, in trust to pay unto, or permit and suffer Ann Cole to have, receive, and take the rents, issues, and profits thereof for her life with remainders over. He made his wife his executrix. Ann Cole, after the testator's decease, married Henry Leicester.

A verdict having been found for the plaintiff, *Serjeant Shepherd* for the defendant obtained a rule nisi to set it aside and enter a nonsuit.

Serjeant Vaughan and *Serjeant Manley*, for the plaintiff, showing cause against the rule: It is now clear that, unless either trustees have some active duty imposed on them, such as the doing of some repairs or the payment of annuities or other disbursements, which renders it necessary that they should have the legal estate, or unless it is devised to them with a view to the sole and separate use of a married woman, which has always been deemed per se sufficient ground to hold it a use executed in the trustees, the legal estate is in the person who has the beneficial interest. Thus, in *Silvester d. Law* v. *Wilson* (1), the devise was to take and receive the rents, and the testator thereby ordered "that such rents should be applied for the subsistence and maintenance of his son." Ashurst, J., dwelt upon this circumstance, and thought that the testator wished that the trustees should have an eye to the application of the money. But no case is to be found where the trustees have been held to take the legal estate if they had nothing assigned them to do but to receive and pay over the rents: *Garth* v. *Baldwin* (2); *Bagshaw* v. *Spencer* (3). The foundation of all these cases was that of *Lady Jones* v. *Lord Say and Seal* (4), but that was the case of a feme covert and there were also annuities to be paid by the trustees. In *Harton* v. *Harton* (5), Lord Kenyon, C.J., said that the provision in that case appeared to be made in order to secure to the several femes covert a separate allowance, free from the control of their husbands, to effectuate which it was essentially necessary that the trustees should take an estate with the use executed, otherwise the husband of each taker would be entitled to receive the profits, and so defeat the very object the devisor had in view. His Lordship also remarked on *Lady Jones* v. *Say and Seal* (4), that it was a case by itself. In *Kenrick* v. *Lord William Beauclerck* (6), Serjeant Lens argued wholly on the ground that there was something in that case to be done by the trustees, and Lord Alvanley, C.J., in giving judgment, cited with approbation the collection of the authorities made in *Jeffreson* v. *Morton* (7), 2 Williams's Saunders, 11 a, n. 17, and the terms in which the learned editor has there laid down the rule. *Shapland* v. *Smith* (8) is to the same effect, and the law there laid down by Eyre, B., has never been contested, but on the contrary it is now understood in the Court of Chancery that the distinction is abolished. Eyre, B., held that there was no difference between a demise in trust to permit to receive, and a demise in trust to receive and pay over, but he mistook the facts of that case; for

the trustees there had to pay taxes and repairs, which he did not advert to. Here nothing is required to be done by the trustees, and there is no necessity for their taking the legal estate. The trustees are not even made the testator's executors; his widow is his executrix. A

Serjeant Shepherd and *Serjeant Best*, for the defendant, supporting the rule: Wherever there is a devise in trust to receive the rents and profits, the use is executed in the usee: *Symson* v. *Turner* (9), where the trustees had nothing to do but to receive and pay over. But where the devise has been to permit and suffer the party beneficially interested to receive, it has been a legal estate executed in the cestui que use unless circumstances required it to be otherwise for the protection of a feme covert or for otherwise effectuating the particular intentions of the testator. In the present case where both phrases are used in the alternative, the former words do not so far control the latter as to take out of the trustees the legal estate thereby given, which it is for the interest of the cestui que trust that the trustees should retain. The effect of the alternative merely is to give the trustees a discretion whether they will let the cestui que trust receive the rents or will themselves receive them, and in order to possess that discretion the trustee must necessarily have the legal estate in him. The discretion must be lodged in someone, and in whom can it be unless in the trustee? This case, in which the husband and wife are separated, is an instance which shows that it is extremely proper that the trustee under such a devise should have the estate vested in him, and he here has as many duties to perform as were cast on the trustees in any of the cases cited. Where the devise is to a woman it is peculiarly necessary that the trustee should have the legal estate in order to protect her against the husband. If the estate is in trustees they may insist on a settlement, or may from time to time pay the rents into the woman's own hand, and if the legal estate is in the trustees and they have made a lease, it will prevail unless they establish a forfeiture incurred by a breach of covenant. B C D E

SIR JAMES MANSFIELD, C.J.—I thought that it had been settled by *Shapland* v. *Smith* (8) that the distinction was abolished unless in cases where something special was to be done by the trustee, as to pay rates or repairs, but I find it is otherwise. It is miraculous how the distinction ever became established, for good sense requires that in both cases it should equally be a trust and that the estate should be executed in the trustee, for how can a man be said to permit and suffer who has no estate and no power to hinder the cestui que trust from receiving? F G

Cur. adv. vult.

June 21, 1809. **SIR JAMES MANSFIELD, C.J.**—This case might be argued and considered for ever without advancing it at all in law, reason, or precedent. But, as it happens, in this will the last words are "permit and suffer," which give the cestui que trust a legal estate. The general rule is that, if there be a repugnancy, the first words in a deed, and the last words in a will, shall prevail. Consequently, for want of a better reason, we are forced to say that we think this will gives the legal estate to the party beneficially interested. The rule for a new trial must, therefore, be discharged. H

Rule discharged.

EARL OF HARDWICKE *v.* VERNON

[Lord Chancellor's Court (Lord Eldon, L.C.), February 27, March 3, 1808]

[Reported 14 Ves. 504; 33 E.R. 614]

Agent—Account—Duty to account—Default—Liability to pay interest on amount found due to principal—Limitation of action.

Where an agent whose duty, express or implied, is to receive and account for money on behalf of his principal, in breach of that duty charges the principal with payments which he (the agent) has never made and does not credit the principal with sums which he has received on his behalf, wilfully concealing from the principal these matters, is liable to pay interest on the amount which he is eventually found to be in default. There is no difference between the duty of an agent who is bound faithfully and accurately to account at least when called on and that of trustees and executors, although it differs widely in character. Where there has been deliberate concealment by an agent the court, generally speaking, will go back to any period, however remote, to set the account right.

Notes. Applied: *Pearse* v. *Green* [1814–23] All E.R. Rep. 405; *Teed* v. *Beere* (1859), 28 L.J.Ch. 782; *Re Whitehead, Ex parte Burnand* (1860), 2 L.T. 776. *Turner* v. *Burkinshaw* (1867), 2 Ch. App. 488. Referred to: *Ormond* v. *Hutchinson* (1809), 16 Ves. 94; *Oddy* v. *Secker* (1854), 2 Sm. & G. 193; *Springett* v. *Dashwood* (1860), 2 Giff. 521; *Makepeace* v. *Rogers* (1865), 5 New Rep. 399; *Rishton* v. *Grissell* (1870), L.R. 10 Eq. 393; *Harsant* v. *Blaine Macdonald* (1887), 56 L.J.Q.B. 511.

As to the liability of a defaulting agent to pay interest, see 1 Halsbury's Laws (3rd Edn.) 190; and as to the limitation of an action to recover the sum in default, see ibid., vol. 24, p. 282, and s. 26 of the Limitation Act, 1939 (13 Halsbury's Statutes (2nd Edn.) 1159). For cases see 1 Digest 519–521, 528–531; 32 Digest (Repl.) 599 et seq.

Case referred to:

(1) *Lord Salisbury* v. *Wilkinson* (undated), cited 8 Ves. 48; 32 E.R. 268; 1 Digest (Repl.) 521, *1544.*

Bill praying for an account by an agent employed by the plaintiff.

Charles de Laet had been employed by Lord Hardwicke for several years as receiver and manager of his estates in Middlesex and Hertford, and continued to act in that capacity after his lordship's death down to the year 1792. De Laet having been for some time much pressed by the succeeding Lord Hardwicke, who had attained the age of twenty-one in 1783, to give an account of his receivership, and producing only loose papers and acknowledging that he had kept no regular books of account, it was agreed that Edward Russell should be employed for the purpose of investigating his receipts and payments. De Laet furnished Russell with twenty-one annual accounts commencing at Michaelmas, 1770, and ending at Michaelmas, 1791, but made out from loose and irregular papers. In the course of making out this account, which took more than two years, several errors, false charges, overcharges and omissions, were pointed out, some by De Laet himself, and upon a balance of the account of errors the sum of £1,650 0s. 1d. appeared to be due to Lord Hardwicke. This account was admitted by De Laet, and signed by him, including errors down to May 19, 1792. The general balance due to Lord Hardwicke upon the account so made out was £69 8s. 10½d. which was paid by De Laet, and a bond of indemnity in the penalty of £9,000 against such payments charged by De Laet in the account for which he could produce no vouchers, was executed by him to Lord Hardwicke on May 12, 1792. De Laet also paid Russell £200 as a compensation for his trouble in investigating the account.

In 1786, De Laet being employed by Lord Hardwicke to sell certain estates, sold them to John Wright for the sum of £5,550. By indentures of lease dated Feb. 26, 1790, certain tithes called the Ridge tithes and Almoners tithes, and certain woods called Tittenhanger, all being the property of Lord Hardwicke, were let to Justinian Casamajor for a term of twenty-three years from May 12 preceding, at the yearly rent of £196 and subject to other annual outgoings, to the amount of £71 4s. 6d. This affair was transacted wholly by De Laet. In June, 1792, De Laet died, having devised his real estates in Middlesex and Hertford to Justinian Casamajor, for life, with remainder to his son William Charles Casamajor, and his issue male in strict settlement, with various remainders over, the ultimate remainder to Justinian Casamajor and Humphry Sibthorp in fee, and he disposed of all the residue of his real personal estates upon the trusts therein mentioned.

The bill filed by Lord Hardwicke against the executors and devisees of De Laet had three objects: (i) to open the account upon charges of errors, false charges, overcharges, and omissions, discovered by Russell since the death of De Laet to the amount of £4,644 10s. 9d.; (ii) as to the estates sold to Wright, the bill charged that they were sold for much less than their real value, and that De Laet agreed to sell them to Wright for the sum of £5,550 upon condition or under some agreement or understanding that Wright should convey to De Laet a meadow, called Sleapside meadow, part of the same estates, without any consideration or for some inadequate consideration, which meadow was conveyed accordingly, and De Laet continued in possession of the meadow till his death, since which time the defendant Casamajor had been in possession under his will; (iii) as to the lease of the tithes and woods to Casamajor, the bill charged that in and since the year 1786 the said tithes and woods were worth yearly between £400 and £500 to be let upon a lease for twenty-one years, and that Levi Lavender, one of the plaintiff's tenants, applied for such lease to De Laet who offered it to him at a rent of £500 a year. Lavender offered to take it at a rent of £400 a year which De Laet refused.

The bill, therefore, prayed a general account of all dealings and transactions of De Laet with regard to the plaintiff, and of all sums of money received and paid by De Laet on account of the plaintiff or his estates during the time aforesaid, and that the difference between the sum of £5,550 for which De Laet sold the estates to Wright and the real value of the said estates, including Sleapside Meadow, at the time of such sale, might be ascertained, and also that the damage sustained by the plaintiff by reason of the lease being made for the rent of £196, might be ascertained, or that the said lease may be declared void, and be delivered up to be cancelled, and that the defendant Casamajor might be decreed to deliver up possession of the premises included therein, and account for the real value of such premises from the date of the lease.

Feb. 27, 1808. The cause came on for further directions upon the Master's report.

By an order, dated Feb. 9, 1799, it was ordered that the defendant Casamajor should deliver up the lease, dated Feb. 26, 1790, to the plaintiff, and an account of what was due in respect of the rent was directed, to be paid, with the costs of trying the issue, to the plaintiff by the executors of De Laet. The Master, by his separate report in 1801, stated the sum due on that account to be £1,550, and, as to the estates conveyed to John Wright by indentures dated Mar. 16, 1788, in consideration of £5,500, the Master stated that the premises so conveyed were of much greater value than that sum, and that Wright or De Laet afterwards sold several parts of those premises for several sums amounting in the whole to £6,160; reserving that part of the premises called Sleapside Meadow which the plaintiff elected to take as owner. The Master calculated the arrear of the rent to which the plaintiff was entitled upon that part of the premises at the sum of £128 17s. The Master's general report dated June 23, 1807, stated that the accounts stated by Russell of De Laet's receipts and payments as agent for the plaintiff in respect of his estates

in Hertford and Middlesex from 1770 to 1791, were erroneous and liable to be surcharged and falsified in respect of several overcharges and omissions specified in the report, upon which account the sum of £5,281 15s. 3d. was found to be due from the executors of De Laet to the plaintiff.

The plaintiff, having received from De Laet's executors the sum of £1,550 reported due to him in respect of Casamajor's lease, with the costs of the issue, prayed an order for the immediate payment of the other sums found to be due to him, viz., £660, the excess produced by the sale of such parts of the estates conveyed to Wright as had been sold beyond what had been accounted for to the plaintiff; £128 17s. the arrear of the rent, set upon Sleapside Meadow; and the sum of £5,281 15s. 3d. found due upon the account by the general report. The plaintiff also claimed a reference to the Master to calculate interest upon the several sums found due to him, from the periods at which they ought to have been paid or accounted for respectively, and to tax his costs.

Richards, *Alexander* and *Spranger* for the plaintiff, assuming as a general proposition that a steward must pay interest for money, retained in his hands, contended upon the various instances appearing upon the report that this was a case infinitely stronger for giving interest upon the several subjects of demand, and that the costs must follow of course.

Sir Samuel Romilly and *Raynsford* for the defendants, the executors of De Laet.

Mar. 3, 1808. **LORD ELDON, L.C.**—In this case the result of the liberty, given to the plaintiff to surcharge and falsify the accounts for twenty-one years stated by Russell is that, instead of £1,650, the sum represented by him to be due to the plaintiff, he is entitled upon that account to a sum exceeding £5,000. The fact that De Laet was in the habit of paying his balances into the banker's is material with reference to *Lord Salisbury* v. *Wilkinson* (1), which has been mentioned by counsel for the defendants. It appears to me, alluding to the plaintiff's letter, that, if he could have satisfied himself that the sum, ascertained by Russell's account, was all that was due, he was disposed to go no further, and to give a release, but, if he was not disposed at that time to enter into the question whether that was the complete justice due to him, he seems to have thought it was not the whole that was due. Another subject of demand upon this bill is the sale of the estate to Wright, in truth and substance De Laet himself being the purchaser and part of the estate being in fact conveyed to him for no adequate consideration, as to which Lord Hardwicke has elected to consider himself the owner. Another subject, brought into contest by this bill, is the lease to Casamajor, in whose conduct I cannot in any part of the case trace any degree of impropriety.

As to the costs, so far as the court looked at the object of making De Laet account for the profit of the transaction in which Wright was represented as a purchaser for above £5,000, and with regard to which the decree considers Lord Hardwicke, notwithstanding that transaction, as the owner, the agent having acted in such a manner that the plaintiff was entitled to the whole benefit derived from it, it could not be, nor was it contended that the court could have any hesitation in making De Laet's estate pay the costs of the suit. With regard to the lease also, if Mr. Casamajor could have been fixed with any impropriety as to that lease, which is not the case, it would have been within the power of the court to charge him individually with the difference of the rent, but it is not fit with reference to his conduct, which is not at all impeached, so to charge him, nor has that been done, but as to the expense of drawing back the benefit, which would have arisen to the plaintiff if that lease had been a proper one, it was not, and could not be, contended that De Laet's estate should not pay the costs of that.

It was, however, insisted that as to one article, viz., the point raised by the plaintiff contending that the account settled by Russell was to be considered as altogether open, and that the settlement was to have no effect whatsoever, the decree, merely giving liberty to surcharge and falsify, is to be considered a decision

against the plaintiff as to that, and, therefore, the costs of that part of the bill should be paid by him. That is not my opinion. If the plaintiff contended for too much upon that part of the case, the defendants also sought with reference to that a great deal more than they were entitled to, and, if the costs could be separated, the best decision would be that with reference to that there should be no costs to the hearing upon either side. But that article is so trifling, that there would be no use in making the distinction. The best decision, therefore, will be to give the costs generally.

The most important question is as to the demand of interest. It is a question with a receiver of all the rents and profits, the produce of enfranchisements, the sale of woods, etc., originally appointed by the plaintiff's father, at a salary, and the intention seems to have been, that at certain periods the receiver should pay what he received to the bankers. The plaintiff succeeding his father in the year 1770, the receiver continued in the employment of the guardians, who did not very minutely and accurately investigate the accounts. The plaintiff, being of age in the year 1778, De Laet was continued as receiver, with almost entire confidence reposed in him by Lord Hardwicke, until the dissatisfaction arose that induced his lordship to call for the accounts. The result of the whole as to this part of the case is that De Laet, standing in this relation, has, by charging the plaintiff with payments that never were made and withholding credit for sums certainly received, placed himself in this situation, that upon Russell's account he had withheld, contrary to the faith of his implied contract, the sum of £1,650; and by the Master's report a further sum to a very considerable amount is now found to be due from his estate upon a general account.

Under these circumstances it has been contended, first, that interest is not to be paid, and, secondly, if it ought to be paid, that the court is called upon to look with anxiety for some time that may, consistently with principles and all the considerations to which courts of equity attend, be said to be the proper period, from which it is to run. There are very few cases upon the question how far a steward is, or is not, to pay interest for sums withheld, and I do not know that any general rule can be laid down, as I must look at the circumstances of the cases that have been alluded to by counsel for the defendants. If a steward is permitted by his employer to hold money and is not called upon for his accounts and the employer can be said to have given a sanction to that practice by his conduct, there may be cases in which interest would not be decreed. In *Lord Salisbury* v. *Wilkinson* (1), I have a strong recollection, not that Lord Thurlow felt any difficulty upon the question whether in many cases a steward might not be charged with interest, but in that case the mode of dealing was such that it might be taken to be a sort of authority, given to the steward, habitually to hold money in his hands, so that in truth Lord Salisbury had made the steward his banker, expected always to be supplied by him with money, had sometimes overdrawn him, and that Wilkinson was authorised to conceive himself in the situation that he was to have money ready whenever it should be called for.

This case is perfectly different from that. The duty of De Laet required him to receive the money, to hand in accounts, and to pay the money to others, upon the notion, understood by everyone, that he was from time to time to pay all that he had received, a case, therefore, upon the report of the Master going much beyond Lord Salisbury's case. On the whole this is a case of wilful concealment of what had been received. Laying out of the case altogether any principle arising out of the circumstance that De Laet was from time to time to pay the money into the banker's, and, supposing that not to exist in the case, there is that species of concealment and overcharges, grounded in fraud, which of themselves would authorise, and require, the court to charge him with interest.

I cannot discover any difference between the implied contract supposed to arise out of the duty of trustees, assignees, and executors, though certainly differing widely in character, and the implied contract of a receiver and agent who is bound

faithfully, diligently, and accurately, to account, at least when called upon, and not to suppress, conceal, or overcharge. There is no ground that can be urged for charging interest against a receiver that will not authorise it against De Laet.

There is another consideration upon which the judgment that I am about to pronounce may by many persons be thought a miscarriage. I, therefore, notice it that it may not be misunderstood. The demand was made at the Bar upon the part of the plaintiff for interest to be paid from the year 1770 to this time, charging interest upon the accounts as they would stand annually rectified from that time to this. Lest mischief should arise from the want of such a declaration, I now state that, hard as it may be upon persons who succeed to property, subject to demands of this nature by the circumstance that the fraud was not discovered until after the death of the parties implicated in it, defeating the expectations of those who succeed them, I think, the court is in general cases justified in saying to a steward, or to those who represent him, that if upon subsequent inquiry it turns out that he, who ought to have kept and annually to have rendered accurate accounts and to have paid the balances, has wilfully concealed sums that he has received, and charged his principal with payments which he never made, with whatever hardship it may be attended, there is a principle that in general cases would authorise the court to say there can be no period, however remote, through which the court will not look for the purpose of setting such an account right. But upon a circumstance in this case I am called upon by the plaintiff himself not to carry the interest so far back, and that is the principle upon which the plaintiff seemed himself to think it right to deal, when he called for the accounts of twenty-one years. I think, therefore, that, all matters between De Laet and this family being considered, but with more tender consideration than if he had been a mere stranger, the plaintiff seems to have been of opinion that he ought to be satisfied with the result of the account at that time fairly taken, and upon the pleadings he would have taken the sum of £1,650, if that had been the sum due, without calling for interest upon the items in the account, forming that sum.

It may be said, if the plaintiff would have been satisfied with that, De Laet's conduct in giving that account instead of giving a fair account of what was then due, has removed him from the situation in which Lord Hardwicke meant that principle to govern. The answer to that is that, though I do not agree that upon the form of the pleadings interest ought not to be given, I think that if the plaintiff meant to ask for interest from an earlier period than the time when that balance was rendered, the bill ought to have pointed out directly that he did mean that. He has not made that demand, and I infer, that it was not his intention, but that his intention was, that, the balance at that time being stated, the demand for interest should be confined to what should appear to be that balance at that time, and there was no reason why interest should be paid upon those accounts, that had been rendered. The time from which the interest is to be computed is the period when Russell gave the balance of £1,650, viz., May, 1792. Interest must also be paid by De Laet's estate (not by Casamajor) upon the difference of the rent from the time that demand was constituted, at £4 per cent., and interest must also be paid upon the sum of £660 from the time it was received, and all the costs must be paid by the estate of De Laet.

Order accordingly.

COSTIGAN *v.* HASTLER AND ANOTHER

[Lord Chancellor's Court in Ireland (Lord Redesdale, L.C.), December 7, 1804]

[Reported 2 Sch. & Lef. 160]

Specific Performance—Refusal of decree—Injustice to defendant if granted.
Landlord and Tenant—Agreement for lease—Lease of mortgaged property by mortgagor—Validity—Redemption of mortgage.

When a person undertakes to do a thing which he can himself do or has the means of making others do the court will compel him to do that thing or procure it to be done, but not if the circumstances of the case make it highly unreasonable or unjust to do so.

An agreement for a lease by a mortgagor cannot be enforced against the tenant unless the consent of the mortgagee has been obtained to the agreement or the mortgagor has redeemed the mortgage. A court of equity will not compel the mortgagor, if it is highly inconvenient, to pay off the mortgage for the purpose of giving effect to the agreement, but it will not be enforced against the tenant if the tenant does not wish to abide by it. If he will not give up the contract, and the court, in the circumstances mentioned, refuses specifically to enforce it the tenant will be left to seek damages as compensation.

Motion to set aside an order to dissolve an injunction.

John Parker, being seised of the lands in question subject to a mortgage to Walter Sweetman, on Mar. 22, 1790, entered into a written agreement with the defendant Hastler (in the name of his trustee, the defendant, Thomas Alley) to execute to him a lease for three lives, with covenant for perpetual renewal, at 16s. 6d. per acre, amounting to £135 6s. per annum for the whole. Hastler, having obtained possession under the agreement, immediately advertised the lands to be let, and the plaintiffs having offered a rent of £221 6s. were declared tenants. A lease for three lives from Alley to the plaintiffs was prepared by Hastler (who was an attorney) bearing date June 1, 1790, which was duly executed by the plaintiffs, but remained in the hands of Hastler without its being executed by him on pretence of his undertaking to get it executed by Alley. The plaintiffs got possession of the demised premises, save about forty acres which remained, as was alleged, in the hands of the cottier tenants whom the plaintiffs had found it impracticable to evict. The plaintiffs paid some rent, the amount of which was controverted by the defendant on the ground that part of it was paid to one Lidwell, a person not then authorised by Hastler to receive it, and on Sept. 28, 1793 (when according to the allegation of the bill all rent was paid up) the defendants distrained and impounded the cattle of plaintiffs. To prevent a sale of the cattle the plaintiffs executed three promissory notes, one for £60 and the others for £70 each, to three persons as trustees for Hastler, subject to a future settlement of accounts. Hastler, however, without any settlement of accounts, brought three several actions upon the notes in the names of Sylvester O'Brien, Patrick Hynes, and John Derinzy, his trustees. Hastler also caused an action to be brought in the name of Alley for the sum of £1,155, penalties for the breach of a covenant alleged to be contained in the lease in letting part of the lands to some of the former occupiers.

Under these circumstances, the original bill was filed, on May 22, 1794, praying that, as no rent was due when the notes were passed, they might be brought into court and cancelled: that Alley, Hastler, O'Brien, Hynes, and Derinzy, might be restrained from proceeding in the several actions at law commenced by them; and that Alley might be obliged to execute leases of the premises to the plaintiffs and put them in possession of such parts as were withheld from them. The answers insisted that the amount of the three notes was fairly due, and offered to execute the leases on plaintiff's settling accounts, and paying the balance due.

Previously to the filing of the bill, Sweetman had filed his bill of foreclosure

against Parker, and, he having subsequently obtained a decree for a sale, the plaintiffs, in July, 1796, were turned out of possession by the injunction of the Court of Exchequer which issued to put the purchasers under the decree into possession, whereupon plaintiffs amended their bill, charging that fact, and that, from the great rise of lands and the improvements made by plaintiffs, the farm had risen considerably in value, and praying that the plaintiffs should be restored to the possession, or otherwise that Hastler should be obliged to pay them the value of their interest in the lands. On July 21, 1797, an injunction until the hearing was obtained, after which (from the distressed circumstances of both parties) no further proceedings were had until May, 1802, when, upon a motion to dissolve the injunction, it was further continued, upon the terms of the plaintiffs speeding their cause. They not having done so, the defendants, in July, 1804, served notice of a motion to dissolve the injunction, which was on July 27 granted without opposition. The plaintiffs moved the LORD CHANCELLOR to set aside the order of July 27, and upon that motion it was proposed and agreed to by all parties in order to prevent further litigation to have the cause heard upon bill and answer, and in that shape it now came on.

Saurin and *Ball* for the defendants.
Burston, *Grady*, and *Espinasse* for the plaintiffs.

LORD REDESDALE, L.C.—This case is one in which I have no difficulty in giving relief upon the facts as they appear. The facts are these. The defendant Hastler was an attorney, and by his friend Alley, as his trustee, he entered into a contract with Parker for the lands in question. It now appears from the statement made by Hastler, which for the purposes of this cause I must take to be true, that in March, 1790, he made a contract which would have given him a right to have had a complete title made to him if Parker could have given it. The only circumstance which prevented his obtaining that title was that the lands were in mortgage, and the mortgagee was proceeding to compel payment of his debt. Under these circumstances, Hastler being an attorney and fully aware of his situation, and Alley being his trustee and acting in concert with him, they hold out to the public that they have a power to let these lands. They advertise them, and the effect of this advertisement is to call on persons to bid for the lands as if they had a power to give a secure title for three lives and to put their tenants into possession. The plaintiffs treat for the lands, and in June, 1790, they came to an agreement. Hastler and Alley had taken the lands of Parker at a rent of £135 6s. and they agree to let at £221, making a profit rent of £86 per annum. Thus the transaction is clearly beneficial to them. They are to gain this profit rent out of the industry of the plaintiffs, without any expense or trouble to themselves, but they had a right to it provided they could perform the contract on their parts. This is an executory contract to be executed on the part of the defendants by doing certain acts. Equity every day enforces such contracts where they can be performed or rescinds them where they cannot.

This contract is to a certain degree carried into execution. The plaintiffs have possession, to a certain degree at least if not the entire possession under the contract. They were entitled to have that possession clothed with a legal demise, and, if Hastler and Alley were not able to do so, they were not entitled on their part to enforce performance of the contract on the part of the tenants. If they had been obliged to come into a court of equity to compel performance by the tenants, they must have performed the contract on their part if they had title, and, if they had not, their bill would have been dismissed. They could have been relieved from the contract on their part only by calling on the tenants to give it up if they objected to the title that Hastler and Alley could give them.

It is evident that they have never given to the tenants what they contracted to give them. They have never given them a valid demise, nor any demise at all. They never had a semblance of legal title themselves. They had nothing but

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Burston, *Grady*, and *Espinasse* for the plaintiffs.

LORD REDESDALE, L.C.—This case is one in which I have no difficulty in giving relief upon the facts as they appear. The facts are these. The defendant Hastler was an attorney, and by his friend Alley, as his trustee, he entered into a contract with Parker for the lands in question. It now appears from the statement made by Hastler, which for the purposes of this cause I must take to be true, that in March, 1790, he made a contract which would have given him a right to have had a complete title made to him if Parker could have given it. The only circumstance which prevented his obtaining that title was that the lands were in mortgage, and the mortgagee was proceeding to compel payment of his debt. Under these circumstances, Hastler being an attorney and fully aware of his situation, and Alley being his trustee and acting in concert with him, they hold out to the public that they have a power to let these lands. They advertise them, and the effect of this advertisement is to call on persons to bid for the lands as if they had a power to give a secure title for three lives and to put their tenants into possession. The plaintiffs treat for the lands, and in June, 1790, they came to an agreement. Hastler and Alley had taken the lands of Parker at a rent of £135 6s. and they agree to let at £221, making a profit rent of £86 per annum. Thus the transaction is clearly beneficial to them. They are to gain this profit rent out of the industry of the plaintiffs, without any expense or trouble to themselves, but they had a right to it provided they could perform the contract on their parts. This is an executory contract to be executed on the part of the defendants by doing certain acts. Equity every day enforces such contracts where they can be performed or rescinds them where they cannot.

This contract is to a certain degree carried into execution. The plaintiffs have possession, to a certain degree at least if not the entire possession under the contract. They were entitled to have that possession clothed with a legal demise, and, if Hastler and Alley were not able to do so, they were not entitled on their part to enforce performance of the contract on the part of the tenants. If they had been obliged to come into a court of equity to compel performance by the tenants, they must have performed the contract on their part if they had title, and, if they had not, their bill would have been dismissed. They could have been relieved from the contract on their part only by calling on the tenants to give it up if they objected to the title that Hastler and Alley could give them.

It is evident that they have never given to the tenants what they contracted to give them. They have never given them a valid demise, nor any demise at all. They never had a semblance of legal title themselves. They had nothing but

the bare possession under an executory contract with Parker. However, under these circumstances, Hastler contrives to prepare the leases himself to prevail on the tenants to execute both parts, and then he contrives to retain both parts in his own hands. It is impossible to say that this is not a fraud in one respect and an abuse of confidence in another. He was the person entrusted in preparing the leases. So far he acted as attorney for all the parties. He abused that character by prevailing on these men to execute the leases which he and his trustee never executed. This of itself would give very ample ground for the interference of a court of equity in this case. The plaintiffs pay rent. A dispute arises whether they have paid all the rent which they had agreed to pay, they insisting that they had paid it to Lidwell, Hastler's agent. Hastler's answer to this is: "Lidwell had been my agent, but I had dismissed him, and had given notice to the tenants, but they thought fit to deal with him afterwards." Supposing the fact to be as asserted, yet it is a fit subject for investigation under all the circumstances of this case.

Be that as it may, it now stands clearly admitted that the contract cannot be executed by Hastler and Alley; they have no power to make the demise which they contracted to make, and, therefore, the contract is to be rescinded. Being a contract executed in part, though not to the full extent, one question is to what extent is it to be rescinded? There is another question with respect to the conduct of the parties while the contract was deemed a subsisting contract between them, which it must be taken to be until the court has decided that it ought to be rescinded. The bill was filed before it appeared that the agreement could not be carried into execution. It sought to have the benefit of it if it could be executed, and, if not, to have it rescinded—a common and ordinary case, one which occupies courts of equity every day.

If it had come on upon the original bill and the only doubt had been as to the title, it would have been referred to the Master to report whether a good title to a lease could be made according to the contract, and, if he had reported that it could, the performance of the contract would have been decreed. When a person undertakes to do a thing which he can himself do or has the means of making others do the court compels him to do it or procure it to be done unless the circumstances of the case make it highly unreasonable to do so. Hastler had a contract with Parker which he could have carried into execution, provided he could either have got the consent of the mortgagee to the lease, contracted for by Parker, or the claim of the mortgagee could have been satisfied by payment of a mortgage debt. If a mortgagor contracts to make a lease, the tenant has a right to say: "You shall either obtain the consent of the mortgagee or redeem the mortgage; or if you complain of the hardship of this, you shall rescind the contract." A court of equity may not compel the mortgagor, if highly inconvenient, to pay off the mortgage for the purpose of giving effect to the contract, but then he shall not enforce it against the tenant if the tenant does not wish to abide by it. If the tenant will not give up the contract, the court might say that it should not be specifically enforced against the landlord under such circumstances, and leave the tenant to seek his compensation in damages at law.

Pending this suit and while the matter remained in suspense both Parker and Hastler were put out of possession by the injunction of the Court of Exchequer, and a sale was made under the decree of that court, at the suit of the mortgagee. This sale might have been prevented by Hastler's coming into court and redeeming the mortgage. He did not do so, and, therefore, unquestionably it is his fault that the agreement cannot be specifically performed. But he insists on the benefit of the contract as if he had done what he ought. It is impossible to say that this is just, and the only question is what under the circumstances ought to be done.

If the cause had come on before the decree and sale, the Master would have reported that Hastler could make a title if he redeemed or if the mortgagee would consent, but that Hastler could not procure that consent. Then the decree would

A have been: "You, the tenant, if you insist on a specific performance, must take it, subject to the mortgage, for if Hastler were decreed to redeem, he must lie in jail for ever, as he is not in circumstances to do so, and, therefore, it would be unjust, under the circumstances of this case, to press for what would be a just decree in other cases, but if you do not choose to take the lease subject to the mortgage, it is but justice that the contract should be rescinded." It is a contract B entered into, I will not say in this respect fraudulently, but under a mistake, Hastler and Alley conceiving that they could get the consent of the mortgagee to the demise. Therefore, leaving fraud out of the case, I should so decree on the ground of misconception. The contract, therefore, must be rescinded.

On what terms is it to be rescinded? It must be upon equitable terms on both sides. I do not agree with counsel for the plaintiffs that, from the time of filing C the bill, these persons are to be considered as tenants to Parker. At the time they entered into the contract, Hastler and Alley had a good title as against Parker, but having been turned out in 1796, it is clear they cannot be obliged to pay more rent than to that time, and it is equally clear that Hastler and Alley are entitled to the difference between the rent actually paid and the rent to that time. The contract was founded on the idea that they were to get actual possession and a D title for three lives. They did get possession of part; the rest, amounting to about 40 acres was in the possession of cottier tenants. If these cottiers gave up possession and became tenants voluntarily to the plaintiffs as holding under them the consequence would be that the plaintiffs have got the entire possession, but if the cottiers insisted on their title and all the plaintiffs could get was the rent which the cottiers before paid, they had no means of turning them out of possession. E Therefore, on this part of the case, some inquiry ought to be made.

With respect to the account, I cannot judge whether the plaintiffs truly state that they had paid all the rent to May, 1793. The Master will inquire into that and into the authority of Lidwell to receive it. The actions brought upon the notes were unquestionably oppressive. The goods were distrained. It is clear that it was in dispute whether they ought to have been distrained, and the notes were F given for what was to be a subject for investigation. The costs of these transactions must be paid by Hastler. What ought the plaintiffs to pay for the occupation during the time they had it? Prima facie they ought to pay the rent reserved upon the contract under which they entered, but that may be unreasonable, for instance, if the cottier tenants held against them, so it might be a fair rent for three lives and yet unreasonable for a short term. All this must be taken into G consideration by the Master, in considering on what terms the contract shall be rescinded.

Order accordingly.

COLE AND OTHERS *v.* PARKIN

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Le Blanc and Bayley, JJ.), June 27, 1810]

[Reported 12 East, 471; 104 E.R. 184]

Deed—Alteration—Restamping—Alteration to validate deed made invalid by mistake.

If, after a deed has been executed, it is altered with the consent of the parties in such a way as to make it in effect a new instrument, it must be restamped, but restamping is not necessary where the alteration is to correct a mere mistake which resulted in the deed when first executed being void and to put the deed into that valid state in which it was originally intended to be.

Notes. Applied: *Bathe* v. *Taylor* (1812), 15 East, 412. Referred to: *Webber* v. *Maddocks* (1811), 3 Camp. 1.

As to alterations of deeds, see 11 Halsbury's Laws (3rd Edn.) 367–371 and cases there cited.

Cases referred to:

(1) *Westerdell* v. *Dale* (1797), 7 Term Rep. 306; 101 E.R. 989; 42 Digest (Repl.) 650, *4032*.

(2) *Camden* v. *Anderson* (1794), 5 Term Rep. 709; 101 E.R. 394; 41 Digest (Repl.) 547, *3248*.

(3) *Hibbert* v. *Rolleston* (1790), 3 Bro. C.C. 571.

(4) *Kershaw* v. *Cox* (1800), 3 Esp. 246, N.P.; 6 Digest (Repl.) 357, *2571*.

(5) *Knill* v. *Williams* (1809), 10 East, 431; 103 E.R. 839; 6 Digest (Repl.) 352, *2553*.

Also referred to in argument:

Bowman v. *Nichol* (1794), 5 Term Rep. 537; 101 E.R. 302; 6 Digest (Repl.) 471, *3302*.

French v. *Patton* (1808), 9 East, 351; Holt, N.P. 333, n.; 103 E.R. 606; 29 Digest (Repl.) 88, *335*.

Rule Nisi obtained by the plaintiffs to set aside a nonsuit in an action in trover for a ship, tried before Lord Ellenborough, C.J., at Guildhall.

At the trial the plaintiffs, who were assignees in the bankruptcy of one Doyle, a bankrupt, proved a bill of sale of the ship executed by the defendant to Doyle, in which, by mistake, the certificate of registry was recited to have been granted at Guernsey instead of Weymouth, where it was in fact granted. When the bill was sent down to Weymouth to be registered there, the mistake was discovered, and it was returned to the parties. The mistake was then rectified with the consent of both parties by striking out "Guernsey" and inserting "Weymouth," and the deed was re-executed and delivered de novo, but without any new stamp. On the objection being taken of the want of a new stamp, the plaintiffs were nonsuited at the trial, with leave to move to set the nonsuit aside, and, a rule nisi having been granted for that purpose,

Sir Vicary Gibbs and *Marryat* showed cause against the rule.

Park and *Scarlett* supported the rule.

Cur. adv. vult.

June 27, 1810. **LORD ELLENBOROUGH, C.J.,** delivered the following opinion of the court.—The only question in this case was whether an alteration in the bill of sale of a ship made a new stamp necessary. The bill of sale was originally executed on June 26, but in reciting the certificate of registry it stated Guernsey as the port where the certificate was granted instead of Weymouth. It was sent down to Weymouth for registration, and returned on Sept. 5, and then the mistake was rectified by consent of all parties and the deed delivered de novo. Whether

this second delivery made a new stamp necessary was the question reserved for the further consideration of the court.

On such further consideration, we are all of opinion it did not. By the statute 26 Geo. 3., c. 60, s. 17 [repealed: see now Merchant Shipping Act, 1894, s. 24], a bill of sale of a registered ship

> "which does not truly and accurately recite the certificate of registry in words at length, shall be utterly null and void to all intents and purposes."

It has been decided upon this clause that a bill of sale not conformable to it is so completely void that a stranger may insist upon its insufficiency: *Westerdell* v. *Dale* (1), and that it gives no title even in equity: *Camden* v. *Anderson* (2) and *Hibbert* v. *Rolleston* (3). This bill of sale, therefore, when first executed, was, from the mistake in the recital of the certificate of registry, to all intents and purposes null and void. It took no effect whatever from its first delivery, and the stamp impressed upon it was wholly inoperative. This defect arose, not from intention, but from mistake. The instrument, as first executed, was not what the parties meant to execute, and it was not in the state in which it was at first intended to be, till it was altered. This is not the case of substituting a new and second contract in the place of a preceding effectual one upon a change of intention in the parties, but merely making the contract what it was originally intended to have been, and in such a case, where the instrument upon its first execution was void to all intents and purposes, where its insufficiency arose from a mere mistake, where in consequence of that mistake it was not in the state in which it was intended to have been when it was so executed, and where upon its second execution it is only put into that state in which it was originally intended to have been, we think it is not going beyond the fair spirit of the stamp laws to hold that upon such second execution, being the first which was effectually operative, a new stamp was not requisite.

Kershaw v. *Cox* (4) was a stronger case than this, for there the bill of exchange was available in the hands of the payee, though not negotiable for want of the words "or order," and the mistake in omitting those words was not discovered till after the bill had been endorsed and negotiated by the payee, when they were inserted by the consent of all parties. This court, in LORD KENYON'S time, held that a new stamp was not necessary on such alteration. In *Knill* v. *Williams* (5), where a note was altered the day after it was made by stating what was the consideration for it, viz., the goodwill of a lease and trade, the court held a new stamp necessary, but that was because it did not appear to have been the original intention that the consideration should be stated; it was clearly an afterthought. The case was said not to be like *Kershaw* v. *Cox* (4), where, by mistake as it appeared, the bill had not

> "been drawn according to the intention of the parties at the time, and it was brought back the next day to Kershaw, the drawer, to have the imperfect execution of it perfected."

In the present case this bill of sale was by mistake drawn contrary to the intent of the parties at the time inasmuch as they meant that the certificate should be truly recited and the second execution of the deed only perfected what was before imperfect. We are of opinion, therefore, that in this case the nonsuit should be set aside, and a new trial granted.

Rule absolute.

M'CARTHY *v.* GOOLD

[Lord Chancellor's Court in Ireland (Lord Manners, L.C.), August 2, 1810]

[Reported 1 Ball & B. 387]

Execution—Sequestration—Validity—Half-pay of officer—Pension—Attachment in hands of assignee—Dividends of bank stock.

The half-pay of an officer in the service of the Crown is not assignable or attachable on grounds of public policy. But a pension granted to an individual and his assigns is assignable and can be attached in the hands of an assignee.

Semble: Dividends of bank stock are choses in action and cannot be attached.

Notes. As to sequestration and attachment, see 16 Halsbury's Laws (3rd Edn.) 68–77, 79–93. For cases see 21 Digest (Repl.) 686 et seq., 713 et seq.

Cases referred to:

(1) *Stone* v. *Lidderdale* (1795), 2 Anst. 533; 145 E.R. 958; 8 Digest (Repl.) 564, *164.*

(2) *Dundas* v. *Dutens* (1790), 1 Ves. 196; 2 Cox, Eq. Cas. 235; 30 E.R. 298; 21 Digest (Repl.) 570, *655.*

(3) *Simmonds* v. *Lord Kinnaird* (1799), 4 Ves. 735; 31 E.R. 380, L.C.; 21 Digest (Repl.) 694, *1934.*

Also referred to in argument:

Opie v. *Maxwell* (1768), cited in 4 Ves. at p. 742.

Grainger v. *Wyvil* (1728), cited in 2 Anst. at p. 534.

Motion praying an order that sequestrators should receive certain funds.

A decree had been pronounced against the defendant directing payment of a sum of money to the plaintiff, and a sequestration had issued to compel the performance of it. A motion was now made that the sequestrators be directed to receive the amount of a compensation pension awarded to the Earl of Westmeath at the time of the Union [between Great Britain and Ireland] payable at the Treasury, which had since been assigned by Lord Westmeath to the defendant upon whose receipt it was now paid. The plaintiff also sought an order for the sequestrators to attach the dividends upon bank stock standing in the name of the defendant, but this part of the application was abandoned. Notices were served upon the bank and the Treasury cautioning them against paying the annuity and dividends to the defendant.

Saurin, *Dominick Rice*, and *Franks*, in support of the application.

LORD MANNERS, L.C.—It has been decided both at law and in equity that the half-pay of an officer is not assignable or attachable on principles of public policy. In *Stone* v. *Lidderdale* (1), the reason given was that he may be forthcoming when his services are required, but M'Donald, C.B., in his judgment, makes a distinction between the case of an half-pay officer and that of a pension granted to an individual. In this case, the grant of the pension was to Lord Westmeath and his assigns. He has assigned it to the defendant, who is in the receipt of it. It is not a chose in action, but a grant, and may be reached by the process of this court, and the proper mode of effecting this is by restraining the defendant from receiving this pension and directing the sequestrators to receive the same at the Treasury without serving any order on the Lords of the Treasury for that purpose.

As to the claim upon the dividends of bank stock, it has been very properly abandoned. I listened very attentively to Lord Thurlow in *Dundas* v. *Dutens* (2), which was heard upon decree and not upon motion, and he was clearly of opinion that choses in action, of which description is stock, could not be reached by the process of this court. My note of that case is more full than that which has been reported. He there states his opinion to be that property in the funds, being a

chose in action, cannot be attached. There is a material difference between rents payable by tenants and funded property as to the effect of a sequestration. In the former case the order is to put a person into possession as a steward or receiver to receive the rents, the tenants being directed not to pay to the person against whom the sequestration issues, but to the sequestrators. In *Simmonds* v. *Lord Kinnaird* (3), nothing has been decided, and I am surprised that *Dundas* v. *Dutens* (2) was not referred to in it. As to the case of deceased persons, where this court takes the whole property into its possession, it bears no analogy whatever to a case inter vivos.

Order granted.

COLWILL *v.* REEVES

[Court of King's Bench (Lord Ellenborough, C.J.), February 19, 1811]

[Reported 2 Camp. 575]

Trespass to Goods—Goods held on sale or return—Possession needed to maintain action—Goods mixed with goods of another person.

A shopkeeper has a special property in goods which have been sent to him on sale or return sufficient to enable him to maintain an action for trespass against any person who without his permission and against his will removes the goods from his premises. This is so although the goods are mixed with the goods of another provided that they remain distinguishable.

Notes. As to trespass to goods, see 38 Halsbury's Laws (3rd Edn.) 753–759; and for cases see 46 Digest (Repl.) 400 et seq.

Action of trespass for breaking and entering the plaintiff's house and taking his goods.

The plaintiff was stated to carry on the business of a furniture broker at the house in question, and it appeared that (among other things) a sofa, sent to him on sale or return, had been carried away by the defendant as part of the goods of one Grindley, a bankrupt who had carried on the same business in the same house.

Park objected that the plaintiff could not maintain trespass for this sofa, as the property in it while unsold continued to abide in the original owner, and the plaintiff was merely his servant to take care of it.

LORD ELLENBOROUGH, C.J., held that the plaintiff had a special property in the sofa, which, coupled with the possession, enabled him to maintain trespass for it in his own name.

Garrow, *Jekyll*, and *Marryat* for the plaintiff.

Park (*Stork* with him) opened as a complete defence to the whole action, that Grindley alone had carried on the business in this house; that, he becoming bankrupt, it was concerted for the fraudulent purpose of protecting his goods from his assignees and his creditors that the plaintiff should send into the house some articles of furniture to be mixed with his; that the plaintiff with this view sent in the goods for which the action was brought; and that they were ignorantly taken by the messenger under the commission as part of the effects of Grindley.

LORD ELLENBOROUGH, C.J.—If a man puts corn into my bag in which there is before some corn the whole is mine because it is impossible to distinguish

what was mine from what was his. But it is impossible that articles of furniture can be blended together so as to create the same difficulty. The goods in question remained distinct, and the messenger might have discovered that they belonged to the plaintiff. He took them at his peril. Whatever fraud there might be in the case, the property was not divested from the plaintiff, and the stratagem described is no defence on the general issue to an action at his suit for taking and converting the goods.

Verdict for plaintiff.

WINCH *v.* WINCHESTER

[Rolls Court (Sir William Grant, M.R.), December 18, 1812]

[Reported 1 Ves. & B. 375; 35 E.R. 146]

Sale of Land—Misdescription—Deficiency in extent—Abatement in purchase-price—Estate sold as "containing by estimation forty-one acres, be the same more or less"—Deficiency of between five and six acres—Declaration by auctioneer.

A purchaser who had bought an estate described in the particulars of sale as "containing by estimation forty-one acres, be the same more or less," but which was found on measurement only to amount to between thirty-five and thirty-six acres was **held** to be entitled to an abatement in the amount of the purchase-money.

Specific Performance—Refusal of decree—Contract sought to be enforced induced by misrepresentation.

The court will not grant a decree of specific performance of a contract which has been induced by the misrepresentation of the person seeking the decree. Parol evidence is admissible to establish misrepresentation.

Notes. Applied: *Denny* v. *Hancock* (1870), 18 W.R. 566. Considered: *Joliffe* v. *Baker* (1883), 11 Q.B.D. 255. Referred to: *Huddersfield Corpn.* v. *Jacomb* (1874), 30 L.T. 78.

As to misrepresentation on a sale of land, see 34 Halsbury's Laws (3rd Edn.) 210, 215–217, 223; and as to its effect in an action for specific performance, see ibid., vol. 36, pp. 303–308. For cases see 40 Digest (Repl.) 271–276; 44 Digest (Repl.) 58 et seq.

Cases referred to:

(1) *Higginson* v. *Clowes* (1808), 15 Ves. 516; 33 E.R. 850; 3 Digest (Repl.) 19, *140.*

(2) *Clowes* v. *Higginson* (1813), ante p. 186; 1 Ves. & B. 524; 35 E.R. 204; 44 Digest (Repl.) 64, *499.*

(3) *Marquis of Townshend* v. *Stangroom* (1801), 6 Ves. 328; 31 E.R. 1076, L.C.; 40 Digest (Repl.) 303, *2516.*

(4) *Ramsbottom* v. *Gosden* (1812), 1 Ves. & B. 165; 35 E.R. 65; 35 Digest (Repl) 150, *397.*

Bill praying a decree of specific performance of a contract of sale of land.

In December, 1809, the plaintiffs, as trustees under a deed executed by Edward Jewhurst, put up for sale by auction an estate described by the particulars as "containing by estimation forty-one acres, be the same more or less," and as being in the occupation of Edward Jewhurst. At the sale John Ayerst, as the agent of the defendant, became the purchaser and signed an agreement for that purpose. Shortly after the sale he entered into possession.

The defendant, by his answer to the bill, stated that he was induced to purchase under the impression that the farm contained the particular quantity of land alleged. He said that his agent before the sale had been informed by Jewhurst in answer to an inquiry that the estate consisted of forty-one acres, and that at the sale and previously to its commencing the agent asked the auctioneer what quantity he sold the farm for, to which the auctioneer replied: "Forty-one acres," adding: "If the purchaser does not like to take it so, it shall be measured. If it proves more, the excess must be paid for; if less, an abatement shall be made." The answer further stated that the land had since been measured, and amounted only to between thirty-five and thirty-six acres, but the defendant submitted to perform the agreement, having an abatement for the quantity of land deficient.

Sir Samuel Romilly and *Newland*, for the plaintiffs, contended that a specific performance must under the circumstances be decreed, and mentioned *Higginson* v. *Clowes* (1) [and see *Clowes* v. *Higginson* (2), ante p. 186], as an authority that parol evidence of declarations by the auctioneer could not be read to explain the particulars of sale.

Hart and *Grimwood* for the defendant.

SIR WILLIAM GRANT, M.R.—This bill seeks to compel the defendant specifically to perform an agreement into which he entered for the purchase of an estate, which had belonged to Jewhurst who conveyed it to the plaintiffs on trust to sell for the payment of his debts. The plaintiffs, as trustees, put the estate up for sale by auction in 1809. The defendant through his father-in-law Ayerst was the purchaser, and Ayerst signed the agreement on the particulars. The description of the estate in the particulars represents it as containing by estimation forty-one acres "be the same more or less." The only objection made is that the estate does not contain forty-one acres, but upon measurement appears to be less than that quantity by five acres and a fraction. The defendant claims an abatement out of the purchase-money for this difference, first, upon the specification of quantity in the particulars, next upon the ground of a representation or warranty verbally given by the auctioneer at the time of the sale.

The effect of the words "more or less" added to the statement of quantity has never yet been absolutely fixed by decision, being considered sometimes as extending only to cover a small difference the one way or the other, and sometimes as leaving the quantity altogether uncertain, throwing upon the purchaser the necessity of satisfying himself with regard to it. In this instance the description is rendered still more loose by the addition of the words "by estimation." The estimated extent of ground frequently proves quite different from its contents by actual measurement. It cannot be contended that the terms "estimated" and "measured" have the same meaning. If a man were told that a piece of land was never measured, but is estimated to contain forty-one acres, would that representation be falsified by showing that, when measured, it did not contain the specified number of acres? The only contradiction to that proposition would be that it had not been estimated to contain so much. If the vendors knew the true quantity, it would be a different question—whether by the use of such phrases they could be protected from the obligation to make it good. Some attempt was made to affect them with such knowledge through the medium of Jewhurst who, according to the testimony of one Noakes when a valuation of the lands in the parish was making by direction of the parishioners, stated to the valuers the contents of his farm, as amounting only to twenty-nine acres exclusive of hedges, roads, and waste, and said, the map account was thirty-six acres. One Springet deposes that two or three days before the sale Jewhurst walked over the farm with him, and specified the contents of the different fields, which, being added together, amounted to forty-one acres. What Jewhurst's own knowledge or belief was on this subject is not ascertained. He may as well be supposed to have purposely understated the quantity on the one occasion as to have overstated it on the other, but, be that as it may,

it is not shown that the plaintiffs knew anything of either statement. It does not appear that Jewhurst was employed by them to show, or describe, the lands or was in any way their agent. They are, therefore, not bound by any representation of his, and, putting fraud, as it must be put, out of the question, I do not conceive that the defendant is entitled to an abatement out of the purchase-money for the deficiency of quantity.

The question then is as to the admissibility and sufficiency of the evidence of the auctioneer's declaration at the sale. The defendant says that Ayerst, his agent, distinctly inquired of the auctioneer for what quantity he sold the farm, and the auctioneer answered: "We sell it for forty-one acres, but, if the purchaser does not like to take it so, it shall be measured. If it proves more, the excess must be paid for; if less, an abatement shall be made."

The admissibility of the evidence must depend on the purpose for which it is produced. If the defendant insists that, the evidence being received, he will be entitled to have the contract performed with an abatement of the price, I think it not admissible for that purpose, as the court cannot execute in his favour a written agreement with a variation introduced by parol testimony [as to this see 36 Halsbury's Laws (3rd Edn.) 320], but, if he says he was deceived by this representation, and, therefore, was induced by fraud to enter into the contract, and offers the evidence for the purpose of getting rid of such contract altogether, for that purpose, I think, it may be received, as, if such a declaration was made by the auctioneer, it would undoubtedly be fraudulent and unfair in the plaintiffs to insist upon the execution of the contract, not giving the defendant the benefit of that declaration: *Marquis of Townshend* v. *Stangroom* (3); *Ramsbottom* v. *Gosden* (4); *Clowes* v. *Higginson* (2).

With regard to the evidence itself, three witnesses depose positively to the declaration as made by the auctioneer in the terms I have mentioned. Two, of the name of Springet, do not recollect that it was preceded by an inquiry from any person, but Ayerst says it was an answer to an inquiry by him in the hearing of all the persons present. Two of the plaintiffs, he says, were present, and did not contradict the auctioneer. On the other hand, the auctioneer, being examined, does not in plain and explicit terms deny the declaration. He says he did not make any declaration contradictory to the representation by the particulars, and that he was not authorised to make the declaration specified by Ayerst, and stated in the answer; he does not say that he did not make a declaration in those words. That declaration is, therefore, made out sufficiently by the evidence.

It is said for the plaintiffs that, at most, this gives an option to the defendant either to take the land as forty-one acres or to have it measured, and that by taking possession and beginning to cultivate the land he waived that option and consented to take it as forty-one acres, but, if the parol evidence is to be taken as the rule, the defendant was to have the land, be the quantity what it might. The measurement was material only to ascertain the price, and, therefore, was in time if before the payment. Several observations were made upon the inconsistency of the defendant's conduct on the supposition that the payment was to be by measurement. If so, the measuring was as much of course as the valuing of the timber or the stock, and yet no proposition came from the defendant for measurement, and it was by mere accident that, the persons who were to value the timber not being able to agree upon the value of a copse wood in one field, and having that measured, Ayerst said that as they were measuring part they might as well measure the whole. The defendant thought so little of measuring the land, that he appointed a day for finally settling the business, not knowing that any measurement had taken place, and at that meeting he was informed by Ayerst of the measurement and the result. Upon that a long negotiation and correspondence took place, and several meetings, and at none of them did the defendant insist upon this parol declaration, supposed to have been made at the auction, whereas the objection was plain. No matter what

A the conditions of sale import the auctioneer did say distinctly that the land was to be measured and to be paid for accordingly.

These circumstances throw a degree of doubt upon the evidence, but are not sufficient to impeach its veracity, particularly in the absence of a plain denial by the auctioneer himself, and with the circumstance that a witness represents the auctioneer to have said at a subsequent period that he did sell at forty-one acres,
B and, if it turned out less, there should be an abatement. The answer, therefore, asserting that such declaration was made at the sale, is sufficiently made out, and consequently the defendant cannot be compelled to take the land without an abatement. If he will not take it, the bill must be dismissed, but without costs as the defence is one to which he did not resort until after the institution of the suit.

C

BUSK *v.* WALSH AND ANOTHER

D

[Court of Common Pleas (Sir James Mansfield, C.J., Heath and Chambre, JJ.), April 21, 1812]

[Reported 4 Taunt. 290; 128 E.R. 340]

Insurance—Policy—Illegality—Recovery of premiums on notice given to insurers—Constructive notice—Bankruptcy of insurers—Notice to commissioners of
E *bankruptcy.*

The plaintiff, having paid premiums on an illegal insurance policy made with the defendants on a future event, before the risk was determined claimed to be allowed to prove for the amount of the premiums as a debt under a commission of bankruptcy which had issued against the defendants, but the claim was refused by the commissioners. The commission having been superseded, the
F plaintiff sued the bankrupts to recover back the premiums without further notice.

Held: the claim made upon the commissioners, who were trustees for the creditors at large and later were trustees of the balance for the defendants, was sufficient notice to the defendants of the plaintiff's intention to rescind the illegal contract.

G

Notes. As to repayment of premiums paid in respect of illegal policy, see 22 Halsbury's Laws (3rd Edn.) 239 and cases there cited.

Case referred to:

(1) *Aubert* v. *Walsh* (1810), 3 Taunt. 277; 128 E.R. 110; 25 Digest (Repl.) 428, *96*.

Rule Nisi obtained by the defendants to set aside the verdict and enter a nonsuit
H in an action for money had and received, brought to recover back the sum of £378, being the amount of the premiums which the plaintiff had paid to the defendants upon several instruments called "peace or war policies," whereby the defendants undertook to pay the plaintiff the sums subscribed by them if preliminaries of peace were not signed between Great Britain and France on or before certain days therein named.

I The illegality of these wagers, as well as the right to rescind them before the time arrived which was to determine the risk, being admitted, as settled by the authority of *Aubert* v. *Walsh* (1), the only question in this case was whether there had been a sufficient renunciation of the contract by the plaintiff under the following circumstances. Walsh and Nesbit were partners, and after the subscription of the policies committed an act of bankruptcy, a commission was sued out, they were declared bankrupts, and many of the creditors proceeded to prove their debts under the commission. Among others, the plaintiff by his solicitor applied to prove as a debt the

sums he had paid as premiums on these policies, but the commissioners, being of opinion that these sums were paid on an illegal consideration and could not be recovered back, rejected the proof. The plaintiff had not in express terms made any declaration to the defendants of his intention to rescind the policies. The commission was soon afterwards superseded by consent of the creditors. The jury, upon the trial of the cause at Guildhall, before SIR JAMES MANSFIELD, C.J., at the sittings after Michaelmas Term, 1811, found a verdict for the plaintiff.

Serjeant Lens, for the defendants, obtained a rule to set aside this verdict and enter a nonsuit on the ground that there was no proof that the contract had been rescinded before the determination of the event insured.

Serjeant Shepherd and *Serjeant Marshall*, for the plaintiff, showed cause against the rule, and contended that the claim made before the commissioners to receive back the premiums was the most open, public, and notorious renunciation of the contract that could have been made. The rights of the bankrupt were at that time all well vested in the commissioners; therefore, it would have been idle to have then notified to the defendants the renunciation of the contract since they had no disposing power over the estate. The act of the commissioners in rejecting his claim was immaterial. If they had allowed it, that act of third persons could not have made any difference. It is clear that an action brought would have sufficiently rescinded the contract, and pending the commission which had regularly issued, a claim to prove under it was equivalent to an action.

Serjeant Lens and *Serjeant Best*, for the defendants, supported the rule: The commissioners having refused the application, the matter remained in the same state as it was in before the application made. It was made, indeed, only with a view of hedging, as the defendants were then unable to pay, and this action, which, if brought in time, would have rescinded the contract, was not brought till after the renunciation made.

SIR JAMES MANSFIELD, C.J. I never could understand where was the good sense of altering the law from that which it certainly was at one time—that, if persons entered into an illegal contract, they were not to have the aid of the law to help them out of their difficulties, but must be left to get out of them as well as they could. But the law is now changed, so that, if a man declares his dissent from an illegal wager before the event happens, even if it is the very day before the event happens, he may recover back the money he has paid. In this case, I think the plaintiff did tell his intention of rescinding the contract to the defendant himself when he told it to the commissioners. To whom did he apply? To the commissioners who were trustees for the creditors at large, and after that trust performed they were trustees of the surplus for the bankrupt. I think, therefore, that the notice given to them sufficiently declared to the bankrupt that the plaintiff rescinded the contract.

HEATH and **CHAMBRE, JJ.,** coincided in the opinion that the contract was rescinded.

Rule discharged.

VAN *v.* BARNETT

[Lord Chancellor's Court (Lord Eldon, L.C.), May 6, 1812]

[Reported 19 Ves. 102; 34 E.R. 456]

Equity—Conversion—Election to re-convert—Slight grounds sufficient—Capacity of infant.

A very slight circumstance, a very slight declaration, will suffice to take from money directed to be laid out in land the quality of land with which it has been impressed, but the owner of the fund must be competent to dispose of it, and, therefore, an infant cannot elect to take in its actual state property free from a trust for conversion.

Notes. As to the equitable doctrine of conversion, see 14 Halsbury's Laws (3rd Edn.) 576 et seq.; and for cases see 20 Digest (Repl.) 354 et seq.

Cases referred to:

(1) *Pulteney* v. *Earl of Darlington* (1783), 1 Bro. C.C. 223; 28 E.R. 1095, L.C.; affirmed (1796), 7 Bro. Parl. Cas. 530, H.L.; 20 Digest (Repl.) 419, *1412*.

(2) *Whelpdale* v. *Partridge* (1800), 5 Ves. 388; 31 E.R. 643; affirmed (1803), 8 Ves. 227; 32 E.R. 341; 20 Digest (Repl.) 419, *1414*.

(3) *Thornton* v. *Hawley* (1804), 10 Ves. 129; 32 E.R. 793; 20 Digest (Repl.) 369, *920*.

(4) *Biddulph* v. *Biddulph* (1806), 12 Ves. 161; 33 E.R. 62; 20 Digest (Repl.) 393, *1141*.

(5) *Kirkman* v. *Miles* (1807), 13 Ves. 338; 33 E.R. 320; 20 Digest (Repl.) 421, *1435*.

(6) *Triquet* v. *Thornton* (1807), 13 Ves. 345.

Petition praying the payment out of court of money paid in in an administration suit.

By indentures dated Dec. 24, 1782, reciting the settlement, dated Feb. 5, 1812, upon the marriage of Charles and Catherine Van for securing a jointure, portions and maintenance, and that Thomas, the son of Charles Van, had charged several estates in the county of Monmouth with several annuities and judgments and was also indebted by specialty and simple contract to a considerable amount, it was declared that for making a provision for payment of the debts of Thomas Van, and in consideration of 10s. he conveyed to Edward Barnett and his heirs several estates, to the use of him and his heirs, upon the trusts, intents and purposes, and subject to the powers, provisoes, etc., after expressed, viz., on trust as soon as conveniently may be to sell and dispose of the aforesaid manors, etc., and the inheritance thereof in fee simple, either entirely or in parcels, by public auction or private contract, for the best price, etc., first, to reimburse to Barnett the balance of the account that day settled, the expenses of the trust, and such other sums as he should advance not exceeding £300 a year for the maintenance of Van, next to pay all sums of money due by Van according to legal priority, and to pay all such residue and surplus as should remain after answering the expenses aforesaid to Van, his executors, administrators or assigns. It was further provided that in the meantime, until the inheritance should be sold, Barnett, his executors, etc., should stand possessed of the rents and profits upon the trusts after expressed, viz., to pay the jointure, maintenance and portions under the settlement of Feb. 5, 1812, annuities charged by Van, and to keep down the interest of debts, and after all such payments to reimburse himself all expenses in execution of the trust and to stand possessed of the moneys which should remain after answering the purposes aforesaid upon the trusts expressed concerning the money to arise by the sale. Van irrevocably appointed Barnett his attorney to contract with annuitants for redemption, and compromise debts, etc., and the deed contained the usual clauses for indemnity, that Van was seised in fee, and for further assurance.

By indentures dated Oct. 10, 1787, previous to the marriage of Thomas Van and Lucy Wewitzer, reciting that it was proposed to lay out in trustees' names in the funds or otherwise, as Lucy Wewitzer should appoint, the sum of £10,000 upon the trusts after mentioned, Thomas Van, in order to make some provision for Lucy Wewitzer as well during the coverture with him as upon her surviving him, and the issue of the marriage, if any, covenanted that he, his heirs, executors, etc., would within one month after the marriage, or as soon after as he should be able, pay to John Palmer and Richard Jacobs the said sum of £10,000, or would procure to be granted, conveyed or transferred to Palmer and Jacobs, or such other person as she should name, so much of the lands of Van situate in the county of Monmouth, and now vested in Edward Barnett on trust to sell, as should be adequate to the said sum of £10,000, on trust to sell and dispose of such lands and to stand possessed of the purchase-money arising and to be received by a sale or sales of such lands on trust with the consent of Lucy Wewitzer notwithstanding her coverture with Van to lay out the whole of such moneys in government or other securities in their names, or in the purchase of freehold premises in some county near or adjoining to the city of Bristol, to be thereon granted and conveyed to Palmer and Jacobs, and their heirs, upon the trusts in such conveyance to be declared, and to pay and apply the interest, dividends or produce of such moneys or the rents and profits of such lands and premises into the hands of Lucy Wewitzer whose receipt was to be good to all intents, or to permit her to take the same for her sole use and benefit, in which case also her receipt alone, whether under such coverture a widow, or under coverture with any after taken husband, should Thomas Van die leaving her surviving him, to be a good and sufficient discharge thereof for and during the term of her natural life.

After the death of Lucy Wewitzer, Thomas Van being then living, the property was to be held on trust for Thomas Van, and to be conveyed or assigned to him accordingly. If Thomas Van should die in the lifetime of his intended wife, and there should be issue of the intended marriage then living, or Lucy Wewitzer should be then enceinte with child, which should be afterwards born alive, then from and immediately after her decease, Thomas Van being then dead, the property was to be held on further trust to and for the issue of such intended marriage, if there should be more than one child, in such proportions, manner, and form, as Lucy Wewitzer should by any deed or deeds or instrument in writing or by her last will and testament legally executed and attested, grant, limit, direct or appoint, give or devise, at their respective ages of twenty-one years, with survivorship, and the interest, dividends or produce of such proportions to be applied in the meantime for the maintenance of such children respectively, if only such child, then on trust for such only child, her or his heirs or assigns, or executors, administrators, or assigns, at his, her, or their ages or age of twenty-one years, and with a similar interest for maintenance.

If there should be issue of the intended marriage living at the time of the death of Lucy Wewitzer more than one, Thomas Van being then dead, and Lucy Wewitzer should have made default either by deed or will of proportioning such trust moneys or estate unto and among such children, then on trust for such children share and share alike, and as tenants in common and not as joint tenants, their heirs and assigns, if such trust estates should be lands, or executors, administrators or assigns, if the same were moneys at their respective ages of twenty-one years, the produce of the said moneys or lands to be applied in the meantime as before mentioned in respect thereto, and if Thomas Van should die in the lifetime of Lucy Wewitzer, and there should be no issue of the intended marriage then living, or which might afterwards be born alive, then on trust and to and for such ends, intents, and purposes, as Lucy Wewitzer should by any deed or deeds or instrument or writing to take place at her death only, or by her last will and testament, grant, limit, direct, or appoint, give or devise, such trust moneys or estates or any part thereof, and for want or in default of any such grant to the next of kin of Lucy

Wewitzer share and share alike as tenants in common and not as joint tenants, if the same were lands, their heirs and assigns, or otherwise their executors and administrators for ever, subject nevertheless to any testamentary or other disposition of Thomas Van in his lifetime as to such trust moneys or estates to take place only at and on the death or decease of Lucy Wewitzer without issue her surviving, and in default only by her of a legal disposition thereof or of any part thereof, as aforesaid, which several trusts should immediately upon such sum of £10,000 or any part thereof being paid or the granting such lands, etc., as should be adequate thereto to the trustees be declared either by such grant or by some other deed, and to contain a clause that it should be lawful for the trustees during the joint lives of Van and his wife and at their joint request to call in, or by sale or mortgage of such trust lands or some part raise and pay to them, or as they should appoint, £10,000, and a covenant by him that, if he should become possessed of or entitled to freehold or other estates of the value of £20,000, to settle £500 a year upon the like trusts, except as to the power of disposing thereof, or, if he should become possessed of estates in land or money under £20,000 and above £5,000, to settle, as she shall appoint, a moiety, with the like exception as to her power of disposal.

The bill was filed by Thomas Van in 1787, praying an account and a reconveyance. An account was decreed in 1788. The plaintiff died in 1794, leaving Charles John Morgan Van his only child, and having by his will given and devised all his estates, which descended from his Uncle Morgan, and all his personal estate whatsoever and wheresoever, to William Richardson, appointing him executor on trust to sell and convert into money all his said real and personal estate, and thereout pay his debts, etc., and, if there should be any overplus, to pay the same to his wife as guardian and for the use of his son. Van, the son, died in 1798, an infant, and intestate; leaving three aunts his co-heiresses. His mother, having taken out administration to him, presented a petition stating that the estate had been sold under the decree, claiming under the construction of the marriage articles or as next of kin of her son, and praying that out of the money in court produced by the sale she might be paid £10,000 after answering the previous encumbrances reported due.

LORD ELDON, L.C.—There are two questions for decision upon the petition in this cause, the first being, whether the residue of the money arising from the sale of the estates conveyed to Barnett by the indentures of 1782 or the remainder of the trust estate is to be taken as real or personal property. The second question is raised by the articles executed upon the marriage of Thomas Van which are most incorrectly drawn; it is whether the sum of £10,000 which is the subject of those articles is money or land and who is in the event entitled to it, attending to the fact of its being for the purpose of the articles secured on land.

These articles clearly provide that when that sum of £10,000, as money, got to the hands of the trustees it was during the life of the wife, her direction, not that of her husband, that could authorise the re-conversion of that money into land. It appears to me that, if it remained a money fund during his life and he survived her, it was to be transferred or paid to him, and, if under her direction it again became land, that land was to be conveyed to him. Such as the subject of the trust might happen to be at her death, it was to be conveyed, transferred, or paid, to him. The provisions that follow, contemplating the event that happened, his death in her lifetime leaving issue, the interest or rents being before secured to her, give the subject, such as it might happen to be, to the issue, according to her appointment, vested at the age of twenty-one, and in default of issue or appointment to her next of kin, not providing for the further event that the issue might not live to attain the age of twenty-one, the event which took place and seems to have been contemplated in the preceding part of the articles. These articles are to be considered as the heads of a future, more formal, settlement.

Though it is true, according to *Pulteney* v. *Lord Darlington* (1),* that a very slight circumstance, a very slight declaration, will take from money the quality of land, with which it was impressed, yet it is not competent to an infant to make that election, and in that case the property will remain as it was.

With regard to the first question, what is the nature of that money or land which it was not necessary to dispose of for the objects of the conveyance to Barnett, the deed of 1782 is a conveyance by the owner of real estate in trust to sell out and out, nevertheless for the purpose only of paying his debts, but a person may so convey for that purpose as to constitute on the property the nature of personalty unless he, or those claiming under him, and capable of making an election, choose to re-convert it by saying it shall remain as it is.

After that deed these articles were executed by which Thomas Van undertakes, when he shall be able, to pay £10,000, or to procure so much of the lands vested in Barnett to be conveyed to trustees, but the express declaration of the purpose of that trust is to convert those Monmouthshire lands into money, to be held upon a trust of which Mrs. Van during the whole of her lifetime may have the direction in this respect, that the subject shall continue permanently money or be laid out again in land, not generally, but of a particular description, viz., near Bristol. Mrs. Van being still competent to determine what shall be the nature of this property, having still the power to say it shall be personal, it is not possible to maintain that it is real.

With regard to the £10,000 all the provision by the articles giving Mrs. Van the power of disappointing her next of kin by making an appointment according to the literal interpretation attaches only on her husband's death in her lifetime having no issue, not in terms providing for the event which happened, leaving no issue who attained the age of twenty-one. The question is whether the articles are in this part to be construed according to the literal sense, or, being considered merely as instructions for a future settlement, the court can safely collect from the whole instrument, as the real meaning of these inartificial articles, that the further contingency here intended is his death in her life, leaving no such issue as are described in the clause immediately preceding, issue having attained the age of twenty-one. On the whole context that does appear to me to be the true construction.

Taking that to be so, the question is whether there is anything in these articles confining Mrs. Van to the interest for life in this property, which she is entitled to say shall be personal, and necessarily preventing her receiving the principal during her life, which then for want of appointment at her death must go to her next of kin, provided the will of her husband does not interpose as there is great reason to think it will; whether, as she may make an appointment to take place at her death, the court will now give her the whole; or whether, before the court will give it to her, she must not make some appointment on trust for herself. I doubt whether she must not make such appointment especially as the former orders in this cause are made with liberty to her to apply, the last order, as I take it by a slip, reserving that liberty, not to her, but to any persons after her death. This order, therefore, must declare this sum of £10,000 to be personal property, and that Mrs. Van is entitled to the interest for her life, with power to appoint the principal by deed and liberty to her to apply after any such appointment.

The other question, as to the residue of the money, arising from the sale of the estates vested in Barnett, depends upon the deed of 1782, the will of Thomas Van and the facts that the son died an infant and his mother is, as his administratrix, entitled to all his personal property. Upon the particular expressions of the deed

* See *Wheldale* v. *Partridge* (2); *Thornton* v. *Hawley* (3); *Biddulph* v. *Biddulph* (4); *Kirkman* v. *Miles* (5); *Triquet* v. *Thornton* (6).

I incline to think there was a conversion out and out, requiring some act by Mr. Van in his lifetime to take from the land the effect of the trust to sell and pay the whole money to him. The question, therefore, is whether under his will it is to be deemed, as it was, personal property, or real estate, which strictly it was not, but as which it might in equity be considered. The true construction appears to me to be that what was actually converted into money in execution of the trust is money; that the will of Thomas Van operated upon it as such; that it was, therefore, personal property of his infant son, who could not make an election; and that his mother is, as his administratrix, entitled to it.

Order accordingly.

BURDEN *v.* BURDEN

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), January 12, 1813]

[Reported 1 Ves. & B. 170; 35 E.R. 67]

Executor—Power to carry on business of testator—Partnership business—Business carried on—Right to remuneration for management.

If a surviving partner who is also the executor of the deceased partner carries on the partnership business, retaining therein the capital of the deceased partner, he is not entitled to any remuneration for his services in managing the business.

Notes. Followed: *Stocken* v. *Dawson* (1843), 6 Beav. 371. Approved: *Stocken* v. *Dawson* (1848), 17 L.J.Ch. 282. Considered: *Wedderburn* v. *Wedderburn* (*No. 4*), 22 Beav. 84. Referred to: *Heathcote* v. *Hulme* (1819), 1 Jac. & W. 122; *Wightwick* v. *Lord* (1857), 6 H.L. Cas. 217.

As to duty of an executor to act gratuitously, see 16 HALSBURY'S LAWS (3rd Edn.) 136–140; and for cases see 24 DIGEST (Repl.) 651–656.

Question raised on an application for further directions.

The question raised was whether the defendant, who was one of the executors and also surviving partner of the testator, should have an allowance for his management of the partnership business subsequently to the death of the testator.

Sir Samuel Romilly and *Bell* for the plaintiffs, beneficiaries under the will: A trustee is bound to execute his trust without compensation. An executor, if it be necessary to continue a trade, may employ a person to conduct it and his payments to such person would be allowed, but, if the executor carries on the business himself, he cannot claim any allowance. It is impossible to distinguish management of the business from the other duties inseparable from his character, such as collecting debts, etc., for which he is clearly not entitled to any compensation. The defendant stood in the double capacity of surviving partner and executor, and there is no case in which a surviving partner, carrying on a trade without the consent of the other parties interested, has been held entitled to an allowance for management. The principle would be most pernicious as applied to executors. If in this case the cestuis que trust have derived some benefit, it is very small and by no means commensurate to the risk of their capitals, and an allowance for management, if it ought to be made, must refer, not to the trouble of the person employed, but to the benefit derived to the cestuis que trust from his exertions.

Leach and *Horne* for the defendant: The executors sold to the surviving partner, and the Master reports that the sum given was the full value of the property, which proves that the transaction was bona fide. The cestuis que trust, receiving the full value of their property, incurred no hazard, and have no right to complain as substantial justice has been done them. In conducting the trade the defendant has not only been exposed to much personal labour, but has also incurred considerable expense in journeys, etc., of which, relying on the faith of his purchase from his co-executors and considering himself as thereby sole owner of the business, he has kept no account. Substantial justice, therefore, can only be done to him by an allowance for management. Many cases in which cestuis que trust have been allowed profits or interest at their election are cases of mere executors, who, having an option to carry on the trade, or not, could not complain, but this executor, being also the surviving partner, had in his own right a distinct interest which compelled him to interfere with the trade and gave him the right to do so. He has carried it on fairly; and misconduct is not imputed to him.

LORD ELDON, L.C.—Without putting the case on any other ground I take it that the defendant must be considered as carrying on the trade for himself and his co-partners. Even if he had carried on the trade under articles, he would not, without an express stipulation, have been entitled to an allowance for his management and time. On the other hand, what is urged as to his expenses appears material as he proceeded on a mistake, considering himself as sole owner of the trade. I consider him as entitled to those expenses, but not to any allowance for his own time and labour. I take this to be the distinction. If a man enters into articles of co-partnership, and the children are to succeed to the share of their parent, the surviving partner is not entitled to an allowance for carrying on the trade. What is this but a case of voluntary management by a surviving partner for himself and the children of a deceased partner. Let the defendant hand over to the plaintiffs the items of the sums actually expended by him, a moiety of which he must be allowed, but nothing for his management, time and labour.

Order accordingly.

WOOD *v.* DOWNES

[Lord Chancellor's Court (Lord Eldon, L.C.), June, July 1, 2, 1811]

[Reported 18 Ves. 120; 34 E.R. 263]

Solicitor—Champerty—Suit by heir-at-law to recover estate—Agreement by client to convey estate to solicitor.

The plaintiff, the heir-at-law of her uncle, wishing to institute a suit to recover her estate, employed the defendant, a solicitor, to prosecute the suit for her. In 1790 the plaintiff and the defendant agreed to a sale of the estate to the defendant in consideration of £100 then paid and £1,000 to be paid later. The conveyance was executed and a fine levied. The £1,000 was paid. In 1791 another conveyance was executed after a recovery in ejectment in right of the plaintiff and possession taken under it because the validity of the former conveyance and fine were in doubt as the plaintiff had not then recovered possession. On a bill to set aside the conveyances, the plaintiff alleged that they had been obtained by the defendant's influence and control while acting as her solicitor.

Held: the transactions savoured of champerty, being a bargain between solicitor and client for the solicitor's benefit before, pending, and after a suit, and connected with the very subject-matter of the suit, and both conveyances should be set aside and cancelled.

Notes. Applied: *Prosser* v. *Edmonds* (1835), 1 Y. & C. Ex. 481. Distinguished: *Booth* v. *Creswicke* (1844), 13 L.J.Ch. 217; *Hunter* v. *Daniel* (1845), 4 Hare, 420. Extended: *Holman* v. *Loynes* (1854), 4 De G.M. & G. 270. Followed: *Simpson* v. *Lamb* (1857), 7 E. & B. 84. Distinguished: *Knight* v. *Bowyer* (1858), 2 De G. & J. 421. Applied: *Anderson* v. *Radcliffe* (1858), E.B. & E. 806. Considered: *James* v. *Kerr* (1889), 40 Ch.D. 449. Referred to: *Hartley* v. *Russell* (1825), 2 Sim. & St. 244; *Stanley* v. *Jones* (1831), 7 Bing. 369; *Harrington* v. *Long* (1833), 2 My. & K. 590; *Jones* v. *Thomas* (1837), 2 Y. & C. Ex. 498; *Richardson* v. *Bank of England* (1838), 4 My. & Cr. 165; *Edwards* v. *Meyrick* (1842), 2 Hare, 60; *Roberts* v. *Tunstall* (1845), 4 Hare, 257; *Tomson* v. *Judge* (1855), 3 Drew. 306; *Lloyd* v. *Attwood* (1859), 3 De G. & J. 614; *Ormes* v. *Beadel* (1860), 2 De G.F. & J. 333; *Bradlaugh* v. *Newdegate* (1883), 11 Q.B.D. 1; *Fitzroy* v. *Cave*, [1904–7] All E.R. Rep. 194; *Wild* v. *Simpson*, [1918–19] All E.R. Rep. 682.

As to transactions between solicitor and client generally, see 36 Halsbury's Laws (3rd Edn.) 85 et seq.; and for cases see 1 Digest (Repl.) 101 et seq.

Cases referred to:

(1) *Strachan* v. *Brander* (1759), 1 Eden, 303; 28 E.R. 701; 1 Digest (Repl.) 86, *659*.

(2) *Proof* v. *Hines* (1735), Cas. temp. Talb. 111; 25 E.R. 690, L.C.; 12 Digest (Repl.) 122, *725*.

(3) *Walmesley* v. *Booth* (1741), 2 Atk. 25; Barn. Ch. 475; 26 E.R. 412, L.C.; 43 Digest (Repl.) 210, *2097*.

(4) *Drapers' Co.* v. *Davis* (1742), 2 Atk. 295; 26 E.R. 580, L.C.; 43 Digest (Repl.) 210, *2095*.

(5) *Oldham* v. *Hand* (1751), 2 Ves. Sen. 259; 28 E.R. 167, L.C.; 43 Digest (Repl.) 83, *710*.

(6) *Newman* v. *Payne* (1793), 4 Bro. C.C. 350; 2 Ves. 199; 29 E.R. 930, L.C.; 43 Digest (Repl.) 204, *2021*.

(7) *Hylton* v. *Hylton* (1754), 2 Ves. Sen. 547; 28 E.R. 349, L.C.; 12 Digest (Repl.) 119, *704*.

(8) *Welles* v. *Middleton* (1784), 1 Cox, Eq. Cas. 112, L.C.; affirmed sub nom. *Middleton* v. *Welles* (1785), 4 Bro. Parl. Cas. 245; 2 E.R. 166, H.L.; 43 Digest (Repl.) 81, *693*.

Bill praying that certain conveyances might be set aside as being fraudulent as against the plaintiff, and other relief.

Herbert Howarth died in 1745, having devised his estates, subject to his debts, to his three sisters as tenants in common in fee. The plaintiff Frances Wood, his great niece by a son of one of those sisters, was his heir-at-law. The bill, filed by William Wood and Frances, his wife, claiming in her right as heiress-at-law and devisee, prayed (i) that the several contracts, deeds, etc., executed by the plaintiff and Frances, to the defendant, of any right or interest belonging to them in the Whitehouse estate or other property of Herbert Howarth, which purported to be an absolute sale or conveyance of any such right or interest to the defendant, might be declared fraudulent as against the plaintiff; and (ii) might stand as security only for any sums that might appear to be due on a general account; (iii) that the purchase made and conveyances taken from George Pardoe and Somerset Davis might be declared to have been taken in trust for the plaintiff; (iv) that an account might be taken of all sums paid and advanced by the defendant to the plaintiff and also of sums expended by, or due to, the defendant, for fees or otherwise as attorney and solicitor, and of the sums paid to Pardoe and Davis, with interest; (v) an account of the rents received and the produce of timber sold and a re-conveyance.

The bill charged that the plaintiffs were deceived by the defendant; that the conveyances were obtained by his influence and control while acting as their attorney and solicitor; that they were not acquainted with their rights, the nature and value of the estate, etc.; that representations were made by the defendant that there was great doubt whether the plaintiffs could recover the estate; that the price he gave was inadequate and an arbitration was made under his control and management; that no attorney was employed on behalf of the plaintiffs in the purchase by the defendant; that his purchases from Pardoe and Davis were made on behalf of the plaintiffs; that Pardoe's principal inducement was the plaintiffs' release of demands on him; and Davis's inducement was that the right of the plaintiffs would prevent his making his security available; and the defendant represented to them that the purchases were made on behalf of the plaintiffs.

The answer represented that the plaintiff, William Wood, being under great anxiety and very unwilling to embark at his own risk in the tedious, expensive and uncertain litigation necessary for enforcing his wife's claims, the agreement took place between him and the defendant in October, 1789, contained in the instrument of that date. The instrument recited that the plaintiff had applied to the defendant to prosecute the suits to which he consented, but as the subject was extensive and confused and likely to be attended with great difficulty and expense, which the plaintiff was not in a situation to advance, etc.

Further, that in 1790 on advice that such an agreement would be illegal, they came to an agreement for a sale to the defendant in consideration of £100, then paid and £1,000 to be paid as after mentioned, of the plaintiff's one-third of the estate; that the conveyance was executed and a fine levied accordingly. Another conveyance was executed, dated Dec. 23 and 24, 1791, after a recovery in ejectment in right of the plaintiff and possession taken under it, on a suggestion of doubts of the validity of the former conveyance and fine, the plaintiff not having then recovered possession, in consideration of the sum of £1,100 formerly paid. The answer denied the several charges in the bill insisting that the plaintiff had full knowledge and the contracts were perfectly fair, etc.

LORD ELDON, L.C., stated the facts, and continued: This is a case of great importance with reference to persons standing in the relation of attorney and client. Taking the first of these instruments either as an agreement entered into with the defendant, a solicitor, applied to to carry on the suit on the part of the plaintiff, and assuming that this deed would give the defendant a benefit of some amount, regarding it as an agreement executed between attorney and client, it

could not have stood in a court of equity. It could not be enforced and further, on the doctrine of champerty and the cases on buying pretended titles, if the defendant had not been the attorney, it would be impossible that a court of equity should permit this deed to have any effect. It is an instrument equally inoperative both at law and in equity; no covenant contained in it could be executed. Whatever effect it might have by way of estoppel, it could have none by transmutation of interest on both grounds, as being liable to imputation for champerty and also as a deed obtained from a client by an attorney beginning to carry on those suits, the effect of which was to be the consideration for this instrument.

The subsequent deed of 1791, which is relied on as a confirmation, clearly cannot have that effect. If the principles of a court of equity, not only with reference to the law of maintenance and champerty, but also as arising out of the relation of attorney and client, would not have permitted the original transaction to stand, this subsequent deed cannot have the effect of doing away with the objections. The defendant is bound to an admission that the deed of 1791 was called for by him under the pressure of an obligation which he had a right to call on the plaintiff and his wife to fulfil. The deed does in fact recite that he had called on them to fulfil their covenant for further assurance under which that deed was executed. This deed, purporting on the face of it to have been executed expressly at the instance of the defendant in discharge of a covenant which is not binding on the ground of champerty, or the relation of attorney and client, must be taken to have been executed in consequence of a covenant having no binding effect in equity, and is, therefore, no confirmation.

The dates, with reference to the subsequent transactions, are extremely material, as are the circumstances, in which the residue of the £1,000 was paid. Taking the situation of the plaintiff and his wife (before any instrument was executed by him) to be such as it is represented to be by the answer confirmed by the representation in several of the instruments, it was, for a suitor to be placed in, a situation of as much difficulty, as doubtful with regard to the probable surplus and as burdensome in point of expense as can be conceived. He was, on the representation of the defendant himself, not only placed under all those difficulties attending the obligations resulting out of the articles of 1787, and the agreements of 1789 and 1790, when the defendant became the purchaser, but he had not the means of successfully struggling with those difficulties.

He had at least, by the advice of his solicitor, fallen into a situation in which his original difficulties were enhanced with all the additional difficulties resulting from an obligation conceived by himself and others to be ineffectual [the difficulties were] never admitted to be so by the defendant who, on the contrary, represented the points to which the plaintiff's attention had been drawn as too absurd to be insisted on. The difficulties from a fine levied by his wife attended the question whether it was to operate by estoppel or not, and from the deed of 1791, which the defendant cannot represent as an independent, detached, voluntary transaction. His mouth is closed as to that, reciting that he called for it in discharge of the obligation arising out of the covenant for further assurance which he represents himself entitled to, and determined to have.

I have observed that this case can be regarded from two points of view and the transaction liable to objections of two kinds. First, it brings forward a consideration of the effect of a bargain between an attorney and his client, for the benefit of the attorney, before, pending and after a suit. It is not only for his benefit, but connected with the very article and subject in contest in a suit in which he was about to be engaged. The objection, therefore, is not merely that which flows from the relation of attorney and client, but beyond that (if not cured by a distinct, separate, detached transaction, after all the circumstances and every objection were known and understood), on the fact that this was the purchase of a title in litigation, with reference to the law of maintenance and champerty.

The authorities applicable to that objection I take from HAWKINS's text (1

HAWKINS, PLEAS OF THE CROWN) whose references fully establish the doctrine he delivers. As to maintenance, he states that it has been said that no one can be guilty of it in respect of any money given to another before any suit is actually commenced; yet if it plainly appear that it was given merely with a design to assist him in the prosecution or defence of an intended suit, which afterwards is actually brought, surely it is as great a misdemeanour in the nature of the thing, and equally criminal at common law, as if the money were given after the commencement of the suit, though perhaps it may not in strictness come under the notion of maintenance. Another passage is material. It states champerty to be the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute, or some profit out of it; and by statute (28 Edw. 1 (Articles upon the Charters) (1300), c. 11) it is enacted that no person, for to have part of the thing in plea, shall take on him the business that is in suit. The YEAR BOOK, 13 Hen. 7, 17 [sic], is referred to for this doctrine, that although the giving part of the land in suit after the end of it to a counsellor for his wages is not within the meaning of the Act, if it evidently appears that there was no kind of precedent bargain relating to such gift, it seems dangerous to meddle with any such gift since it cannot but carry with it a strong presumption of champerty. LORD NORTHINGTON [in *Strachan* v. *Brander* (1)], relieving against a bargain of this sort, gives the reason in these words, that it savours of champerty or carries a strong presumption of it.

The cases that have reference to this subject are: *Proof* v. *Hines* (2); *Walmesley* v. *Booth* (3); *Drapers' Co.* v. *Davis* (4); *Oldham* v. *Hand* (5); *Newman* v. *Payne* (6). In *Hylton* v. *Hylton* (7) it is laid down as clear law that no attorney can take anything for his own benefit from his client pending the suit, save his demand. I add that, as a guardian cannot take anything from his ward pending the guardianship, or at the close of it, or at any period until his influence has ceased to exist, the obligation on an attorney to refrain from taking an extraordinary benefit is at least as strong.

Welles v. *Middleton* (8) is an extremely strong case of this kind. It was admitted that the transaction was liable to no objection as between man and man; but it was overturned on this great principle, the danger from the influence of attorneys or counsel over their clients, while having the care of their property; and whatever mischief may arise in particular cases, the law, with the view to preventing public mischief, says that they shall take no benefit derived in such circumstances. It is not denied in any case that if the relation has completely ceased, if the influence can be rationally supposed also to cease, a client may be generous to his attorney or counsel, as to any other person; but it must go so far only.

In *Strachan* v. *Brander* (1) the plaintiff, by descent a Swede but born in England, claimed as heir of a Swede, a large estate. Being in indigent circumstances he applied to Willis, an attorney who agreed to undertake his cause if a fund could be procured. A subscription was proposed and Willis became one of the subscribers on these terms, that the plaintiff, if he succeeded, should pay the subscribers, and among them Willis, double the sums advanced, and if he failed, the subscribers were to lose their money. A bond was given with a penalty of £4,000 and £1,000 was advanced. LORD NORTHINGTON decreed that the bond could not be permitted to stand as a security for more than the £1,000 actually advanced, stating that this transaction, though not strictly champerty, was so near it that it could not be permitted to prevail. He declared that it savoured of champerty and was, therefore, dangerous to public justice. That has been since followed. If such be the doctrine, let us examine this case.

On the question whether these can be represented as bargains made by the defendant with the plaintiff for the plaintiff's benefit, I cannot be supposed to err in stating that the defendant may fairly be regarded in purchasing his client's title on these, or any terms as not meaning to purchase for his client's benefit. Next, this is really champerty and it is impossible to deny that it savours of it.

A Then as to the confirmation by the deed of December, 1791, it is impossible to declare that to be such a confirmation, in the sense of that word that the transaction is now to be regarded as free from objection. This is not a separate, detached transaction; but was called for professedly under the force, pressure and influence of the prior transaction. This passed when it is impossible to represent the plaintiff as a free agent; when he was labouring under all the pressure of his situation, B independent of these transactions and when his difficulties were aggravated, as they were, by the effect of those transactions. This purchase, therefore, could not possibly have stood in 1791.

The next question is whether the defendant can hold for his own benefit the purchase he made from Davis, that is, whether an attorney, employed to recover this third part of an estate, can, by availing himself of his situation and acting C on the opportunity of bargaining for the purchase of a mortgage which the client would have had, stating that the purchase was for the client himself, admitting that on the doctrine of equity it was not for his own but for his client's benefit, turn round on his client and insist on holding the mortgage in this instance, not only for £630 but for £1,100. It is a most difficult point to maintain, if the purchase of the plaintiff's third of this estate cannot stand, that the defendant may set his D foot on that, to enable him to stretch forward to a mortgage and, in that shape, claim a charge of £1,100, having made the purchase for £600. The plaintiff, therefore, must be entitled to redeem that mortgage on payment of the sum of £630 and interest, the same terms on which Davis would be entitled.

There is a question beyond that of rather more difficulty, namely, whether the defendant, having actually purchased the interest of Pardoe, such as it was, and E having afterwards recovered the third of the estate, if he must give up the original third, is bound also to give up a moiety of the third he purchased from Pardoe. I have had much difficulty on that, but my conclusion is that he is bound to give up that also, taking it in such circumstances that he must be considered a purchaser for the plaintiff's benefit, if the original transaction as to the plaintiff's own third cannot stand. It is too dangerous to permit these written declarations of trust to F be done away by the answer of the defendant, contradicting them and stating that he has put himself into a situation in which he is obliged to exhibit these, as appearances merely to evade the administration of justice.

The defendant, therefore, being a trustee for the plaintiff of the original third and the interest in Davis's mortgage, is also a trustee of a moiety of the third purchased from Pardoe.

G As to the acquiescence from 1791, why should that produce another effect? Is the plaintiff at this moment delivered from the difficulties in which he was involved in 1791? He is in exactly the same situation of difficulty and embarrassment as he was at that period.

On those grounds, after a very anxious consideration of this case, my opinion is that the plaintiff is entitled to relief against this defendant to the extent I have H stated. It follows that, giving the plaintiff relief on these principles, I must give it to him with his costs of suit.

Declaration accordingly.

CAMPION *v.* COTTON

[ROLLS COURT (Sir William Grant, M.R.), July 16, 17, August 17, 1810]

[Reported 17 Ves. 263; 34 E.R. 102]

Fraudulent Conveyance—Avoidance as against creditors—Marriage settlement—Marriage as consideration—False recitals as to ownership of property—Expenditure on improvement of property—Merger with estate.

Marriage is a sufficient consideration to defeat the claims of creditors notwithstanding that the settlement impugned contains false recitals that the property had been purchased with the wife's money, there being no proof of fraud on her part. Voluntary expenditure by the husband after marriage in improvements by building and enfranchising copyholds is also protected for the money has merged with the estate, but not jewels and furniture purchased by him after the marriage and given to the wife.

The consideration of marriage will support a settlement even of movable effects, and neither the joint possession of furniture, nor the want of an inventory, nor the fact that the settlor was indebted at the time and that his wife knew it, will affect the settlement.

Notes. A settlement made before and in consideration of marriage is protected from those settlements which are void as against a trustee in bankruptcy under s. 42 of the Bankruptcy Act, 1914 (2 HALSBURY'S STATUTES (2nd Edn.) 379). Certain voluntary conveyances with intent to defraud creditors are voidable under s. 172 of the Law of Property Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 785).

Applied: *Fraser* v. *Thompson* (1859), 4 De G. & J. 659. Referred to: *Re McBurnie, Ex parte McBurnie's Trustees* (1852), 16 Jur. 807; *Colombine* v. *Penhall, Penhall* v. *Miller* (1853), 1 Sm. & G. 228; *Re Reis, Ex parte Clough* (1904), 73 L.J.K.B. 929.

As to a settlement in consideration of marriage and the effect of bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 550; and as to fraudulent and voidable conveyances where marriage is a consideration, see 17 HALSBURY'S LAWS (3rd Edn.) 655; and for cases see 25 DIGEST (Repl.) 191 et seq. As to expenditure by husband on improvement to wife's property, see 19 HALSBURY'S LAWS (3rd Edn.) 840; and for cases see 27 DIGEST (Repl.) 131.

Cases referred to in argument:

Douglasse v. *Waad* (1668), 1 Cas. in Ch. 99; 22 E.R. 713, L.C.; 25 Digest (Repl.) 262, *700*.

North v. *Ansell* (1731), 2 P. Wms. 618; 2 Eq. Cas. Abr. 209; 24 E.R. 885; 25 Digest (Repl.) 289, *955*.

Wicherley v. *Wicherley* (1731), 2 Eq. Cas. Abr. 391; cited in 2 P. Wms. at p. 618; 22 E.R. 334; sub nom. *Wicherley's Case*, cited in Amb. at p. 234; 37 Digest (Repl.) 379, *1143*.

Doe d. Watson v. *Routledge* (1777), 2 Cowp. 705; 98 E.R. 1318; 25 Digest (Repl.) 272, *811*.

Bill filed by the plaintiff, a creditor on behalf of himself and all other simple contract creditors of J. L., deceased, the testator, against the defendants, the testator's executor, and heir, and Charlotte L., his widow, to set aside a deed of settlement dated June 1, 1805, and certain transactions made between the testator and the defendant widow as being fraudulent and void as against creditors, and for certain accounts and inquiries. The defendant, widow, denied all charges of fraud and any knowledge that the testator was indebted; and claimed that the settlement had been made in consideration of marriage.

The plaintiff alleged that J. L., a stockbroker, in 1775 went to board and lodge with the defendant Charlotte L., and married her in June, 1805, having no property of his own but having laid out considerable property of other persons received by

him in the course of his business; and with the view of making a provision for himself and Charlotte L. and of withdrawing out of the reach of his creditors a considerable part of his property, he at different times transferred into the name of Charlotte L. alone, or jointly with others, various sums of stock, and invested money in stock and other securities in her name alone or with others; that he also with the same view delivered to her various jewels, etc., purchased with the money of other persons, at the time he was such trader and indebted, as before mentioned. By his will dated Nov. 10, 1799, he made the following disposition:

> "I request the small debts I owe may be discharged as soon as conveniently may be. I give and bequeath to Mrs. Charlotte L. with whom I now board and lodge at Golders Green, the sum of £500 of lawful money," [to be paid her within six months after his decease] "which I should consider a very poor compensation for the great obligations due to her, did I not take into consideration that the whole of the furniture, wine, plate, stock, carriages, etc. (with some trifling exceptions) are her own property, with a trifle in the funds, which she has saved in twenty-five years unremitting attention to my ease and comfort."

He gave all the rest of his property to his nephew Cotton, and appointed him executor. The testator died in 1808 seised of considerable real estates, and indebted by specialty and simple contract to a considerable amount. The defendant Charlotte L. entered into possession of some copyhold estates to which she claimed title, and also of some freehold estates which she claimed as a gift to her by the testator in his life.

The bill charged that the assignment of the funds, etc., was fraudulent; that they were not purchased with the defendant Charlotte L.'s own money; that the testator was at the time, and with her knowledge, greatly indebted beyond what he possessed; that the transfers were made, and the jewels delivered, for the purpose of defeating the creditors; that the money, plate, furniture, etc., were not her own property or settled to her separate use, but the testator's property; that a surrender of copyhold estate on Jan. 22, 1803, purchased by the testator, as the defendant Charlotte L. pretends, and as it was declared, with £600, her money, to the testator and his heirs in trust for her, with a covenant that he would stand seised in trust for her, and an admission accordingly, and two other purchases in 1805, for £610 and £575, under similar circumstances, were fraudulent, being made with the testator's money with the view to enfranchise the copyholds and make them freehold; and that by a deed dated Sept. 19, 1806, the testator fraudulently declared that £500 paid for enfranchising copyholds was the defendant Charlotte L.'s property, whereas it was his own; that the defendant Charlotte L. alleges that previously to the marriage a settlement was executed dated June 1, 1805, reciting that she was possessed of £2,500 3 per cent. consolidated bank annuities, £2,500 3 per cent. reduced annuities, standing in her name, and of £1,200 3 per cents. in the names of the testator and Charlotte L., also of goods, household furniture, jewels, etc.; that the testator was seised to him and his heirs of freehold and copyhold estates purchased with the defendant Charlotte L.'s money; and declaring, that in consideration of the marriage, etc., those funds, the rents, and jewels, should be held for her sole and separate use; that she might assign, transfer, sell, etc., with power to limit or dispose by will.

The bill, charging that all these recitals were fabricated and false, prayed an account of the debts and the personal estate, etc.; that the several deeds and instruments executed by the testator in favour of the defendant Charlotte L. might be declared fraudulent and void; that the real estate might be declared liable to the specialty debts; and that the funds of stock might be declared liable, and be applied, in discharge of the debts.

The defendant Charlotte L., by her answer denied all the charges of fraud; claimed the furniture and other specific articles as purchased with her own money, and as presents, made to her by the testator; stated that the estates were purchased partly

with her money, partly with his; that the stock was purchased with her money at her desire; that she delivered to the executor such jewels and personal property as belonged to the testator; and those retained by her were purchased by him for her with her money, arising from savings, presents, and otherwise; and the only jewels and plate given to her were some trifling articles, specified, given to her the day before his marriage. She denied the knowledge that he was indebted, believing him to be of considerable property, etc.; and insisted that the settlement, being in consideration of marriage, was good against the creditors.

Sir Arthur Piggott, *Hollist*, *Leach* and *Cooke* for the plaintiff.
Sir Samuel Romilly and *Bell* for the defendants.

Aug. 17, 1810. **SIR WILLIAM GRANT, M.R.**—If the effect of the deed executed upon the marriage of the defendant Mrs. L. be such as is contended for by her counsel, it will be unnecessary to enter into the consideration of various topics which were discussed at the hearing. They insist that whether the stock, the furniture, and the real estate, were puchased with her money or not the deed, in the nature of a marriage settlement, gave her such a right to all these descriptions of property as cannot be impeached by her husband's creditors. It is clear that, supposing the whole to have been his property, he might have settled it upon his marriage. According to the cases decided at law even the movable effects might be so settled; and neither the joint possession which he had of the furniture, nor the want of an inventory, would invalidate the settlement. It is clear that the fact of his being indebted at the time, and of her knowing him to be so, would not affect its validity.

Then assuming the falsehood of the declaration that the property had been purchased with her money, will that circumstance prevent her acquiring, as against him and those claiming under him, all the rights which the settlement acknowledged her to have, and professed to secure to her? I apprehend it to be clear that the husband, not only could not controvert her right to any part of the property, but was compellable to do whatever acts might be necessary to invest her with a complete title to it. He has expressly covenanted so to do; and the marriage was a sufficient consideration for the covenant. Then how is it fraudulent against the creditors? The utmost they can make of the falsehood in the deed is that the property was in truth Mr. L.'s, though it was asserted to be her's: but, if he could settle this property, and has done what bound him to give a title to it, supposing it to be his, how are they advanced by establishing that fact? All she could necessarily collect from seeing it asserted in the preceding declarations of trust that the real estate had been purchased with her money contrary to the fact, was that he chose to take that mode of giving her those estates. I do not think it can be inferred from the evidence that she knew he was in such circumstances as to make his bounty to her a fraud upon anyone. While it was mere bounty, she could not indeed have compelled him to complete her title by conveyance: but from the moment the consideration of marriage intervened it became matter of obligation upon him to give her all the title he himself had; and there is no proof of any such fraud in her as can prevent her receiving the benefit of that obligation. There is no ground, therefore, on which the creditors can avoid the settlement in the whole or any part.

As to the additional value that the land may have received by building, subsequent to the marriage, or by enfranchising copyholds, I do not see how it is possible to make a mere voluntary expenditure by him upon her estate a ground of charge against her or the estate. The jewels purchased by him, and given to her after the marriage, are subject to the debts unquestionably. The account of the testator's estate prayed by the bill is quite of course. There must be an inquiry whether any jewels or articles of furniture purchased by him subsequent to the marriage were in the possession of his wife, or any other person for her use, at the time of his death.

Order accordingly.

COWLAM *v.* SLACK

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Le Blanc and Bayley, JJ.), February 7, 1812]

[Reported 15 East, 108; 104 E.R. 785]

Easement—Common appurtenant—Creation and proof of right—Doctrine of lost grant—Enjoyment of right for fifty years—Tenant of the lord of the manor—Unity of possession—Evidence for presumption of new grant.

Common appurtenant may be claimed as well by grant within time of memory as by prescription, and after a unity of possession in the lord of the land in respect of which the right of common was claimed with the soil and freehold of the waste, evidence that the lord's tenant of the land had for fifty years past enjoyed the right of common on the waste is evidence for the jury to presume a new grant of common as appurtenant, so as to support a count in an action by the tenant for surcharging the common, declaring upon his possession of the messuage and land with the appurtenances and that by reason thereof he was entitled of right to the common of pasture as belonging and appertaining to his messuage and land, and also to support another count, in substance the same, alleging his possession of the messuage and land, and that by reason thereof he was entitled to common of pasture, etc.

Notes. Claims to right of common by prescription are dealt with by s. 1 of the Prescription Act, 1832 (6 Halsbury's Statutes (2nd Edn.) 669) and that Act is not affected by Part 1 of the Law of Property Act, 1925; see s. 12 (20 Halsbury's Statutes (2nd Edn.) 456).

Referred to: *Baring* v. *Abingdon*, [1892] 2 Ch. 374; *Derry* v. *Sanders* (1919), 88 L.J.K.B. 410.

As to creation and proof of common, see 5 Halsbury's Laws (3rd Edn.) 326 et seq.; and for cases see 11 Digest (Repl.) 8 et seq. As to prescription under doctrine of modern lost grant, see 12 Halsbury's Laws (3rd Edn.) 551 et seq.; and for cases see 19 Digest (Repl.) 66 et seq.

Cases referred to:

(1) *Bradshaw* v. *Eyre* (1597), Cro. Eliz. 570; 78 E.R. 814; sub nom. *Bradshawes Case*, Moore, K.B. 462; 11 Digest (Repl.) 28, *360.*

(2) *Sacheverell* v. *Porter* (1637), Cro. Car. 482; W. Jo. 396; 79 E.R. 1016; 11 Digest (Repl.) 8, *42.*

Rule Nisi obtained by the plaintiff to set aside a nonsuit and for a new trial in a claim to his right of common of pasture. As the evidence showed that the land was held by the plaintiff as tenant to the lord of the manor it was argued that the unity of possession extinguished the right of common, and the plaintiff was nonsuited.

The plaintiff declared that before and at the time of committing the grievances after mentioned, he was, and from thence hitherto had been, and still is lawfully possessed of a certain messuage, and 250 acres of land, with the appurtenances, in the parish of Crowle, in Lincolnshire; and by reason thereof during all the time aforesaid had had, and of right ought to have had, and still of right ought to have, common of pasture for all his commonable cattle levant and couchant in and upon his messuage and land with the appurtenances, in, upon, and over, certain large wastes or commons in the parish aforesaid, etc., Ealand Carr, or Bolton (and so mentioning several other commons, some of them stinted) as belonging and appertaining to his messuage and land with the appurtenances, etc.: and he then alleged a grievance to him by the defendant's surcharging the common and waste grounds. A second count, to the same effect, laid the plaintiff's messuage land and appurtenances as being within the manor of Crowle. A third count, more general, stated the plaintiff's lawful possession at the time of the grievance of the messuage and land with the appurtenances; and that by reason thereof he was entitled of right to

common of pasture in, upon, and throughout, all the commonable waste grounds in the parish of Crowle, for all his commonable cattle, levant and couchant in and upon his last-mentioned messuage and land, with the appurtenances (without claiming such right of common as belonging and appertaining to his messuage and land); and then it proceeded as before to state the disturbance of the plaintiff's right by the defendant's surcharging the common.

At the trial before GROSE, J., at the last assizes at Lincoln, it appeared that the plaintiff, his father, and grandfather, had occupied the manor-house and farm for above fifty years past, during all which time they had constantly stocked and enjoyed the common. But it appearing also, upon cross-examination, that the messuage and farm were so held by the plaintiff and his ancestors, as tenants to the lord of the manor, the objection was taken that neither the lord nor his tenants could have a right of common upon the lord's own soil, but that the unity of possession extinguished the common. The learned judge, being of that opinion, nonsuited the plaintiff. Subsequently the plaintiffs obtained a rule nisi to set aside the nonsuit.

Reader and *Copley* for the defendant, showed cause against the rule.

Sir Vicary Gibbs, *Clarke*, *Serjeant Rough* and *Denman* for the plaintiff, in support of the rule.

Cur. adv. vult.

LORD ELLENBOROUGH, C.J., delivered the following judgment of the court. —This was a motion for a new trial in a cause tried before GROSE, J., at Lincoln, and the only question was whether the nonsuit was maintainable, on the ground that the evidence did not support the declaration. The plaintiff had alleged a disturbance of his right of common for all commonable cattle, levant and couchant on his land; which right he claimed in all the counts of his declaration, but the last, as belonging and appertaining to the said closes of land. In the last count, after stating that he was possessed of such closes, he alleged "that by reason thereof" he was entitled to the same right of common in the place in question.

It appeared in evidence that the plaintiff was tenant to the lord of the manor of the closes in respect to which the common was claimed, and of course, that as any right of common, which might have been antecedently appurtenant to these lands, became extinct by a union of them which had taken place in the hands of the lord with the soil out of which such common was claimed, the tenant could not claim the common in question in right of his land as appurtenant, after such union had taken place. But inasmuch as the tenant, and his father before him, had, for a long series of years, actually enjoyed this common, it was contended before us (for no such point was made below), on the part of the plaintiff, that such enjoyment laid a foundation for presuming a new grant from the lord, and which presumption ought to have been left to the jury: supposing that any new grant could in point of law have sustained the allegation of common belonging and appertaining to the plaintiff's lands, which occurs in all the counts but the last; and of his being entitled to common by reason thereof, which occurs in the last count. Upon consideration, there does not appear to be any material difference in point of legal effect between the claims of common as made in these several counts: in all the claim is in substance a claim of common appurtenant to the closes in respect of which the common is claimed. The only question upon the argument of which the court wished further to consider was whether common appurtenant, for which, as is said in the text of Co. LITT. 122, one must prescribe, is, as suggested in the notes of the learned commentators, also claimable by grant as well as by prescription. It certainly occurs in favour of such claim by grant that as prescription is only evidence of an immemorial grant, by which in time beyond memory the right then began to exist, it may equally begin to exist through the same medium, i.e., of grant, now shown, or fairly to be presumed from usage at the present day.

Bradshaw v. *Eyre* (1), which was a case similar to the present as far as the

extinction of common by unity of possession is concerned, did not afford an express authority for the creation of common strictly appurtenant by a new grant at the present day, because the lease contained not only the words: "all commons, profits, and commodities thereto appertaining" (upon which the argument for common appurtenant might be built) but the further words: "or occupied or used with the aforesaid messuage;" which latter words might import a substantive new grant in gross of common to the tenant, by words of reference to antecedent usage and enjoyment as the measure of its future enjoyment, and not strictly an annexation of such right de novo as an appurtenant to the lands, etc., in question.

However, *Sacheverell* v. *Porter* (2), referred to in the fourth note upon Co. LITT. 122, but much better reported in SIR WILLIAM JONES, 396, is decisive upon the question. According to SIR WILLIAM JONES, Sacheverell brought trespass against Porter for breaking his close and consuming his grass with his beasts in Crippleston in the county of Stafford. And the case was such upon the pleading and special verdict, that Foulke Pembridge was seised of Whitenhall waste in Crippleston, and the prior of Stone was seised, in right of his church, of three messuages, one hundred acres of land, etc., in Stullington in the county aforesaid; and being so seised Foulke by his deed, 2 Hen. 4 (1401), granted to the prior and his successors common of pasture for himself and his successors, and his tenants, in Stullington in the said waste. The priory was dissolved and came to King Henry 8, and by descent to Queen Elizabeth, who by letters patent granted it to Rowland Hill in fee, and from him by mesne conveyance it came to one Warlowe, who enfeoffed the defendant of thirty-three acres, parcel of the lands in Stullington, with the appurtenances in fee; and he put his beasts into the waste land to take his common; and the plaintiff being owner of the waste brought trespass. It was adjudged, upon argument at the Bar by ROLLE and SERJEANT MILWARD, by all the court, BRAMPSTON, JONES, CROKE, and BARKLEY, JJ., that the action does not lie. By all the court these points were adjudged: first, when Foulke granted to the prior, for him and his tenants of Stullington, common of pasture, this was common appurtenant, and this may be as well by grant as by prescription. The other points are not material to be here stated.

It appearing from this pointed authority, in confirmation of the reason of the thing upon principle, that common appurtenant (such as was claimed by the plaintiff's declaration) may be created by modern grant, it was proper that the jury should have had the usage in this case left to them, as a foundation whereupon they might or might not, according as the evidence of enjoyment would have warranted them, have presumed such a grant to have been made by the lord to the plaintiff or his father, as would have sustained the right claimed of common appurtenant in respect of their lands. As this was not done, we think the nonsuit should be set aside, and a new trial granted.

Rule absolute.

ATKINSON *v.* RITCHIE

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Le Blanc and Bayley, JJ.), February 9, 1809]

[Reported 10 East, 530; 103 E.R. 877]

Shipping—Carriage of goods—Cargo—Delivery—Short delivery—Departure of ship from port of loading under apprehension of embargo—Right of freighter to damages.

The master and the freighter of a vessel mutually agreed in writing that the vessel should proceed to St. Petersburgh, there load a complete cargo of hemp and iron, proceed to London, and deliver the cargo on being paid freight. The master had loaded about half the cargo at St. Petersburgh when, on hearing a general rumour of an embargo being laid on British ships by the Russian government, he sailed for London. In so doing he acted bona fide, and there was a well-grounded apprehension for his acting as he did. The embargo in fact took place six weeks later. In an action by the freighter for damages for breach of the agreement,

Held: the freighter was entitled to damages, because the master had not shown that such a state of circumstances existed that the contract was no longer capable of being performed by him without a criminal compromise of his public duty.

Notes. Applied: *Splidt* v. *Heath* (1809), 2 Camp. 57, n. Referred to: *Spence* v. *Chodwick*, [1843–60] All E.R. Rep. 639; *Esposito* v. *Bowden*, [1843–60] All E.R. Rep. 39; *The Teutonia* (1871), L.R. 3 A. & E. 394; *Jacobs, Marcus & Co.* v. *Credit Lyonnais*, [1881–5] All E.R. Rep. 151; *Watts, Watts & Co.* v. *Mitsui & Co.*, [1916–17] All E.R. Rep. 501; *Ralli Bros.* v. *Compañia Naviera Sota y Aznar*, [1920] All E.R. Rep. 427; *Walton Harvey, Ltd.* v. *Walker and Homfrays, Ltd.*, [1931] 1 Ch. 145; *Czarnikow, Ltd.* v. *Java Sea and Fire Insurance Co., Leslie and Anderson, Ltd.* v. *Java Sea and Fire Insurance Co.*, [1941] 3 All E.R. 256; *Fibrosa Société Anonyme* v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1941] 2 All E.R. 300; *Constantine (Joseph) SS. Line, Ltd.* v. *Imperial Smelting Corpn., Ltd.*, [1941] 2 All E.R. 165; *Atlantic Maritime Co., Inc.* v. *Gibbon*, [1953] 2 All E.R. 1086.

As to delivery of cargo, see 35 Halsbury's Laws (3rd Edn.) 384 et seq.; and for cases see 41 Digest (Repl.) 352 et seq.

Cases referred to:

(1) *Paradine* v. *Jane* (1647), Aleyn, 26; Sty. 47; 82 E.R. 897; 12 Digest (Repl.) 417, *3236*.

(2) *Bullock* v. *Dommitt* (1796), 6 Term Rep. 650; 2 Chit. 608; 101 E.R. 752; 12 Digest (Repl.) 428, *3294*.

(3) *Brecknock and Abergavenny Canal Navigation Co.* v. *Pritchard* (1796), 6 Term Rep. 750; 101 E.R. 807; 12 Digest (Repl.) 431, *3310*.

Also referred to in argument:

Blight v. *Page* (1801), 3 Bos. & P. 295, n.; 127 E.R. 163, N.P.; 41 Digest (Repl.) 347, *1409*.

Touteng v. *Hubbard* (1802), 3 Bos. & P. 291; 127 E.R. 161; 11 Digest (Repl.) 565, *3435*.

Action by the plaintiff for breach of an agreement by the defendant in not loading a complete cargo of hemp at St. Petersburgh.

The plaintiff being master of the ship *Adelphi*, in August, 1807, chartered her to the defendant by the following instrument:

"Memorandum for charter. London, Aug. 12, 1807. It is this day mutually agreed between Captain J. Ritchie, of the ship *Adelphi*, burden 400 tons or

thereabouts, now in the river, and W. Atkinson, of London, merchant, that the said ship, being tight, and every way fitted for the voyage, shall with all convenient speed sail and proceed to St. Petersburgh, or so near thereunto as she may safely get, and there load from the factors of William Atkinson, a complete cargo of clean hemp, and 80 tons of iron for ballast, not exceeding what she can reasonably stow, etc., and being so loaded shall therewith proceed to Woolwich and London, and deliver the same, on being paid freight for clean hemp £5 per ton, for ballast iron 5s. per ton, with two-thirds port charges and pilotage as customary; restraint of princes and rulers during the said voyage always excepted: one half of the freight to be paid on unloading and right delivery of the cargo, and the remainder in three months following. Thirty running days are to be allowed the said merchant (if the ship is not sooner dispatched) for loading her at St. Petersburgh, and thirty running days for delivery at Woolwich and London, and ten days on demurrage over and above the said laying days at £6 per day. Penalty for non-performance of this agreement £2,000. The ship to sail with convoy from the Sound for England. William Atkinson."

The *Adelphi* sailed in ballast from Deptford on Aug. 24, 1807, and arrived at Cronstadt, the port of St. Petersburgh, on Sept. 16 following, where the plaintiff proceeded to take in her cargo under the charterparty, and continued loading her with all due diligence until Sept. 25, and had then taken on board between 70 and 80 tons of iron for ballast, the same being a sufficient quantity for ballast, and a considerable quantity of hemp. On Sept. 26 there was a general rumour of an embargo being intended to be laid by the Russian government on all British vessels; and there was every appearance that it would take place immediately, but it did not in fact take place then, nor until six weeks afterwards. On Sept. 25 Mr. Booker, the agent for the British factory at Cronstadt and also the agent to the house of Hubbard & Co., the defendant's agents, in consequence of instructions that he had received from Sir Stephen Shairp, His Majesty's Consul General at St. Petersburgh, desired the captains of such British vessels as were ready to proceed to sea to do so as soon as possible, as he expected an embargo might take place immediately. In consequence of this the plaintiff gave directions to leave off screwing down any more hemp, which was the usual mode of loading, and to fill the ship up as fast as possible by hand; and the whole of that day was occupied in loading the vessel in this manner till 6 o'clock, at which time she was filled up as far as could be done by hand. The ship sailed on the evening of Sept. 25 with a cargo more than half what she could have carried, though there was at the time as much hemp of the defendant's lying in lighters alongside of the vessel as would have completely loaded her. The plaintiff acted bona fide and as an honest man under the existing circumstances, and there was a reasonable and well-grounded apprehension for his acting as he did; and he brought home as complete a cargo as he could under the circumstances. Several other vessels sailed the same evening as the *Adelphi*. All or almost all the vessels which had passes sailed either the same evening or the next morning without full cargoes under the apprehensions of an embargo: but some other British vessels did not sail from Cronstadt at that time, and were not detained but completed their loading. If the *Adelphi* had stayed she might have completed her loading. The plaintiff sailed without any previous communication with Hubbard & Co., the defendant's agents, to whom he was addressed, they residing at St. Petersburgh. As soon as they had notice of the circumstances they immediately came to Cronstadt with an intention to stop the ship, but it was too late; and they then formally protested against him for breach of his charterparty. The *Adelphi* arrived in London and delivered her cargo there to the defendant, who refused to pay the freight as little more than a moiety of the quantity of hemp stipulated by the charterparty was brought by the plaintiff. The freight of the iron and hemp so

brought to London and delivered to the defendant amounted, according to the rate stipulated in the charterparty, to £960 15s.

At the trial before LORD ELLENBOROUGH, C.J., a verdict was taken for the plaintiff for £2,000 damages, subject to an award as to their amount and to the opinion of the court on a Special Case which stated the facts set out above.

Taddy for the plaintiff.
Littledale for the defendant.

Cur. adv. vult.

LORD ELLENBOROUGH, C.J., delivered the following opinion of the court.— The question between the parties in this case arises on an agreement in the nature of a charterparty. The parties are the merchant freighter on the one hand and the master on the other; each contracting for himself with the other as principals. Under such circumstances any constructive agency on the part of the defendant, in his character of master, for the plaintiff, as the freighter of goods, is wholly out of the question. Their relative claims on, and duties in respect of, each other are conclusively fixed and defined by the terms of their own written contract. No exception (of a private nature at least) which is not contained in the contract itself can be engrafted on it by implication as an excuse for its non-performance. The rule laid down in *Paradine* v. *Jane* (1) (Aleyn, at p. 27) has been often recognised in courts of law as a sound one, i.e., that

> "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may; notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract."

This has been recognised in several cases, as in *Bullock* v. *Dommitt* (2) and *Brecknock and Abergavenny Canal Navigation Co.* v. *Pritchard* (3).

It has been contended that the exception contained in this contract of "restraint of princes and rulers during the voyage," excuses the not taking on board a complete cargo in this case. But, without considering whether this provision respecting restraint of princes, etc., be at all applicable by way of excuse for the non-performance of this part of the master's stipulated duty, viz., the taking on board a complete cargo, yet, at any rate, the restraint meant must be an actual and operative restraint, and not a merely expected and contingent one, as this at most only was. It has been further argued by counsel for the defendant that supposing the master, in respect of his express contract, not to be otherwise justifiable in regard to the freighter, yet that he is so, at any rate, on the ground of his paramount duty to the State which required him to save the property and crew under his charge from the impending peril of an instantly expected embargo; and that in every private contract, however express in its terms, there is always a reservation to be implied for the performance of a public duty, in which the interest of the state is materially involved. That no contract can properly be carried into effect which was originally made contrary to the provisions of law or which, being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law, are propositions which admit of no doubt. Neither can it be questioned that if, from a change in the political relations and circumstances of this country with reference to any other contracts which were fairly and lawfully made at the time, they have become incapable of being any longer carried into effect without derogating from the clear public duty which a British subject owes to his sovereign and the State of which he is a member, the non-performance of a contract in a State so circumstanced is not only excusable, but a matter of peremptory duty and obligation on the part of the subject. But in order to found this new public duty which is to supersede the performance of his former private one, it is necessary that an actual change in the political relations of the two countries should have taken place, and that the danger to

result to the public interests of his own country from an observance of the contract should be clear, immediate and certain. In short, such a state of circumstances must be shown to exist as that the contract is no longer capable of being performed by him without a criminal compromise of his public duty.

Can anything of this kind be said, with truth, to exist in the present case? No actual change in the political relations of Great Britain and Russia had then taken place. The danger to result from remaining at Cronstadt was neither immediate nor certain; in point of fact, it attached only at the distance of many weeks afterwards. And no one can venture to suggest even in argument that the loading in question might not have been completed without any criminal compromise of public duty. Indeed, to allow a man to withdraw himself from the performance of a distinct positive contract on the ground of some speculative inconvenience suggested as likely to result from such performance to the general interests of the State, would afford great encouragement to disingenuous subtleties and refinements on subjects of this kind, and would render all reliance on the solemn stipulations of parties in commercial matters precarious and insecure; which encouragement this court would most reluctantly lend its assistance to administer. For the reasons already given, such an argument has no foundation to rest on in the present case. Therefore, neither on this ground, any more than on the others already considered, is the plaintiff precluded from a right to recover. The consequence is that the verdict for the plaintiff must stand and the postea be delivered to the plaintiff.

Judgment for plaintiff.

WRIGHT *v.* WAKEFORD

[Lord Chancellor's Court (Lord Eldon, L.C.), March 18, 1811]

[Reported 17 Ves. 454; 34 E.R. 176]

Power of Sale—Creation of power—Requirement that two or more formalities be observed and instrument be attested—Attestation clause stating compliance with only one formality—Invalidity of power.

Where an instrument creating a power requires two or more formalities to be observed and is also required to be attested, and the attestation clause states that only one of the formalities has been complied with, the power is not well executed.

Notes. Referred to: *Doe d. Mansfield* v. *Peach* (1814), 2 M. & S. 576; *Doe d. Hotchkiss* v. *Pearce* (1815), 6 Taunt. 402; *Moodie* v. *Reid* (1816), 1 Madd. 516; *Hougham* v. *Sandys* (1827), 2 Sim. 95; *Allen* v. *Bradshaw* (1835), 1 Curt. 110; *Tatnall* v. *Hankey* (1838), 2 Moo. P.C.C. 342; *Burdett* v. *Spilsbury* (1843), 10 Cl. & Fin. 340; *Re Wrey's Trust* (1850), 17 Sim. 201; *Vincent* v. *Bishop of Sodor and Man* (1851), 4 De G. & Sm. 294; *Roberts* v. *Phillips* (1855), 24 L.J.Q.B. 171; *Morris* v. *Rhydydefed Colliery Co., Glamorganshire* (1858), 5 Jur. N.S. 339; *Newton* v. *Ricketts* (1861), 9 H.L. Cas. 263; *In the Goods of Jenkyns* (1862), 32 L.J.P.M. & A. 71.

As to execution of a deed in special cases, see 11 Halsbury's Laws (3rd Edn.) 352 et seq.; and for cases see 17 Digest (Repl.) 213 et seq.

Cases referred to:

(1) *M'Queen* v. *Farquhar* (1805), 11 Ves. 467; 32 E.R. 1168, L.C.; 37 Digest (Repl.) 390, *1215.*

(2) *Croft* v. *Pawlet* (1739), 2 Stra. 1109; 93 E.R. 1064; 48 Digest (Repl.) 125, *1045.*

Bill for specific performance of an agreement for the sale of an estate.

An objection was taken to the title in the following circumstances. By indentures of lease and release, dated June 10 and 11, 1776, previous to the marriage of Thomas and Mary Wood, a considerable part of the premises, agreed to be purchased by the defendant, was limited to Edward Bacon and Robert Hudson, their heirs and assigns, to the uses and subject to the powers and provisoes after mentioned. It was among other things provided that it should be lawful to Bacon and Hudson, and the survivor of them and his heirs, at any time with the consent and approbation of Thomas Wood the elder and Thomas Wood the younger, or the survivor of them, testified by any writing under their and his hands and seals or hand and seal, attested by two or more credible witnesses, to make sale or dispose of and convey, or convey in discharge for or in lieu of other manors, etc., all or any of the hereditaments therein mentioned (being a considerable part of the purchased premises).

By indentures of lease and release dated Mar. 3 and 4, 1788 (Bacon being then dead), reciting that Giles Stibbert with the consent of Thomas Wood the elder and Thomas Wood the younger, testified by their being parties to and signing, sealing and delivering the said indenture, had contracted with Robert Hudson for the absolute purchase of the premises in fee-simple, it was witnessed that, in consideration of £15,988 to Robert Hudson, paid by Giles Stibbert, with the consent of Thomas Wood the elder and Thomas Wood the younger, testified as aforesaid, Robert Hudson with the consent and approbation of the two Woods testified as above mentioned, did in pursuance and execution of the said power for that purpose contained in the said indenture sell to Giles Stibbert, his heirs and assigns.

The objection was that, though these indentures were signed, sealed and delivered by Hudson and the two Woods, the memorandum of attestation of the execution was endorsed in the following words:

> "Sealed and delivered by the within-named Robert Hudson, Thomas Wood, sen. and Thomas Wood, jun. in the presence of: Charles Bicknell, Chancery Lane. George Burley, Lincoln's Inn."

After the death of Thomas Wood, the elder, another memorandum was endorsed dated Nov. 13, 1810, signed by the same witnesses in the following terms:

> "We do hereby attest and certify, that the within written indenture at the time of the execution thereof, as above attested, was signed, as well as sealed and delivered, by the several parties within named in our presence; as witness our hands."

A motion was made that the defendant might be ordered to pay into the bank the residue of the purchase-money.

Sir Arthur Piggott and *Bell* in support of the motion: On principle, as well as on the authority of *M'Queen* v. *Farquhar* (1), this power was sufficiently executed. The witnesses are merely required to attest. The parties contemplated only the usual form of attestation, and the writing, not the signing, is to be attested.

The cases on the Statute of Frauds, as to wills, on which it was at one time held that sealing was equivalent to signing, may afford some illustration of this question. In *Croft* v. *Pawlet* (2) a devise was established, though the attestation did not state that they signed in the presence of the testator. Admitting that any substantial circumstance required by the power must attend the execution, such as attornment, livery of seisin, etc., were essential by the common law, this power is substantially well executed. The admission of such nice and critical objections would be attended with great danger, and the most extensive and pernicious consequence to titles now existing under the execution of powers. The words of this power are not confined to precedent consent and approbation and then the objection is cured by the subsequent attestation.

Sir Samuel Romilly, *Hall* and *Preston* for the defendant, opposed the motion.

LORD ELDON, L.C.—I take it to be necessary that there should have been an attestation of the act of signing and that not being mentioned, is not to be considered as included in the attestation of the sealing and delivery. If this case then, is to depend on the question whether subsequent attestation would do, I have a strong opinion that it would not do on the ground that, where a deed of this sort gives a power, the execution of that power is a limitation of a use, and, unless the use arises at the time when the power is executed, on ordinary principles it does not arise at all.

The fact that the execution of a power is the limitation of a use is demonstrated in the ordinary case of jointure or a lease, granted under a power. The instrument proceeds to express what is implied in law, that execution of the power the estate or interest created arises as if it were expressed in the original settlement. If, however, many titles depend on it, I should wish this question to be discussed at law.

This deed certainly raises a question, not in any degree decided by *M'Queen* v. *Farquhar* (1) which I think is rightly decided. That was the case of powers to be executed in the presence of witnesses and, in one instance with this further requisite expressed, to be attested by witnesses. The power actually exercised by the deed, upon which the question arose, was to be exercised in the presence of witnesses but was not required expressly to be attested by witnesses. The deed, said to be an execution of the power on the face of it, was expressed to be executed in the presence of the witnesses. So far from determining that attestation of the sealing was an attestation of the signing, I merely said that there would be a miscarriage in a judge if he did not direct the jury to presume that the deed was signed (as it professed to be on the face of it) in the presence of the witnesses who attested the sealing and delivery. That way of putting it, so far from deciding, expressly avoided the question whether attestation of the sealing and delivery is to be taken as attestation of the signing also.

I do not agree with the proposition that the writing is the thing to be attested. In the case of an execution by will of a power in the ordinary words, "by his deed, sealed and delivered in the presence of two or more credible witnesses, or by his last will attested," etc., it is not the will that is attested but the act of the testator. That necessary act is to be found in the Statute of Frauds requiring, not merely that the instrument shall be executed by the testator in the presence of the witnesses but that it shall be attested and subscribed by them. Two acts are, therefore, required: one, that he shall subscribe in their presence; the other, that they shall attest that he has done so.

It is true, that it was decided at one time that sealing was signing. When it was urged that the legislature meant more than sealing, first, from the circumstance that sealing is not mentioned as to wills; and secondly, as the legislature must have proposed some evidence from the handwriting of the party, the objection was that a person may sign by his mark, an act affording no material testimony. On such reasoning it was decided originally that sealing was signing. On a review of that, however, the contrary has been held for a long time, and so far is sealing from being equivalent to signing, that it is determined that sealing is not necessary. Further, that sealing without signing is not a sufficient execution of a will. The converse holds as to a deed which cannot be without sealing and delivery. If signed, it may be a writing but, if delivered, it may be a good deed whether signed or not; and if it is to be executed under a power with signature and sealing, both are required.

Assuming then that the deed, in order to be a good execution of the power, must be a writing, not only sealed and delivered but also signed, if it be required that both should be attested, an attestation is required of two acts in their nature different. Further, if a signature be actually found at the bottom of the deed and

the jury will find that act as done in the presence of witnesses, I do not say that would not do; but, if attestation at the time is required, it cannot be presumed where there is no signature even though the signature which is there, may be presumed to have been in the presence of witnesses not appearing to be so. If, therefore, the real meaning of this power is that there shall be an attestation on the instrument of the signing as well as the sealing, and there is on the instrument no such attestation, it is not a case for the presumption of a jury that the act was done which appears not to have been done. As this is a case of great importance, it is a proper subject for the decision of a court of law.

A Case directed to Court of Common Pleas.

WHITELOCKE *v.* BAKER

[Lord Chancellor's Court (Lord Eldon, L.C.), April 10, 1807]

[Reported 13 Ves. 511; 33 E.R. 385]

Evidence—Declaration—Pedigree—Tradition—Evidence from persons connected with person in question—Descriptions in wills, Bibles, and registry books, and on monuments.

Tradition generally is not evidence of pedigree. The evidence must be from persons having such a connection with the party to whom it relates that it is natural and likely from their domestic habits and connections that they are speaking the truth, and that they could not be mistaken. Declarations in the family, descriptions in wills, descriptions on monuments, descriptions in Bibles and registry books, are all admitted on the principle that they are the natural effusions of a party who must know the truth.

Notes. Considered: *Berkeley Peerage Case* (1811), ante p. 201; *Johnson* v. *Lawson* (1824), 2 Bing. 86; *Monkton* v. *A.-G.* (1831), 2 Russ. & M. 147; *Shields* v. *Boucher* (1847), 1 De G. & Sm. 40; *Haines* v. *Guthrie* (1884), 13 Q.B.D. 818; *Re Jenion, Jenion* v. *Wynne*, [1952] 1 All E.R. 1228. Referred to: *Slaney* v. *Wade* (1836), 7 Sim. 595; *Davy* v. *A.-G.*, [1934] All E.R. Rep. 176; *Hollington* v. *Hewthorn & Co.* (1942), 59 T.L.R. 35; *Jarman* v. *Lambert and Cooke (Contractors), Ltd.*, [1951] 2 All E.R. 255.

As to declarations as to pedigree, see 15 Halsbury's Laws (3rd Edn.) 310 et seq; and for cases see 22 Digest (Repl.) 373.

Case referred to:

(1) *Goodright d. Stevens* v. *Moss* (1777), 2 Cowp. 591; 98 E.R. 1257; 3 Digest (Repl.) 407, *78*.

Motion by the plaintiff suing as a pauper, that the depositions under a commission taken out by him ex parte, the defendants not joining, should be suppressed on objections to the depositions themselves, and on misconduct, attributed by affidavit to the plaintiff's agent, and to the commissioners, one of whom was represented as being the solicitor of a person having a corresponding interest with the defendants in the question.

The application was made not only after publication but even after the cause had been called on in the regular course to be heard, when, the plaintiff not appearing and the defendants not having an affidavit of the subpœna to hear judgment, the cause was struck out.

Plowden for the plaintiff, in support of the motion.
Hart for the defendants.
Heald for the commissioners.

LORD ELDON, L.C., in the course of his judgment said: The next ground for this motion is the materiality of the further evidence which it is supposed can be given. If that could be represented as most highly material, I dare not trust myself with laying down a precedent that would authorise attempts to bring forward an application in every case where, even after a cause had been struck out, the party might see that it would not be convenient to hear the cause on the evidence on which he originally intended to hear it. The danger from that would be enormous. But there is hardly any part of what is stated in these affidavits that would in the form of depositions be evidence. I accede to the doctrine of LORD MANSFIELD in *Goodright d. Stevens* v. *Moss* (1) (2 Cowp. at p. 594), but it must be understood as it has been practised and acted on, and one word in that passage wants explanation. It was not the opinion of LORD MANSFIELD, or of any judge, that tradition generally is evidence even of pedigree. The evidence must be from persons having such a connection with the party to whom it relates that it is natural and likely from their domestic habits and connections that they are speaking the truth, and that they could not be mistaken. The whole goes on that: declarations in the family, descriptions in wills, descriptions on monuments, descriptions in Bibles and registry books, all are admitted on the principle that they are the natural effusions of a party who must know the truth; and who speaks on an occasion, when his mind stands in an even position without any temptation to exceed or fall short of the truth. But there may be many circumstances forming part of the tradition which you would reject, taking the body of the tradition.

Applying that to this case and the particular circumstances of this unfortunate person, the answer to an objection on that ground is that the rules of law are framed for general cases, and must apply to this, unless it is an excepted case. There is no rule that will allow me to give the benefit of what may be called a species of secondary evidence of tradition to a person under these circumstances, that I could not give under other circumstances. It is a misfortune that I cannot cure.

Motion refused.

A

MESTAER *v.* GILLESPIE AND OTHERS

[Lord Chancellor's Court (Lord Eldon, L.C.), November 15, 16, 26, 1804]

[Reported 11 Ves. 621; 32 E.R. 1230]

B

Fraud—Contract—Prevention of fulfilment of statutory requirements—Relief by court of equity—Validation of contract.

A court of equity will not allow a fraudulent use to be made of the provisions of the Statute of Frauds [and **semble** other statutes] prescribing requirements to be fulfilled if certain contracts are to be valid. Accordingly, where the sellers of a ship wrongfully prevented the purchaser from having the transaction endorsed on the ship's certificate of registration, as required by the repealed Ship Registry Acts of 1786 and 1794, they were **held** not entitled to rely on that fact on their claim that the sale was invalid for non-compliance with the Acts.

C

Notes. Referred to: *Haigh* v. *Kaye* (1872), 26 L.T. 675.

Cases referred to:

D

(1) *Rolleston* v. *Hibbert* (1789), 3 Term Rep. 406; subsequent proceedings sub nom. *Hibbert* v. *Rolleston* (1792), 3 Bro. C.C. 571.

(2) *Curtis* v. *Perry* (1802), 6 Ves. 739; 31 E.R. 1285; 4 Digest (Repl.) 465, *4079.*

Motion for an injunction.

E

The defendants, the Beatsons, being indebted to the plaintiff to the amount of £4,000, proposed, and it was agreed, that the plaintiff should accept bills to the amount of £7,000, in consideration of which and the debt of £4,000 the Beatsons would assign to the plaintiffs one moiety of two ships, the *Juliana* and the *Ocean*, then in dock building; that the ships should be sold for the mutual benefit of the plaintiff and the Beatsons and the bills accepted by the plaintiff should be discharged out of the produce of the sale and in the meantime should be renewed; and the whole of the ship *Juliana* should be assigned to the plaintiff as a security for performance of the agreement. This agreement became abortive, the Beatsons being disappointed in their expectation of redeeming some securities they had formerly given upon those ships. The parties then came to another agreement by which, in consideration of £11,000, composed in the same manner of the original debt of £4,000 and the plaintiff's acceptances for £7,000, the Beatsons agreed to assign to the plaintiff three-fourth parts of the ship *Atlas*, then at sea, freighted by the East India Co., with the proportion of the freight. A bill of sale was executed on July 3, 1803, by the Beatsons to the plaintiff of three-fourths of the ship and the freight, under the charterparty entered into by the East India Co., and all future earnings, that might become due, but, the endorsement upon the certificate of the registry required by the statutes 26 Geo. 3, c. 60, and 34 Geo. 3, c. 68 [Ship Registry Acts of 1786 and 1794], not being made within ten days after the return of the ship to port on Dec. 17, an action of trover was brought by the assignees under a commission of bankruptcy issued against the Beatsons, and, judgment being recovered by the plaintiffs in that action, and possession of the ship having been obtained by them, this bill was filed. A motion was made by the plaintiff, that the defendants, the East India Co., might be directed to pay the balance due for the freight of the *Atlas* into court, and that the other defendants might be restrained from proceeding at law, the endorsement of the certificate within ten days, for which application was made immediately on the ship's arrival, having been prevented by the Beatsons. The circumstances that prevented the endorsement of the certificate appeared, according to the bill and answer though not distinctly, to be that the Beatsons proposed terms, viz., that the plaintiff would give up the first instalment of the freight to be applied in discharge of acceptances they had given for £2,600, part of the debt of £4,000 and should pay

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the costs of actions that had been brought against the Beatsons upon some of the plaintiff's acceptances which were dishonoured.

Spencer Percival, *Romilly* and *Bell*, in support of the motion, argued that under these circumstances, everything required by the statutes having been done except the endorsement of the certificate which was prevented by what must be considered a fraud upon the plaintiff, the defendants insisting upon terms to which they were not entitled, the court would relieve. Otherwise the statutes would be made the engine of fraud.

Sir Thomas Manners Sutton, *Richards* and *Steele*, for the defendants, the assignees under the bankruptcy, contended that the court could not relieve against the positive terms of the statutes in this case any more than in *Hibbert* v. *Rolleston* (1), the rights of third persons intervening, though, if the question was only between the plaintiff and the bankrupts, they might be compelled to execute a proper contract. Even if the imputation of fraud could be maintained, which was a proper subject for a jury, the policy of the law must prevent the relief.

LORD ELDON, L.C.—The bankruptcy makes no difference in this case. Whatever relief might have been obtained against the bankrupts may be had against their assignees. At present, unless it can be made out that this plaintiff was wilfully and fraudulently prevented by the Beatsons from having his title made good, I do not see any ground for relief in this court, but, if a jury upon the issue whether that was fraudulently prevented should find the affirmative, the assignees, representing the creditors, could not possibly avail themselves of that fraud.

On that two questions arise: (i) Can this court interpose, putting the case that a fraud of that species, and with those consequences, has been committed?; (ii) Do the circumstances of this case authorise the court to say such a fraud has been committed? On the former point the injunction ought not to be granted unless the question of law is a grave and serious question, fit for judicial consideration and decision. In *Rolleston* v. *Hibbert* (1), in the Court of King's Bench, the decision of a court of law could not possibly be any other. The question, being as to the property in the ship if the instrument has not all the particulars required by the Act, must have been decided immediately as it was stated. But in a variety of cases, though the property would not pass at law, an equity would arise to have a legal title made. In the case, for instance, of a conveyance by bargain and sale which cannot be complete as a legal conveyance without enrolment, yet that very instrument, only inchoate, and not complete to pass the property, is in this court evidence of an agreement to convey, and the conscience is bound to make further assurance, that obligation arising from the payment of the money. Many other cases may be put.

When the question came before Lord Thurlow in *Hibbert* v. *Rolleston* (1) his Lordship had great doubt upon it. That case was not decided in public, but I happen to know that the Lord Chancellor gave his reasons to the counsel on both sides, and the ground of the judgment, distinguishing the case from those to which it was compared upon the Statute of Frauds, and the bargain and sale without enrolment, was that the policy of that Act of Parliament was to make the instrument defective and void to all intents and purposes, and the object of that policy could not be attained if such a thing as an equitable title to the ship could subsist as parties might rest upon their equitable title, without desiring the legal title. The object being that there should be a public registry, accessible, of the ownership of all vessels navigating to and from the British dominions, the legislature had declared that this object should be secured by a bill of sale which should be such in the form and contents as to manifest all the circumstances necessary to secure the knowledge of who were the owners from time to time, by which the history of the ship from the moment she was built might be pursued. On another question whether, when it was decided that the property did not pass, the party could be compelled to refund the money if the answer should be that it was no fault of his

that the other had not a good title, but the fault of the assignor himself, such an answer could not be given to an action brought to recover the money in a case of this sort if the circumstances will sustain the imputation of fraud by the bankrupts in not performing their part of the agreement, express or implied, imposing on them the obligation to accede to the request of the assignee to enable him upon the ship's arrival to make good his title, which having prevented, they could not at law say the money should not be refunded. There is, therefore, a difference even at law upon that supposition between this case and *Rolleston* v. *Hibbert* (1).

As to the power of a court of equity, my opinion is that, if this is a case of fraud, *Hibbert* v. *Rolleston* (1) has no application and that the present case is to be decided with reference to what courts of equity are in the habit of doing in cases where instruments are rendered null by statute, and to the true intent and meaning of these two Acts of Parliament. The later Act was made to assist the policy of the former Act in this respect among others, to exclude, as far as was practicable and just, the interposition of a court of equity where the legal title was not obtained, expressly adopting the doctrine of *Hibbert* v. *Rolleston* (1). But that case does not in any degree determine this case, for the reason that that was precisely such a case as occurs every day upon the grant of an annuity, the grantor saying he has offered to do all that is necessary and has done all, that is to be done by him, and, if the grantee has not done what is necessary, the blame is with him and the consequence must fall upon him. The defect in *Hibbert* v. *Rolleston* (1) was only a slip in point of caution by the assignee, not inserting some words that ought to have been in the bill of sale. The policy certainly was just the same without those words as with them, but the Act positively required those words, and, therefore, no court could interfere: see *Curtis* v. *Perry* (2) (6 Ves. at p. 745).

But that is not the case alleged by this bill, that the plaintiff was improperly, wilfully, and fraudulently, prevented from making good his title, and prevented by the Beatsons, bound in conscience to assist him in all his endeavours for that purpose. Supposing that to be true, another question arises, and I agree that there can be no relief in equity if the Act has positively said so. On the other hand, if that is not expressly declared or the relief clearly excluded by the policy of the Act, the equitable jurisdiction upon fraud exists. Many other cases may be put. Suppose a ship at sea to be sold for £10,000 and by circumstances she becomes worth £20,000, and upon the return of the ship the master, being a friend of the vendor, is kept out of the way and there could be no conviction of him or proceeding according to the Act, in that simple case, nothing resting in agreement, but the title conveyed as far as possible, and the consequential right to have it made good prevented by a clear, palpable, fraud, would there be a right to come here, or to bring an action? Many circumstances may be supposed that would make it impossible to recover the actual damages, or to place the party in the actual state in which he ought to be. What has this court been in the habit of doing? As to the policy of the Act, a variety of instances that might be put, which would terrify all mankind from dealing for a ship at sea, must be considered.

Under the Statute of Frauds, however, although it declares that interests shall not be bound except by writing, cases in this court are perfectly familiar which decide that a fraudulent use shall not be made of that statute, where this court has interfered against a party meaning to make it an instrument of fraud, and said that he should not take advantage of his own fraud, even though the statute has declared that, if the prescribed circumstances do not exist, the instrument shall be absolutely void. One instance is the case of instructions upon a treaty of marriage, the conveyance being absolute but subject to an agreement for a defeasance, which, though not appearing by the contents of the conveyance, can be proved aliunde. There are many other instances.

I do not say, attending to the whole policy of these two Acts of Parliament that this is a case in which the court finally will be at liberty to proceed upon that ground.

A The question at present is whether I can take upon myself at this moment to say that upon full consideration of all that can be submitted, this court has clearly no right to interfere. For the purpose of the present interposition of this court it is sufficient to say that the case furnishes a question of great doubt as to the law. The question upon the facts is whether, attending to what was proposed by the Beatsons as reasonable or not, this plaintiff can be represented as having been wilfully and B fraudulently prevented from effectuating his title during those ten days. I do not know that it is necessary to insert the word "fraudulently," as the ground of relief if the Beatsons' action was wilful and the effect was the same incapacity. According to my present opinion, that remains in sufficient doubt to require further investigation to determine the real quality and nature of that transaction.

C Nov. 26, 1804. The motion again came before Lord Eldon, L.C., and Sir William Grant, M.R., when the court considered the question whether the conduct of the Beatsons was a wilful and fraudulent prevention, making it impossible for the plaintiff to complete his title to the ship; the effect of the now repealed Ship Registry Acts; and the jurisdiction of the court to grant the injunction sought by the plaintiff; and an order was made inter alia granting the injunction and directing an issue D to determine the facts relating to the Beatsons' conduct. At the trial of the issue a verdict was returned that the plaintiff had been wrongfully prevented from completing his assignment. The motion was again argued before the Lord Chancellor and the Master of the Rolls, but a compromise took place and no judgment was given.

E

F

LADY ARUNDELL *v.* PHIPPS AND ANOTHER

[Lord Chancellor's Court (Lord Eldon, L.C.), January 16, August 4, 1804]

[Reported 10 Ves. 139; 32 E.R. 797]

Husband and Wife—Contract between—Purchase by wife from husband of family property—Defeat of husband's creditors.

G A purchase by a wife from her husband of property of particular value to the family may be sustained against the husband's creditors even though the object is to preserve the property from the creditors, provided that the transaction is bona fide and the consideration paid is reasonable in relation to the value of the property transferred.

H **Notes.** As to dispositions between husband and wife, see 19 Halsbury's Laws (3rd Edn.) 837; and for cases see 27 Digest (Repl.) 134 et seq.

Cases referred to:

(1) *Kidd* v. *Rawlinson* (1800), 2 Bos. & P. 59; 126 E.R. 1155; 25 Digest (Repl.) 217, *342*.

(2) *Twyne's Case* (1602), 3 Co. Rep. 80 b; 76 E.R. 809; sub nom. *Chamberlain* v. I *Twyne*, Moore, K.B. 638; 25 Digest (Repl.) 185, *109*.

(3) *Dewey* v. *Bayntun* (1805), 6 East, 257; 102 E.R. 1285; 25 Digest (Repl.) 214, *315*.

(4) *Jarman* v. *Woolloton* (1790), 3 Term Rep. 618; 100 E.R. 765; 27 Digest (Repl.) 99, *734*.

(5) *Cadogan* v. *Kennett* (1776), 2 Cowp. 432; 98 E.R. 1171; 25 Digest (Repl.) 191, *140*.

Motions in each of these causes for an injunction to restrain the disposition of

goods taken in execution under a judgment obtained in the Court of King's Bench by creditors against Lord Arundell until answer or further order.

By indentures dated April 29, 1800, reciting the marriage settlement of Lord and Lady Arundell, dated April 23 and 24, 1764, settling several estates in the county of Lincoln, part of the family estates of Lady Arundell, to the use of Lord and Lady Arundell for their lives and the life of the survivor, with remainders in strict settlement to the second and subsequent sons, and lastly to the eldest son, in tail male, and, in default of such issue, to such persons, for such estates, intents and purposes, as Lady Arundell notwithstanding her coverture should by any deed or writing under her hand and seal, with or without power of revocation, or by her will, either absolutely or conditionally direct, limit or appoint, and, in default of appointment, to her right heirs. The indentures also recited that the premises were subject to encumbrances by mortgage to the amount of £3,716, and to two sums of £10,000 each under the marriage settlements of the two daughters of Lord and Lady Arundell, and that there was no male issue of Lord and Lady Arundell nor a probability of any; that Lord Arundell was indebted to several persons in considerable sums; and that the sums mentioned charged on the estates of Lady Arundell were raised for Lord Arundell and received and applied by him for his own use except £2,416, expended in enclosing upon the estates; that Lord Arundell was debtor to the estate of Lady Arundell in the whole of the mortgage debt of £3,716, except the £2,416; and that Lord Arundell was possessed of paintings, drawings, engravings, prints, statues, medals, plate, jewels, china, glass, fixtures, linen, articles of ornament and furniture, books, manuscripts, and implements of household and husbandry, in or about his mansion-houses, chapels, gardens, etc., at Wardour, Lanherne, and Irnham.

Several of the creditors of Lord Arundell were very urgent for payment, and it had been proposed and agreed by Lord and Lady Arundell that the sum of £12,000 should be charged upon the estates of Lady Arundell and applied in discharge of the debts of Lord Arundell, and that the estates should, in default of male issue, entitled under the settlement of 1764, be settled to the use of the two daughters of Lord and Lady Arundell and their issue, subject to a power for Lady Arundell to charge a sum of £3,000 and an annual sum not exceeding £200. It was agreed that Lord Arundell should be released from the sum in respect of the part of the mortgage debt owing by him to the estate of Lady Arundell, and that in consideration thereof he should assign to trustees for the separate use of Lady Arundell the paintings and other articles, before mentioned. In pursuance and part performance of the agreement, by indentures of even date Lady Arundell, in pursuance of an agreement between Lord Arundell and her, with his privity and approbation, and in exercise of her power under the settlement of 1764, appointed the settled estates after the decease of the survivor of Lord and Lady Arundell and failure of their male issue entitled under the settlement, to the use of Lord Clifford and James Everard Arundell, their heirs and assigns. Lord and Lady Arundell accordingly conveyed, subject and charged as aforesaid, to the use of the said trustees for the term of ninety-nine years without impeachment of waste if Lord and Lady Arundell, or the survivor, should so long live, and, subject thereto, to the use of Lord and Lady Arundell and the survivor, the trustees to preserve contingent remainders and the male issue, etc., by way of continuation of the uses of the settlement of 1764. After the determination of the said uses, or when they should be incapable of taking effect, the estates were to be held to the use of Lord Clifford and Mr. Arundell, their heirs and assigns, upon the following trusts, viz., that they should with all convenient speed after the execution of the indentures by mortgage, sale, or other disposition, out of the term or inheritance raise the sum of £12,000, and pay the same to such person or persons, and for such intents and purposes, as Lady Arundell should by deed or instrument in writing appoint, and, in default of appointment, to Lady Arundell, for her separate use, and subject thereto should be seised and possessed of the term and inheritance to such uses as Lady Arundell should by deed or will

appoint, and, in default of appointment, to her, her heirs and assigns, with a covenant by Lord Arundell that he and Lady Arundell would levy a fine to enure to the said uses.

It was witnessed that in further performance of the agreement and in exercise of her power Lady Arundell appointed that Lord Clifford and Mr. Arundell, their heirs, executors, etc., should pay and apply the sum of £12,000 which they were by the indenture directed to raise in discharge of such of the debts owing by Lord Arundell as he, his executors or administrators, should by any writing or writings under his or their hands direct or appoint, and, subject to raising the said sum, should during the joint lives of Lord and Lady Arundell pay the rents and profits as Lady Arundell should appoint, in default of appointment, to her separate use. If Lord Arundell should die in the lifetime of Lady Arundell, they were to pay the rents, etc., to Lady Arundell for life, but, if Lord Arundell should survive her, then according to her appointment by will, in default thereof to Lord Arundell for life, and after the decease of the survivor of Lord and Lady Arundell and failure of their male issue entitled under the indenture of 1764 to convey the estates to the use of the two daughters, or one of them, or their issue, according to the appointment of Lady Arundell by deed or will, and, in default of appointment in moieties in strict settlement, remainder to the right heirs of Lady Arundell.

The settlement then declared the estates the sole security for the money raised on mortgage by Lord and Lady Arundell, discharging Lord Arundell, his heirs, executors, etc., and gave powers to Lady Arundell by deed or will, subject to the said sum of £12,000, to charge the sum of £3,000 and an annuity, not exceeding £200. The settlement gave the usual powers of leasing, selling, exchanging, etc., and in consideration thereof Lord Arundell assigned to Lord Clifford and Mr. Arundell all the paintings, drawings, etc., at the mansion-houses of Wardour, Lanherne and Irnham in trust to dispose thereof according to the appointment of Lady Arundell as if she were unmarried, by deed or will, and in default of or until appointment, and so far as no such appointment should extend, to permit Lady Arundell to use and enjoy the said paintings and other articles for her separate use, without being subject to the debts, control, interference, or engagements, of Lord Arundell, and after her decease to assign the said articles to the persons who would be entitled under the Statute of Distribution after her death, if she should survive Lord Arundell.

A verdict was given for the plaintiff in an action in the Court of King's Bench brought by a creditor of Lord Arundell against the sheriff of the county of Wilts for a false return of nulla bona to a writ of execution upon a judgment against Lord Arundell, involving the point as to the validity of the indentures of April, 1800, as against creditors. The present bill stated that the verdict was contrary to law and fact, and suggested an intention to move for a new trial; that the defendants had sued out execution upon the judgments obtained by them against Lord Arundell, and that the sheriff had seised the furniture, etc., and threatened to sell it before an application could be made for a new trial.

Richards, *Romilly* and *Hall* in support of the motion: The object of Lord and Lady Arundell in this transaction was that Lady Arundell should become the purchaser of these articles, of great and particular value to this family, and partly to satisfy debts of Lord Arundell. The transaction was public. The sum of £12,000 was actually paid by Lady Arundell, as the purchase-money upon the assignment of the articles under this deed, and was applied in payment of the creditors of Lord Arundell. The distinction taken at the trial upon which this deed was considered void was, admitting, that chattels vested in trustees for the separate use before marriage would be protected from the debts of the husband, this purchase was after marriage. There can be no difference whether it was before or after marriage. Great stress also was laid upon the circumstance that the possession was with Lord Arundell, as complete evidence of fraud. That is no evidence of fraud if the

possession is according to the title. The object of this application is to restrain the defendants from proceeding under an execution until an opportunity can be had of moving for a new trial in an action in the Court of King's Bench by another creditor against the sheriff for a false return of nulla bona in which the plaintiff obtained a verdict upon the ground that the deed was void.

LORD ELDON, L.C.—Upon this case, I believe, my decision in the Court of Common Pleas in *Kidd* v. *Rawlinson* (1) was disputed. My opinion upon the trial of that cause was that possession is only prima facie evidence of fraud, and, as that property could not be reached by bankruptcy and the possession was according to the deed which created the title, and the title was publicly created, that was not a fraudulent possession against the creditors in general. Upon a motion for a new trial the court agreed with me. With great deference, if Lord Ellenborough thinks otherwise, I am at present of the same opinion, and I am also of opinion, upon the doctrine of this court, that, if the purchase by the wife is bona fide, it is of no consequence, whether it is before or after marriage. The mere circumstance of possession of chattels, however familiar it may be to say that it proves fraud, amounts to no more than that it is prima facie evidence of property in the man possessing until a title, not fraudulent, is shown, under which that possession has followed. Every case from *Twyne's Case* (2) downwards supports that. Can there be any doubt that a married woman, having separate property, may buy an interest in the property of her husband by a settlement under the direction of this court?

The injunction was granted upon an undertaking not to remove the goods.

A motion was made in the Court of King's Bench for a new trial in *Dewey* v. *Bayntun* (3) and a rule was granted which was afterwards made absolute. The cause was tried a second time, when a verdict was again obtained by the plaintiff.

August 4, 1804. *Alexander* and *Leach*, for the defendant Taunton, had obtained an order nisi for dissolving the injunction, contending that Lord Arundell continued in possession of the furniture, etc., after the execution of the deeds, that the transaction was merely colourable, and that the deeds were void as against creditors.

Richards, *Romilly* and *Hall* for the plaintiff, showing cause, argued that a married woman might purchase with her own property other property which she may have limited to her separate use; and such a limitation was good in point of law, not a fraud upon any person, and she had a right to hold against the creditors of her husband. The only grounds on which at the last trial the bona fides of the transaction was put to the jury were that there was not sufficient publicity, that there was no inventory, not considering at all, whether Lady Arundell had paid valuable consideration. The circumstance that no inventory was annexed to the deed was of no weight: *Jarman* v. *Woolloton* (4). How was it to be made more public and notorious? The joint possession being consistent with and preferable to the title under this deed, there could be no fraud.

LORD ELDON, L.C.—I granted this injunction on the ground that this bill was brought, that Lady Arundell was according to law to be considered equitable owner of goods and chattels of a very special and peculiar kind; that she became so under a contract of purchase which she insisted she was entitled to make with her husband; that she had contracted with him for the ownership, and instruments were executed placing the legal property in trustees for her use and benefit, and, attending to all the circumstances, her title, as administered in this court, and the title of her trustees, as administered in other courts, are as incapable of being impeached as they were upon the date of the instrument; that an action was brought by a creditor; and the sheriff was prevailed on to return nulla bona. An action was brought against him for a false return by the creditor, insisting, he might have had possession of these goods and chattels, either the property of Lord Arundell or, in a

A question between him and his creditors and all other persons including Lady Arundell and her trustees, liable to her husband's creditors. The form of the action being against the sheriff, it depended upon some arrangement in the court of law whether the trustees or the wife could maintain the question that these were not the goods of Lord Arundell or liable to execution by his creditors. What arrangement I do not know, but I do not think myself at liberty to surrender the B jurisdiction of this court because the Court of King's Bench may by some arrangement execute the jurisdiction of a court of equity. It is my duty to give the plaintiff relief according to the rules and proceedings in this court if she is entitled to sue here; and Lady Arundell from the nature of her title had a right to have it decided here by some mode of proceeding.

Another ground upon which Lady Arundell is entitled to relief here is that from C the very nature of the property in question, the quality and nature of the property alleged to be purchased, the purpose and object of the purchase, it is quite impossible for her to have the benefit of it, if a bona fide transaction, unless she can specifically enjoy it, and, this court having in many instances interposed to protect the enjoyment of a specific chattel, the question is whether the very object and subject of the contract do not make it necessary to consider whether the court cannot give the D specific relief of fixing in the trustees the very property instead of the amount in damages.

From the only account I have had of this case in the Court of King's Bench—the report at 6 East, 257—it appears to have been asserted that a husband and wife could not after marriage contract for a bona fide and valuable consideration for a transfer of property from the husband to the wife or trustees for her. The doctrine E is not so either here or at law. I stated before what I conceived the doctrine of this court and of the law upon this subject. There have been two trials, as there was a mistake in point of law upon the first. As to the subsequent trial I know nothing, except what is said here. But if the case is finally to be decided here, there are many points deserving great consideration and very fit for discussion as connected with every fact and circumstance of the case in detail and bearing upon the question F whether this instrument is fraudulent against creditors.

When LORD MANSFIELD in *Cadogan* v. *Kennett* (5) upon this subject speaks of trick and contrivance, he ought to state what the law denominates trick and contrivance. For instance, in this case, if the purpose of this instrument was to defeat creditors, it is said to be bad. I desire that that may be reconsidered. If the express object of the purchase was to vest this property, of the value of £12,000, in G trustees to transmit to the daughters of Lady Arundell, if she paid the value, £12,000, to the creditors of Lord Arundell, that is not illegal. It is assuming a great deal to say, it is delaying or defeating the creditors. But, if so, it has in all time been sanctioned by this court and courts of law too. If the property transferred was of the immense value at which this has been stated, certainly then it ought to be submitted to the jury, whether it was not fraudulent as to a great part. H It is said that the limitation to the daughters here is not to be deemed a part of the consideration of the settlement with reference to the creditors. It is not necessary to touch upon that if the property bore any reasonable proportion to the value of £12,000. If it were necessary to discuss it attention must be given to the cases of moral obligation, executed by a provision for persons not the direct objects of the contract, in which that provision has been held such a part of the considera- I tion as would support their interest, as well as those with regard to whom that contract was more directly entered into.

As to possession and the other circumstances relied on at law, suppose the question arose the day after the deed was executed, and the £12,000 had become to all intents and purposes part of the assets of Lord Arundell, which, I see, was questioned at the Bar. Suppose it proved the day after that the property was worth that sum, could it have been contended that for want of publicity, of an inventory, of possession, considering the nature of the subject and the relation in

which the parties stood, this would not have been a deed the trusts of which must have been executed for Lady Arundell? If it is contended that the deed was originally fraudulent because no consideration was paid, or what a court of law would call colourable, all subsequent facts and enjoyment tell forcibly connected with the objections to the deed at the time of execution. They are evidence in the other case, but such as, when the value is appreciated, ought to be stated to the jury to be weighed, regard being had to the law if the question had occurred immediately after the execution. The circumstances of not informing witnesses, the steward, etc., would not have weighed with me, as they are circumstances in almost every transaction of this nature, and, therefore, not so unusual as to afford a fair ground of suspicion.

As to the nature of the possession, what is the publicity to be? Suppose, there were no trustees, but an agreement, without the interposition of trustees, by a covenant that this property upon the wife's advancing £12,000 to the creditors of the husband should be to her separate use. The nature of the transaction must have left the legal property in the husband, and I doubt extremely, whether that could be a fraudulent possession, even in a court of law. Clearly it would not here. Suppose, this had been before marriage, and these articles had been settled as heirlooms, and it is exactly the same, if after marriage and for valuable consideration, what is the publicity showing that they are heirlooms? What is the nature of the property, and the sort of possession naturally to be looked for? When Lady Arundell was making a settlement for the benefit of her daughters, afterwards in all probability to enjoy the possession of this ancient family seat, there was neither legal nor moral fraud in taking the property for which she paid the value. But the nature of the property, the relation of the parties, the circumstances, that she could have no object but to transmit it to her family, and that she must live with him, who sold it, those circumstances are very material as to the possession.

It is said that Lord Arundell dealt with creditors as if this was his property, and there might be a considerable question whether his or the steward's dealings in conversation or correspondence with creditors, as if this was part of the husband's property, is to be admitted in a question between the husband and wife, more difficult perhaps between the creditors and the sheriff, but it is extremely possible that such a case might be laid in evidence with reference to her acts that the dealings of the husband might be considered a part of her conduct with regard to the property, and, therefore, that sort of evidence would be admissible against her. It was also stated at the Bar that she has permitted a creditor in more instances than one to take execution out of this property. That is a very material fact, but to be stated with some qualification. It is evidence that she did not believe the property to be her's, but not conclusive evidence. She might let part of her own property go to discharge a particular debt by which she saw her husband pressed. That fact, therefore, ought to be examined, before it can be considered as having much influence one way or the other. It is very difficult to find the means of taking the opinion of a court of law in this particular case.

Order that it should be admitted that the sheriff returned nulla bona; that an action should be brought in the Court of Common Pleas for that return; and Lady Arundell and the trustees should be at liberty to defend it.

ATTERSOLL *v.* STEVENS

[Court of Common Pleas (Sir James Mansfield, C.J., Chambre and Heath, JJ.), February 12, 1808]

[Reported 1 Taunt. 183; 127 E.R. 802]

Landlord and Tenant—Waste—Waste by stranger—Right of tenant to damages —Lease permitting tenant to take soil—Soil tortiously taken by stranger.

By a lease dated June 15, 1792, one T. demised land to the plaintiff at an annual rent for twenty-one years, with liberty to dig half an acre of brick earth annually, and the lessee covenanted that he would not dig more, or, if he did, that he would pay an increased rent of £375 per half acre, "being after the same rate that the whole brick earth was sold for." A stranger dug and took away brick earth, and in an action for trespass the lessee recovered the whole value of the earth so taken. On a rule nisi to set aside the verdict on the ground that the damages were excessive,

Held: on its true construction the lease amounted to an absolute sale of all the brick earth, twenty-one half acres being sold absolutely and the lessee being entitled to take further earth on making additional payment, and, therefore, the plaintiff was entitled as damages to the full value of the earth lost to him.

So **held** by Sir James Mansfield, C.J., and Heath, J., Chambre, J., dissenting.

Landlord and Tenant — Waste — Liability of tenant — Waste committed by stranger.

Every lessee of land, whether for life or years, is liable in an action of waste to his lessor for all waste done on the land leased, by whomsoever it may be committed: per Heath, J.

Notes. Considered: *Toleman* v. *Portbury* (1870), L.R. 5 Q.B. 288.

As to a tenant's liability for waste, see 23 Halsbury's Laws (3rd Edn.) 566–570; and for cases see 31 Digest (Repl.) 389 et seq.

Cases referred to:

(1) *Jesser* v. *Gifford* (1767), 4 Burr. 2141; 98 E.R. 116; 19 Digest (Repl.) 202, *1420*.

(2) *Bedingfield* v. *Onslow* (1685), 3 Lev. 209; 83 E.R. 654; 36 Digest (Repl.) 306, *527*.

(3) *Jefferson* v. *Jefferson* (1683), 3 Lev. 130; 83 E.R. 614; 2 Digest (Repl.) 96, *606*.

(4) *Berry* v. *Heard* (1632), Cro. Car. 242; Palm. 327; W. Jo. 255; 79 E.R. 812; 31 Digest (Repl.) 399, *5259*.

(5) *Thomlinson* v. *Brown* (1755), Say. 215; 96 E.R. 857; 19 Digest (Repl.) 201, *1419*.

(6) *Cole* v. *Forth* (1672), 1 Mod. Rep. 94; 86 E.R. 759; sub nom. *Cole* v. *Green*, 1 Lev. 309; sub nom. *Greene* v. *Cole*, 2 Wms. Saund. 228, H.L.; 31 Digest (Repl.) 393, *5181*.

Rule Nisi to set aside a verdict on an inquiry of damages after judgment by default in an action for trespass.

In Michaelmas Term, 1807, *Serjeant Best*, for the defendant, obtained a rule nisi for setting aside the verdict which had been found upon the execution of a writ of inquiry after judgment suffered by default in this action. The declaration was in trespass, and stated that the defendant had broken and entered the plaintiff's close, and dug therein and carried away a quantity of brick earth belonging to the plaintiff, and converted it to his own use. There was also a count for taking, carrying away, and converting other brick earth of the plaintiff.

The circumstances of the case, as disclosed by the affidavits, were that by

indenture of lease, dated June 15, 1792, James Theobald had demised to the plaintiff several closes of land at Gray's, in Essex, containing 565 acres (excepting thereout the land let to James Burn, whose lease had come by assignment to the defendant), together with full power to the plaintiff to dig to or for brick earth or clay, and to make or convert the same into brick or tiles, as thereinafter mentioned, to hold to the plaintiff for a term of twenty-one years at the rent of £1,075 per annum. The lessor covenanted that the plaintiff should have, take, and enjoy from and out of certain grounds containing 38½ acres, including therein a field called the Brickfield containing 5½ acres, the remaining part of which was let to James Burn and others, with free right and liberty annually to dig, turn up or sink to the depth of 20 feet from the plane surface one half acre of the said ground, for the purpose of obtaining thereout brick earth and clay to be made into bricks or tiles, or otherwise to be disposed of as the plaintiff should think proper. The plaintiff covenanted not to dig more than half an acre in any one year, or, in case he should dig any greater quantity, that he should pay to James Theobald the increased rent of £375 for every half acre so dug, being after the rate that the whole brick earth was thereby sold or intended to be sold.

Upon the execution of the writ of inquiry the plaintiff proved that the defendant had excavated a piece of ground of the extent of 48 perches, part of the 38½ acres destined by the lease for digging brick earth, and that the clay taken from thence was of a quality for making bricks superior to the residue of the plaintiff's land, but he gave no evidence of any injury done to his possession other than the loss of this earth. On the behalf of the defendant it was represented to the jury and the under-sheriff that they ought not to adopt for their measure of damages the full value of the earth so taken because the plaintiff had a mere possessory interest in the soil and no right to the soil itself beyond the extent of half an acre annually, that this trespass did not impede him in the exercise of his right to take his annual half acre because the 38½ acres were much more than enough to furnish the half acre for every year during his term, and that, therefore, the plaintiff was entitled to nominal damages only inasmuch as the defendant would, after the event of this action, remain responsible for the value of the earth dug to the plaintiff's landlord to whom it belonged. On the other hand, if the plaintiff were permitted to recover the full value of the earth, he would recover what did not belong to him, for he would not be liable to his landlord for any increased rent in respect of the earth for which these damages were given since it was not dug by himself, the lessee, but by a stranger. The jury, however, found a verdict for the plaintiff with £550 damages, which they considered to be the full value of the whole of the brick earth so dug by the defendant.

Serjeant Lens, for the plaintiff, showed cause against this rule: If the plaintiff is entitled to anything more than mere nominal damages, he is entitled to the full amount of the present verdict. This lease is a mode by which the tenant purchases this brick earth. In the course of his term he might take the whole 38½ acres, paying the further rent stipulated. He had a right to the soil itself; he certainly would during his term have used the soil in question, which was the best in the field. The taking it, therefore, clearly occasioned a loss to the lessee. It is doubtful whether the landlord could recover any part of these damages as for an injury done to his reversion, but, if he could, his damages must be merely nominal. He has parted with every interest in this earth except the bare possibility that the tenant might not choose to dig it at the stipulated price during his term. If it would be waste in the tenant to dig this soil himself, he would be answerable to his lessor in waste if a stranger dug it, and, therefore, he would have a title to recover the full value against the stranger. But he claims by a still stronger title. The lessee cannot commit waste by taking this earth, for his covenant gives him a right to take it. Prima facie he has purchased the whole, notwithstanding the contingent interest which perhaps remains in the landlord in case the tenant should

perchance omit to convert during his term any part of the ten acres and a half. Therefore, when it is urged that the plaintiff may take his 10½ acres in some other part of the 38½ acres, he may answer that he has a right to take the whole 38½ acres, if he will. During the lease, consequently, till it is clear that he will leave some part of them to revert to the landlord, the taking the earth is an injury to the tenant only. The defendant cannot reply that he leaves sufficient. It is not competent for him to carve out a portion for the tenant who in common prudence will elect first to dig the best earth, which is that now taken from him. This is not an easement. It is not a mere option given to the lessee, enabling him to do something for which he is to pay when it is done, but it is an actual purchase of ten acres and a half of the soil itself to be taken where the lessee pleases, and the soil, when so taken, is the tenant's, not the landlord's soil. The plaintiff does not contend that he can deprive the lessor of his remedy, but, if the lessor sued the stranger, his right must be reduced upon the production of this lease to mere nominal damages, for the lease would show that he had absolutely sold the very soil, that it could never more become part of his inheritance, provided the tenant chose to take it. If the landlord can recover of a stranger the value of the half acre of soil for which the lessee has paid £375, he will be doubly paid for it, and the lessee, who can by no possibility afterwards take that same soil, will have paid his rent without receiving the benefit meant to be given by the lease. The effect of this lease is that the landlord is estopped of waste against his tenant, and he must be also estopped of waste against a stranger. In this case the landlord has actually received the value of the 10½ acres, for the price of them is included in the rent. He has, therefore, been satisfied for them; the tenant has not. To whom, then, shall the recompense for the injury be paid? Undoubtedly to the tenant, who has bought the soil, not to the landlord who has sold it, and has been already paid for it.

SIR JAMES MANSFIELD, C.J., inquired whether there were any cases in which a lessor had recovered damages against a trespasser for an injury to land let. He said that *Jesser* v. *Gifford* (1) was not a case of land let. It was the case of a nuisance in the adjoining land which was an injury to him in the particular estate for his interest, and to the plaintiff for his reversion. It was contended that the action would not lie, but it would be very strange if that were so, for by the old law the only remedy in such a case was given to him who had the freehold by quod permittat prosternere.

Serjeant Williams, as amicus curiae, cited *Bedingfield* v. *Onslow* (2), where it was held that both lessor and lessee should sue in respect of trees injured by a stranger, the lessor for the body of the tree, the lessee in respect of the shade and fruit. So may the copyholder and the lord: *Jefferson* v. *Jefferson* (3). If a stranger subvert land leased at will, the lessee may bring trespass against him, and may have damages for the profits, and the lessor may have another action of trespass, and shall recover damages for the destruction of the land: 2 Rolle's Abridgment 551. N. 4, 5.

SIR JAMES MANSFIELD, C.J.: No action of waste, or in the nature of waste, lies against tenant at will. If he commits waste, that determines his will, and he becomes a trespasser: if a stranger committed the waste, that did not determine the will. The case of trees is peculiar, for upon their being cut, the property in them instantly reverts to the lessor. *Berry* v. *Heard* (4) was a case of trover by the lessor for the bark of an oak cut by a stranger on land of the plaintiff, then under lease; three justices against Croke, J., held the property of the tree, when cut, to be in the lessor. Is there any case on a covenant not to permit waste, where the action has lain for the act of a stranger? Would it be a good plea to such an action to show that a stranger cut the trees?

Serjeant Lens: Waste would lie in such a case, covenant would not, for he covenants only against his own acts.

SIR JAMES MANSFIELD, C.J.: In all actions of waste, the lessor may recover treble damages against the tenant, and if the lessor may also sue the stranger, he would recover single damages against him. How could the stranger plead the lessor's recovery in waste against the tenant, in bar of the action against himself? [*Thomlinson* v. *Brown* (5) was also referred to.]

Cur. adv. vult.

Feb. 12, 1808. The following judgments were delivered.

CHAMBRE, J.—This case comes before the court upon a motion to set aside the execution of a writ of inquiry of damages in an action of trespass, the jury, under the direction of the under-sheriff, having assessed the damages by a rule contended not to be legally applicable to the circumstances of the case.

The plaintiff is a lessee for the residue of a term of twenty-one years, commencing in 1792 or 1793, of an estate consisting of several hundred acres. As to 38 acres, parcel of the farm, the lessor has covenanted that the plaintiff shall have free right annually during the term, to dig half an acre thereof to a certain depth, for the purpose of obtaining the brick earth, to be made into bricks or tiles, or otherwise disposed of. The plaintiff (the lessee) has covenanted not to dig more than half an acre in any one year, or, if he did, that he would pay an increased rent of £375 for every half acre so dug which is mentioned to be "after the rate that the whole brick earth was thereby sold for or intended to be sold." The plaintiff being in possession under this lease, the defendant, who has a brick ground adjoining, either wilfully or by a mistake of the boundaries, dug up and converted the brick earth of a portion of the said 38 acres, parcel of the plaintiff's farm which the plaintiff had not then particularly appropriated for the exercise of his own right. For this trespass the action was brought wherein, judgment being suffered to go by default, the whole value of the brick earth taken and all the damages arising from the acts of the defendant have been assessed to the plaintiff as fully as if he had been owner of the fee simple in the estate without making any deduction for the interest of the landlord, or for any damages for which the defendant is liable in an action at the landlord's suit.

I am of opinion that the rule given to the jury was wrong, and that the proceedings ought to be set aside. It is necessary in the first place to see what were the legal rights of the plaintiff and of his lessor at the time when the trespass was committed, for the manner in which the defendant is liable to render satisfaction for the injury he has done must depend on the nature of those rights at that time. The plaintiff had the possessory right for the residue of the term; besides this the covenant of his lessor gave him a special privilege to take the brick earth of half an acre, part of the 38 acres, in each year of the term without paying any additional rent or compensation for it to the landlord. He had also the further privilege of digging up and appropriating to his own use the brick earth of the residue of those 38 acres, at any time during the term, either the whole of it or such parts as suited his interest or inclination, but upon the terms of making a large compensation to the lessor for the exercise of that further privilege. By exercising those privileges, and severing the brick earth from the soil and freehold he becomes a purchaser of, and acquires a property in, the earth so severed, and the covenant protects him from the consequences of what would otherwise be waste, but, till then, the earth remains a part of the soil and freehold of the lessor. There are no words in the lease to convey any estate of freehold to the plaintiff; his right rests in covenant; the contract is executory; and it depends upon his own subsequent choice and acts whether he will take, or the lessor shall part with, anything by the covenant or not. The plaintiff's interest, then, consists in his possessory right, and in the privileges communicated to him by the covenant. He may still take his half acre per annum out of the residue of the 38 acres, but

A the act of the defendant has prevented him from exercising his further privilege to the full extent, and the main question is how the value of that further privilege is to be estimated.

It appears to me clear that his beneficial interest therein was no more than the difference between the value of the earth taken by the defendant and the price that the plaintiff must have paid for it if he had taken it himself. All the remaining B interest was in the reversioner, who, as I conceive, could maintain no action against the plaintiff for the rent or compensation agreed upon by the covenant in respect of brick earth dug up and taken, neither by or for the plaintiff, but by a stranger against his will; for which act, so far as it affected the inheritance and the right which the reversioner would otherwise have had against his tenant under the covenant, the compensation, I apprehend, was due to the reversioner, and the C reversioner only, and recoverable by him in an action on the case. Undoubtedly the defendant is answerable to the full extent of the injury he has done, but to whom is he answerable?

Where different persons have distinct rights in the subject of a trespass, the compensation must be to each in proportion to the injury he has received. One of them cannot claim that part of the compensation which belongs to the other, D nor can the satisfaction made to one be a bar to an action brought by the other. It can hardly be necessary to cite cases upon this point. It has been supposed, in the course of the discussion in the present case, that where there is an existing tenancy for life or years so that an action of waste may be brought against the tenant for any injury done to the inheritance, that action is the only remedy the reversioner has, and he can maintain no action against the stranger who in fact commits the E waste, but I take the law to be clearly settled otherwise, and that the reversioner may in all cases maintain an action on the case against such stranger, whether the tenancy be at will, for years, or life, or he may, if he pleases, waive the penal action of waste, even against the tenant, and bring case against him. The only authority against this is a dictum of LORD COKE, in his COMMENTARY UPON THE STATUTE OF MARLBRIDGE (2 Co. INST. 146):

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> "that if the lessor should not have the action of waste, he should be without remedy."

But all practice is against that dictum, and I incline to adopt the supposition of PEMBERTON and LEVINZ, in *Jefferson* v. *Jefferson* (3), that LORD COKE is to be understood according to the subject-matter he is speaking of, that is, that he had G no remedy by an action of waste, and the rather, as LORD COKE himself has taken no notice of the position in his COMMENTARY on the 67th section of LITTLETON, where he treats largely on the subject of waste. There is a full and judicious statement of the law on this subject in a note of WILLIAMS, J., upon *Greene* v. *Cole* (6) (2 Wm. Saund. 252 b.). The manuscript precedents upon the point, settled by pleaders of the first reputation in their time, are numerous. *Bedingfield* H v. *Onslow* (2) seems also to be an authority, though the act which occasioned the waste was not an immediate trespass upon the land, but an obstruction of a rivulet in an adjoining piece of land by which the stream was turned upon the land and wasted it. That act the tenant had a right to withstand by removing the obstruction as much as he had the right of resisting an actual trespass upon the land. The action, however, is not an action of waste against the tenant, but an action I on the case against the person who diverted the stream.

It is further argued, and it seems to be the argument most relied upon in support of the plaintiff's right to recover the whole, that he is liable to pay the additional rent for the ground dug up by the defendant, though it was done without his consent, and against his will, and he received no benefit from it. Therefore, it is said, the lessor loses nothing and the plaintiff, who must pay him the increased rent, has a right to stand in his place and recover the whole damages from the defendant. If this were so, it might still be doubted whether in a general action of

trespass, alleging no special damage, any increase of damages could be given to the plaintiff by reason of his liability to pay money under a particular contract, but, without resting on that objection, I think the foundation of the argument totally fails, being of opinion, as I have before expressed myself, that the plaintiff, in respect of what the defendant has done, is not liable to any payment under his covenant in the lease. The case is not within the terms of the covenant. The plaintiff has not directly or indirectly done the act, or received the benefit, from whence the obligation to pay is to arise. To supply, however, the defect of the language of the covenant, recourse is had to a supposed rule in actions of waste, namely, that where the waste is committed by a stranger, it is presumed to be done by him in collusion with the tenant, and that for that reason the tenant must always be charged in the proceedings with having committed the waste himself. I apprehend that this argument cannot possibly apply in this case. In the first place, I think the law of the action of waste attaches upon no part of the transaction. The plaintiff has not been rendered liable to such an action. His lessor could not proceed against him in that action without stating that the waste was committed by the plaintiff himself, against which charge, the lease that gives him the authority affords a complete defence.

I apprehend, too, that this supposed presumption does not take place even in the action of waste itself. I find no traces of it in any of the books. The act, indeed, is considered as the act of the tenant, but the reason assigned is that he may withstand the commission of waste, et qui non obstat quod obstare potest, facere videtur. The situation of the tenant is extremely analogous to that of a common carrier. To prevent collusion (and not on presumption of actual collusion) both are charged with the protection of the property entrusted to them against all but the acts of God and the King's enemies, and, as the tenant in the one case is charged with the actual commission of the waste done by others, so in the other case the carrier is charged with actual default and negligence, though he loses the goods by a force that was irresistible, or by fraud against which no ordinary degree of care and caution could have protected him. Supposing that collusion must necessarily be presumed in the action of waste, the presumption must stop there. If it were otherwise, the tenant would be without redress against the actual wrongdoer by whom he has been subjected to a forfeiture and damages. There is no doubt that he has a remedy against him by action of trespass, but, if the presumption continued, the collusion established by it would amount to a licence and afford a defence to the action. It would be still more extravagant to set up the presumption again in an action of covenant to wrest and pervert the plain meaning of unambiguous words, and especially in a covenant one of the effects of which is, to prevent any liability to the action of waste for the species of injury which the land has received. There is no other rule, I think, to construe the covenant by, but the obvious intention of the parties, and the plain meaning of the language they have used, and the substance of their agreement is no more than this, that, if the plaintiff in his business of brick-making thought fit to use the materials that were to be found in part of the farm he took in lease, he should be at liberty so to do, paying a fixed price for what he took and had the benefit of. The price he covenants to pay, but I do not know by what law we are authorised to extend this covenant so as to make him responsible under it for what has been taken by a stranger, by trespass and against the plaintiff's will, for which the plaintiff has brought an action of trespass.

In what I have said upon the proper estimate of the plaintiff's damages I have not noticed several circumstances and distinctions that might require attention in making the estimate, for instance, the subversion of the soil from its effect upon the produce and future cultivation of the ground during the term was an injury to the plaintiff's interest as tenant, for which, if the case rested there, proportionate damages ought to be given him, but if he goes for the greater damage, in respect to the profits he might have made of the brick earth, he must

give up the other damages, because he himself could not have obtained that greater profit without doing the same damage to the ground with respect to the purposes of agriculture. I have only noticed the principal object of damages, that being sufficient to dispose of the legal question before us, and on that question my opinion is that the plaintiff has had damages assessed to him which belonged to another person, his lessor, and, therefore, I think the proceedings upon the inquiry ought to be set aside.

HEATH, J.—In order to ascertain the measure of damages to which the plaintiff is entitled, it is necessary to ascertain the nature and quality of the estate and interest which he has in the land in question. It is common learning that every lessee of land, whether for life or years, is liable in an action of waste to his lessor for all waste done on the land in lease by whomsoever it may be committed. If a general or a partial permission be given to the lessee in the instrument creating the estate to commit waste, he is so far a tenant without impeachment of waste. Such permission vests the property of what is the subject of waste in the lessee, so that he avails himself of it during the continuance of his interest. It is so with respect to trees and minerals. In cases of bankruptcy the present lessee would be considered as the purchaser of so much soil. So, if he had stipulated for any quantity of timber growing on the land with a liberty of selling the same at a certain price, can there be a doubt but he must be considered as the purchaser of such timber? It has been urged that no certain portion of the land has been set out, the soil taken must be considered as the property of the plaintiff, or at least he has a right to elect that land out of which it is taken. The proof is this, that, if the landlord has brought an action of waste against the plaintiff on account of the removal of this soil he could not have protected himself in any other manner than by insisting on the articles and his election. The tortious act of another may give the party injured a right either to affirm or disaffirm the act as it shall the best suit his interest, and as he shall be advised. If the defendant be only to pay the increased rent, it is giving him, who is a wrongdoer, all the benefit and advantage of the plaintiff's contract.

To consider the landlord's right to recover. The cases between landlord and tenant, where the tenant has no right to commit waste, are not applicable because the soil and the trees are merely committed to the possession and custody of the tenant. Such custody and possession is merely fiduciary. In what respect can the lessor here recover damages? Not for the removal of the soil, for that is sold to another, but only for any damage possibly done to the inheritance if such there be, in the manner of the excavation. But such damages are distinct from those demanded by the plaintiff in the present action. If the lessor cannot recover damages for this excavation, the lessee may recover them. So I think that the right of the plaintiff to recover these damages, is proved directly, by the injury he has sustained, and indirectly because the landlord cannot recover them, and it is clear that the one or the other of them is entitled to them. No special damage could be set forth, because the damage is immediate, direct, and unconnected with any other damage. For these reasons I think that the damages have been properly assessed.

SIR JAMES MANSFIELD, C.J.—I am of the same opinion as my brother HEATH. I concur in far the greater part of the law stated by my brother CHAMBRE, but on the frame of these covenants I think the case tolerably clear in favour of the measure of damages adopted on this occasion.

In effect and substance this is a sale of brick earth by the lessor to the lessee. The habendum of the lease is for twenty-one years at the rent of £1,075 per annum. I take it for granted, as it was said in the argument, and indeed it is what is expressed afterwards in the lease, that the price of half an acre per annum for twenty-one years is calculated in the rent. The habendum is with full power to take this brick earth. There is a covenant that the lessee should have, take, and

enjoy certain grounds containing 38½ acres, with free right annually to dig to the depth of 20 feet from the plane surface one half acre for the purpose of obtaining thereout brick earth to be made into bricks or tiles, or otherwise to be applied to such purposes as the lessee should think proper. The lessee covenants not to dig more than half an acre in a year, or otherwise to pay £375 for every further half acre, being after the rate that the whole brick earth was thereby sold or intended to be sold for. I think the lessee, after these words, had the same right as the lessor. What more right could any man have in brick earth, than to dig, take, and sell it?

Then there are the words "which the whole earth was sold or intended to be sold for." The lease amounts to an absolute sale of the whole brick earth, but the tenant was not to pay for the whole unless he used the whole. Twenty-one half acres are sold absolutely. The lessor could now take no brick earth; that would infringe the power of the lessee; as against him, the lessee might now say the brick earth was all his. If he took more than half an acre, he was to pay the additional price. If the lessor had taken this earth, even to the value of £100,000, the lessee would have had a right to recover against him the full value of it. Then why not against a stranger? It is true that in an action against the lessor, the lessee must either have allowed the stipulated price by way of deduction from the damages, or it might have been recovered against him in a cross-action. It is said he had not elected this spot, but surely at the moment that a stranger began to dig he might say: "This is the earth I intended to dig." By the affidavits it appears that this was very valuable earth. When it was dug by a stranger, had not the lessee a right to come and take it away and use it? And, if so, has he not a right to make the stranger pay for it?

The consequence of this taking by a stranger and of this action against the stranger is, as between the lessee and the lessor, that it must be taken to have been dug by the lessee. If this, and what himself had dug, did not together exceed the half acre per annum, there is nothing to pay, but if it exceeds that quantity, the lessee must pay the stipulated rent for the surplus. In such a case as this, would the lessee be answerable in waste to the lessor for brick earth dug by a stranger? On a general covenant not to dig brick earth, I should think it a doctrine hard upon the lessor to say that, if a stranger took the earth, the lessee should not be liable on this covenant. It is held in 2 Co. Inst. 145, 6, 303, F. N. B. old edition 60; new edition 137, that the lessee shall be charged with waste committed by a stranger. In Co. Litt. 54 a. even infants and femes covert, tenants. are held by Lord Coke answerable for the acts of a stranger. So, of tenant by the courtesy or in dower, 2 Rolle's Abridgment 821, 9. If the law were not so, there would be no protection to a lessor where he lives at a distance from his estate. This is not the case of a sack full of earth stolen by night, but many hands and carts must be employed, and the tenant must necessarily know it. When the lessor comes to see his estate, and finds the soil has gone, it is impossible that he should know who took it. Suppose on a covenant not to take brick earth the lessor sues, finding a quantity gone, is it an answer to say: "I did not take it; a stranger, a beggar, took it: resort to him?" The law authorises the tenant to use force in order to resist the taking, and, if that force is resisted by force, the law will not presume that the law is so feeble as not instantly to repel it and prevail. Such a covenant would be of no value whatever if this were so.

Lord Coke (2 Co. Inst. 303) says that the lessee shall answer for the waste done by any stranger, for he in the reversion cannot have any remedy but against the tenant, and the tenant shall have his remedy against the wrongdoer, and recover all in damages against him, and by this means the loss at last shall light upon the wrongdoer. If the lessee gave permission to a stranger to dig, no doubt it would be the act of the lessee, and he would be bound to pay the lessor the stipulated price. What is the difference between his agreeing to it and his standing by while the stranger takes it? It is not necessary to pre-judge the question whether the lessor

A can sue in this case, but I have great difficulty in finding out how the lessor can be injured, for, if the plaintiff had contracted to sell this earth to the defendant and had received the full value for it, must not he have paid his landlord the increased rent? How does it differ whether he extorts the price by an action, or receives it by voluntary payment? If the lessee may take it as against the lessor and recovers damages as against a stranger, although the stranger took it in the first instance B against the will of the lessee, he cannot say he does not so far confirm the act of the stranger that he ought to pay the lessor for it. He has in fact the brick earth, since he is paid for it in damages in an action, and he could not avoid paying on his covenant for any brick earth beyond the half acre, of which he has the advantage. Therefore, if the lessor has any right, it must be for mere nominal damages, and I cannot say this verdict is wrong.

C *Rule discharged.*

D

DAVIS AND OTHERS *v.* HONE

[Lord Chancellor's Court in Ireland (Lord Redesdale, L.C.), February 1, 1805]

[Reported 2 Sch. & Lef. 341]

Specific Performance—Contract—Modified contract—Lapse of time—Change of E *circumstances.*

Where, in consequence of lapse of time and a change of circumstances occurring since the agreement was entered into, it would be unconscientious against the defendant to grant the plaintiff specific performance according to the letter of the agreement, a court of equity will execute the contract according to a conscientious modification of it to do justice so far as the circumstances F will permit.

Specific Performance—Contract—Legal remedy lost—Plaintiff's own default.

Equity will decree specific performance where it is conscientious that the agreement should be performed, although the party seeking performance has lost his remedy at law by his own default, as, e.g., in a case where the terms of the agreement have not been strictly performed by the person seeking specific G performance and to sustain an action at law performance must be averred according to the terms of the contract.

Notes. As to specific performance when contract oppressive or in equity should be modified in its terms, see 36 Halsbury's Laws (3rd Edn.) 299-303, 313, 314. For cases see 44 Digest (Repl.) 48 et seq., 105, 106.

H Case referred to:

(1) *Errington* v. *Aynsly* (1788), 2 Dick. 692; 2 Bro. C.C. 341; 21 E.R. 440; 44 Digest (Repl.) 37, *259.*

Also referred to in argument:

Cooke v. *Booth* (1778), 2 Cowp. 819; 98 E.R. 1380; 31 Digest (Repl.) 80, *2335.*

Clifton v. *Walmesley* (1794), 5 Term Rep. 564; 101 E.R. 316; 17 Digest (Repl.) I 336, *1417.*

Baynham v. *Guy's Hospital* (1796), 3 Ves. 295; 30 E.R. 1019; 17 Digest (Repl.) 335, *1409.*

Eaton v. *Lyon* (1798), 3 Ves. 690; 30 E.R. 1223; 17 Digest (Repl.) 258, *624.*

Action for specific performance of agreements for leases.

The dean and chapter of Christ Church, Dublin, being seised in fee of the lands of Ballymolehans, otherwise Ballymolihanstown, Ballytipper, otherwise Tippers-town, and Ballylaghan, otherwise Tinkelly; situate in the county of Dublin, demised

the same in or about 1650 to a person of the name of Usher, at the yearly rent of £107 12s. 6d. for a term of twenty-one years. Usher shortly after demised the same lands for a term of sixteen years to Jeffery Davis, at a rent of £215 5s. per annum in which lease there was a covenant on the part of Usher that

"he, his executors, administrators or assigns, should and would some time before the end or expiration of the first seven years of his said lease from the dean and chapter, or at any time sooner, as also at or some time before the expiration of the first seven years of every future lease that should be obtained by him or them of the said demised lands, or at some time sooner, make all proper applications, and use all proper endeavours, with the said dean and chapter, for the renewal of the said lease, and of every future lease which should be obtained as aforesaid, and that on the obtaining of every such renewal or new lease by the said Usher, his executors, administrators or assigns, he and they should and would at all times within six months after his or their giving notice of such renewal to the said Jeffery Davis, his executors, administrators or assigns, at the request and cost of the said Jeffery Davis, his executors, administrators and assigns, renew unto the said Jeffery Davis, his executors, administrators and assigns, by adding so many years to the term he or they should at each respective time have to come by the lease by which he or they should immediately before have held and enjoyed the said demised premises, as he the said Usher, his executors, administrators and assigns, should have obtained from the said dean and chapter, in addition to the number of years which he the said Usher, his executors, administrators or assigns, should have to come in the premises at and immediately before the time of his or their obtaining such respective renewal or new lease as aforesaid, the said Jeffery Davis, his executors, administrators and assigns, accepting of every such renewal or new lease, or thereupon surrendering the former lease within six months after such notice, and paying unto the said John Usher, his executors, administrators or assigns, the sum of £300 as a fine, where seven additional years should be so added as aforesaid, and so in proportion where a less or greater number of years should be so added as aforesaid, and also paying double the yearly rent, and no more, as should be reserved and made payable to the said dean and chapter and their successors, by the said Usher, his executors, administrators and assigns, out of the said premises."

Jeffery Davis covenanted for himself, his executors, administrators and assigns, to pay such rent and fine on each renewal, with a covenant

"that in case upon any future renewal to be made by the said John Usher, his executors, administrators or assigns, with the dean and chapter, the said Jeffery Davis should apprehend the yearly rent to be too much advanced, it should be at the election of the said Jeffery Davis, his heirs, administrators and assigns, whether to accept a renewal, or refuse the same, and merely hold for the residue of the then unexpired term."

The dean and chapter continued to renew the lease every seven years to Usher and the persons deriving under him, on payment of a fine (which was gradually increased) without demanding any increase of rent, and the Usher family continued to renew to their tenant, Jeffery Davis, and his representatives on payment of the fine stipulated to be paid by the original lease, so that the rent payable to the dean and chapter by their immediate tenant, Usher, and that payable to Usher by his tenant, Jeffery Davis and his representatives, continued the same as reserved by the original leases. In 1796 the interest of Usher, the original lessee, became vested in John Usher, and one moiety of the interest of Jeffery Davis became vested in James Moore Davis (late husband of the plaintiff Sarah Davis) and the other moiety thereof became vested in the other plaintiffs.

The septennial fine for renewal which was then demanded by the dean and chapter, being considerably increased, John Usher called upon his tenants, the

representatives of Jeffery Davis, to contribute a certain proportion of the fine over and above the sum of £300 which they were bound to pay by their lease. This they at length consented to do upon his agreeing to add two years and a half to their term, and accordingly, on April 10, 1796, John Usher executed a new lease of one undivided moiety of the lands in question to James Moore Davis, and a new lease of the other undivided moiety to the other plaintiffs for a term of eighteen years and a half from Sept. 29 preceding, each lease reserving a moiety of the old rent and containing the covenants in the original lease (particularly that for renewal) and none other.

In 1801 Usher sold his interest to the defendant Hone for a sum of £950. When the usual time for renewing arrived, the defendant inquired of the agent of the dean and chapter what fine would be expected for a renewal, and on being informed that a sum of £1,035 8s. 9d. would be required, he served a notice on the plaintiffs, stating the sum required as a renewal fine and calling upon them to contribute a moiety thereof in order that they might be entitled to a renewal, or otherwise that he should consider himself at liberty to act as he should be advised by renewing upon any terms he might be able to make with the dean and chapter, by increasing the rent or fine, or suffering the term to expire. The plaintiffs not having complied with this notice, the defendant entered into a treaty with the dean and chapter for a renewal upon payment of a fine of £500 and an additional rent of £80 per annum. The plaintiffs, on hearing of this treaty, served a notice on the defendant on Dec. 9, 1802, offering to renew in the defendant's name with the dean and chapter, and afterwards to ascertain by arbitration, or otherwise, how much of the fine the defendant was liable to pay, but that at present they were willing, in order to guard against the rent being raised, to advance the whole fine required by the dean and chapter in expectation that the defendant would immediately after grant a renewal, according to the true meaning of the covenant in the lease between plaintiffs and John Usher, and repay such part of the fine as in justice he ought to do, and in case of refusal that they would lay their case before the dean and chapter.

The defendant not having agreed to this proposal, the plaintiffs, by a memorial, represented their situation to the dean and chapter, stating the hardship to which they would be exposed by having their rent so much increased as it would be by the mode of renewal proposed by the defendant, and stating that they and their undertenants had, on the faith of the uninterrupted usage which had prevailed so long, of renewing by increase of fine and not by an increase of rent, expended large sums of money in improvements on the lands, the benefit of which they would thus be deprived of. The dean and chapter, in consequence of this representation, declined to accede to Mr. Hone's proposal for increasing the rent or to vary from their usual mode of renewal. On Dec. 30, 1802, the plaintiffs served a notice on the defendant informing him of the proceeding they had taken and of the resolution of the dean and chapter, offering to pay the whole renewal fine, as the dean and chapter might require so that the defendant should have the profit rent payable to him by the plaintiffs clear of all deductions, or else to pay the defendant his purchase-money, with interest and costs. The defendant having refused to comply with this notice, this bill was filed praying that the defendant might be obliged to renew on the terms proposed by the dean and chapter, the plaintiffs offering to pay the fine on having their interest renewed to them by the defendant, and, in case of the defendant's refusal to renew, that the plaintiffs might be at liberty to renew in his name, they paying the fine and so from time to time to renew in like manner, and that their interest might be continued by renewals or that they might be decreed entitled to such interest under said renewals as the court should direct, and praying general relief. Proof was given of considerable expenditure in building and other permanent improvements, made by the occupying tenants during the last sixty years.

Stewart, *Saurin*, *Burslon*, *Jameson*, *O'Farrel* and *Fox*, for the plaintiffs.
M'Cleland, *Serjeant Moore*, *Ball*, *Mayne* and *Mahaffy*, for the defendant.

LORD REDESDALE, L.C.—The cases in which a court of equity decrees specific performance of contracts are generally cases in which damages (which might be recovered at law) would not answer the intention of the parties in making the contract, and a specific performance, as far as the contract can be performed, is, therefore, essential to justice. If ever there was a case in which the court ought to decree a specific performance, if it can do so, it is this. If the court should not interfere, the plaintiffs will be exposed to demands the reasonableness and extent of which cannot be foreseen, and, therefore, cannot be measured.

A court of equity frequently decrees specific performance where the action at law has been lost by the default of the very party seeking the specific performance, if it be notwithstanding conscientious that the agreement should be performed, as in cases where the terms of the agreement have not been strictly performed on the part of the person seeking specific performance, and to sustain an action at law performance must be averred according to the very terms of the contract. Nothing but specific execution of the contract, so far as it can be executed, will do justice in such a case. If the plaintiffs in the present case had brought an action at law, and recovered large damages, Mr. Hone might have filed a bill for relief against this covenant as having become by circumstances a covenant which it was unconscientious strictly to enforce and offering to perform it according to conscience. But the plaintiffs have first resorted to a court of equity by filing a bill calling on the court for a specific performance of the covenant. The court ought not, I think, to give specific performance according to the letter of the covenant, for that would be unconscientious against the defendant in consequence of the change of circumstances.

But because the plaintiffs ought not to have the covenant performed literally, they are not to lose their property entirely. This court will execute the covenant according to a conscientious modification of it to do justice as far as circumstances will permit. It has happened by lapse of time and change of circumstances that it would be harsh and unjust to require execution of the covenant specifically in its very terms, but it is the advantage of a court of equity, that it can modify the demands of parties according to justice. It may refuse specific execution unless the party seeking it will comply with a conscientious modification of the covenant in the mode of executing it. Here, from time to time, for 150 years, all the persons interested in the property made themselves parties to the abuse of the power of renewal (viz., by continually increasing the fine and not the rent), and all the improvements have been made on the faith of the continuance of that abuse.

Much property in this country was under similar circumstances, and in 1795 an Act of the [Irish] legislature was passed [35 Geo. 3, c. 23] legalising this abuse, and the motive for this law must have been the long practice, and the injustice to individuals which the strict execution of the law would produce. Consequently a lease by the dean and chapter at the old rent became authorised. After the passing of this Act, when a renewal was about to take place in 1796, what was the transaction? It is evident it could not have been in the contemplation of the parties at that time that there would be a renewal thereupon upon any other terms than by increasing the fine. A difficulty arose in the minds of the parties, and the effect of the transaction which then took place was a compromise. The under-tenants paid part of the fine beyond the stipulated sum, and a new under-lease to them was executed, but the old covenant was inserted in the new under-lease. The insertion of that covenant without modification was improvident and both parties mistook their interest, for by the strict words the lessor might lose the whole benefit which he derived from the lease, and the tenants, by not coming to terms for future rents, might greatly endanger their interest.

Under these circumstances Mr. Hone purchased, and in 1802 applied for a renewal in the usual way. He called on the tenants to pay the whole fine. It might be conscientious, but nothing had been arranged to oblige them so to do. This was more than Mr. Usher called on them to pay. He only required them to pay a part; then the transaction between M'Guire and Hone took place: an application was

made to the dean and chapter to increase the rent and diminish the fine. The defendant represented the tenants as having misconducted themselves. The object was to get an alteration in the habitual mode of renewal, and the dean and chapter, upon the defendant's representation, agreed to the new mode of renewal proposed by him. The under-tenants being informed of this; objected, and thence the litigation arose.

The question is whether under these circumstances the court should or should not decree specific performance; and I think it should, but the difficulty is, on what terms. The fine has been increased far beyond what was in contemplation of the parties in the original transaction. On what account? Greatly on account of the improvements. But who have the benefit of these improvements? The tenants. The tenants, therefore, should in conscience pay the increase upon the fine because it is in respect of what they have the enjoyment of that the fine is raised. This is at least a ground for modification; strictly, the covenant should be specifically performed. It is only because it would be unconscientious so to compel performance of it, that such performance ought to be decreed. The court imposes the modification as a condition on the tenants on which it grounds a decree for specific performance as a right in conscience. In the contemplation of a court of equity, the lessor having that which on the original interest he bargained to have on renewal, was not, in equity, any interest in the reversion, but subject to the covenant for renewal, and he cannot in conscience retain the estate wholly free from the effect of that contract.

It is clear that when the original contract was made, the abuse which has since prevailed, must have been (to a certain extent at least) in contemplation of all the parties. It prevailed in all the renewals from that time to 1796, and the parties in the transaction of 1796 acted in confidence that the renewal would be always at the old rent, which the Act of 1795 had then authorised. The result is this. The plaintiffs are entitled to have the lease renewed upon whatever terms a renewal can be obtained. These are the old rent and a fine. But the amount of the fine must be according to the pleasure of the dean and chapter, and it must greatly exceed the value of Mr. Hone's interest in the property. It would, therefore, be unconscientious to require him to pay all but £300. This being unconscientious is a ground for the court to say it will not make a decree, but leave the parties to an action at law, unless the plaintiffs will agree to a conscientious arrangement. If Mr. Hone were sued at law and large damages were given and he came for relief, I cannot say on what terms he could be entitled to relief. I remember the case of *Errington* v. *Aynsly* (1), where the plaintiff contracted to build a bridge over the river Tyne for £9,000, and entered into a bond in that sum, conditioned for the performance of his contract. He built the bridge, but it was thrown down by a flood, and it was found that no bridge built on that site could stand. He filed a bill to be relieved against the bond upon an issue of quantum damnificatus on his building a bridge where it could be built to stand, and upon his building such a bridge, and submitting to an issue of quantum damnificatus by the change of site, he was relieved from the penalty.

LEGH *v.* HEWITT

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), June 28, 1803]

[Reported 4 East, 154; 102 E.R. 789]

Agriculture—Agricultural holding—Tenancy—Undertaking to cultivate according to custom of country—Good husbandry in neighbourhood in like circumstances.

In an action against a tenant on promises that he would occupy the farm in a good and husbandlike manner according to the custom of the country, an allegation that he had treated the land contrary to good husbandry and the custom of the country was **held** to be proved by showing that he had treated it contrary to the prevalent course of good husbandry in the neighbourhood, as by tilling half the farm at once when no other farmer there tilled more than a third, though many tilled only a fourth. It was not necessary to prove any precise definite custom or usage in respect to the quantity of land tilled.

Per Lord Ellenborough, C.J.: What shall be considered in farming as a good and husbandlike manner must vary exceedingly according to soil, climate and situation. Therefore the "custom of the country" with reference to good husbandry must be applied to the approved habits of good husbandry in the neighbourhood under circumstances of the like nature.

Notes. Referred to: *Westropp* v. *Elligott* (1884), 9 App. Cas. 815.

As to implied covenants to cultivate land according to the custom of the country, see 1 Halsbury's Laws (3rd Edn.) 263 et seq.; and for cases see 2 Digest (Repl.) 55 et seq.

Case referred to in argument:

Powley v. *Walker* (1793), 5 Term Rep. 373; 101 E.R. 208; 2 Digest (Repl.) 52, *271.*

Rule Nisi obtained by the plaintiff to set aside the verdict and for a new trial in an action of assumpsit for breach of an agreement to occupy land conformably to the prevalent usage of the country where the land lay.

The declaration stated that, whereas on Feb. 2, 1801, the defendant was tenant to the plaintiff of a certain farm at Lymm and High Legh in the county of Chester, containing 55 Cheshire acres, in consideration thereof he promised that during his tenancy of the premises he would use and occupy the same in a good and husbandlike manner, according to the custom of the country where the premises lay; and it then assigned breaches, first, that during such tenancy the defendant wrongfully and contrary to good husbandry and the custom of the country ploughed up and converted into tillage 5 Cheshire acres of grass land, parcel of the premises, which according to good husbandry and the custom of the country ought not to have been ploughed up; and the defendant afterwards took divers and excessive crops of grain therefrom; secondly, that whereas according to good husbandry and the custom of the country the defendant as tenant ought not to have had at any one time more than a certain part, to wit, one-third of the premises in tillage, yet he wrongfully kept in tillage a larger part, to wit, one-half at the same time, contrary to good husbandry and the custom of the country, and took excessive crops of grain therefrom; thirdly, that the defendant had more at one time than a third part of the arable part of the premises sown with wheat, contrary to good husbandry and the custom of the country; by reason of which misconduct and breaches of contract the estate was impoverished to the plaintiff's damage of £500. The promises were laid in the same manner in the second count, and the breaches alleged generally. The third count laid the promises to be that the defendant would use and occupy the premises in a tenant-like manner, and would not, during his tenancy, or in the year when the same should determine, take

from the premises any greater crops of corn than by the custom of the country should and ought to be by him taken. There were also the common money counts added. The defendant pleaded non assumpsit.

At the trial before LORD ELLENBOROUGH, C.J., counsel for the plaintiff put his case on the implied assumpsit founded on the course of good husbandry as known and practised in that part of the country; and many witnesses were called who established that, by the practice of good husbandmen in the neighbourhood, not more than one-third of a farm in a cold soil like that was ever kept in tillage at the same time, and in most other instances, where the soil was warm, not above a fourth; and that not more than one-third of what was in tillage ought to be laid down in wheat. The defendant, who had quitted the farm in May, 1802, was proved in 1801 to have had half of it (viz., something more than 27 acres) in tillage in that year, of which 11 acres were sown with wheat. It appeared, however, that this practice was governed by covenants in the leases of the respective tenants whose mode of cultivation was spoken of, and the witnesses could not speak of any custom of the country independent of the obligation of covenants. But they all agreed that a practice like that of the defendant was contrary to the course of good husbandry and exceedingly prejudicial to an estate, and that in fact the plaintiff's farm had been materially deteriorated under the defendant's management. It was further proved that the defendant, in a conversation with the incoming tenant, had admitted that he should not have ploughed up the grass field mentioned in the first count if he had stayed in the farm, without marling it, which would have cost him £50, but there was no evidence applicable to the third count, to show that the defendant had taken off a greater proportion of the corn that was sown than he was entitled to as an offgoing tenant.

After the plaintiff's evidence was closed, it was objected by counsel for the defendant that the plaintiff ought to be nonsuited as there was no evidence of any such custom of the country as was alleged in the declaration; but the court was of opinion that the evidence, though slight, ought to go to the jury, when counsel for the plaintiff contended that it was not necessary for him to prove any custom, but that it was sufficient for him to show that the defendant had not managed his farm in a husbandlike manner. The court, however, thought that, as the declaration was framed, the plaintiff had founded his action on what he called the custom of the country, and that it was necessary for him to prove it. The jury, hearing this opinion delivered after counsel for the defendant had urged to them that there was no evidence of such a custom, being satisfied on that head, found a verdict for the defendant without waiting to have the evidence summed-up or receiving the direction of the court in point of law on the effect of it. Therefore the Chief Justice in his report of the trial on a rule nisi obtained for setting aside the verdict and having a new trial, considering that the jury were influenced by the opinion which had been thrown out by the court in the course of the trial in answer to what was contended for by counsel for the plaintiff, concluded with saying that, if it were not necessary for the plaintiff to prove any custom, he thought that there ought to be a new trial.

Manley and *Wigley* for the defendant, showed cause against the rule.
Gibbs, *Topping* and *F. Clarke* for the plaintiff, supported the rule.

LORD ELLENBOROUGH, C.J. The jury have found a verdict for the defendant under an impression that the words in the declaration "according to the custom of the country" required a more strict and specific proof in respect of the relative quantity of land allowed to be annually in tillage than I think they demanded. The words are that the defendant promised to "use and occupy the premises in a good and husbandlike manner according to the custom of the country where the premises lie." By which I understand the parties to have meant no more than this, that the tenant should conform to the prevalent usage of the country where the lands lie. From the subject-matter of the contract it is evident

that the word custom, as here used, cannot mean a custom in the strict legal signification of the word; for that must be taken with reference to some defined limit or space which is essential to every custom properly so called. But no particular place is here assigned to it; nor is it capable here of being so applied. What shall be considered in farming as a good and husbandlike manner must vary exceedingly according to soil, climate and situation, and, therefore, the custom of the country with reference to good husbandry must be applied to the approved habits of husbandry in the neighbourhood under circumstances of the like nature. That is the fair and natural meaning of the words of the contract as laid. Perhaps a contract to occupy an estate in a good and husbandlike manner simply would have imposed the same duty on a tenant; because the same sort of evidence, drawn from the approved practice of that part of the country, would have been brought forward to show what was good husbandry. It would not, indeed, have been conclusive against a tenant under such a form of declaring to show that he had not managed the estate according to the custom of the country without the addition of these words, but still they must be understood in the manner which I have before mentioned. But evidence that an estate had been managed according to the custom of the country would be always a medium of proof that it had been treated in a good and husbandlike manner. Here there was no evidence of any custom of the country to allow so much as half the farm to be in tillage at once; for in no instance was there more than a third. Here, therefore, there was clear evidence of mismanagement, contrary to the custom of the country in good husbandry, and the verdict being founded in misapprehension there must be a new trial.

GROSE, J.—This is a promise to occupy the land conformably to the prevalent good management of it in that part of the country. Without a lease, no landlord would let his estate on any other terms. Then the question is whether the defendant did manage the farm in such a manner. That is negatived most explicitly by the evidence. Some farmers put a fourth, some as much as a third, of their land in tillage at a time; but nobody did or can entertain a doubt but that ploughing half the estate in one year was bad management. The jury were misled by what was said in the course of the trial that the custom of the country as alleged in the declaration must be shown to be founded on a precise usage obtaining throughout that part of the country; for on the merits of the case nothing can be more dishonest than the defendant's conduct appears to have been, and there is no doubt what the verdict would have been had not the jury conceived themselves bound by the opinion delivered on the form of the declaration.

LAWRENCE, J.—From what has passed on the discussion of the case here, it is evident that the necessity of proving a precise custom of the country in respect to the course of husbandry was insisted on before the jury and made part of the case for their consideration at the trial; for even now it has been pressed in argument that, in order to maintain the declaration, it was incumbent on the plaintiff to prove a definite known custom or course of husbandry in that country, and that the estate was not treated by the defendant according to that known custom. But that was not necessary; it was sufficient to show what was the prevalent course of good management there, which was the course of management according to good husbandry which the defendant undertook to observe and, by providing that the estate was not so managed, the plaintiff made out what he undertook to do, namely, that the estate was treated in a manner "contrary to good husbandry and the custom of the country."

LE BLANC, J.—The jury went on the ground that the words "custom of the country" were to be taken in a precise sense, as denoting a certain known uniform course of husbandry there established; but I think that the words of the declaration altogether mean no more than if the promise had been laid to be simply to manage

A the farm in a good and husbandlike manner, which must always be taken with reference to the usage and mode of cultivation in that part of the country where the lands lie. For instance, it would be no breach of such a contract in Devonshire to show that the farm had not been managed according to the course of good husbandry as used in Norfolk. This, however, was a case put out of all doubt; for here it was proved that no custom of the country authorised the manner in B which the defendant had treated this estate, and that was sufficient to make out the allegation that he had managed it contrary to good husbandry and the custom of the country.

Rule absolute.

C

VALLANCE *v.* DEWAR

D

[Court of King's Bench (Lord Ellenborough, C.J.), December 16, 1808]

[Reported 1 Camp. 503]

Insurance—Marine insurance—Usage—Underwriters' obligation to take notice of general usage.

E A policy of insurance on the ship *C.*, her freight and cargo, was expressed to attach "lost or not lost, at and from any port or ports in Newfoundland to one port of discharge in P., or to any port or ports in the U.K." On arrival at Newfoundland in June, the *C.* was employed in banking or fishing on the Newfoundland coast until October. She then took in her homeward bound cargo and sailed in December, but soon after foundered in a gale. In an action F on the policy, the defence was that the underwriters had not been informed that the ship was to be employed in banking, and that, by the banking, their risk was greatly increased as the policy, being "lost or not lost, at and from", attached immediately on the arrival of the vessel at Newfoundland. At the trial, witnesses proved that, according to the usage of the Newfoundland trade, ships after their arrival on the coast were either employed in banking or took an intermediate voyage to adjacent settlements during which times they were G covered by a separate and distinct policy, and that a policy of the present sort was understood to attach when the ship began to take in her homeward cargo.

Held: if a usage was general, even though not uniform, the underwriters were bound to take notice of it, and, therefore, the assured was entitled to recover under the policy.

H **Notes.** Considered: *Mount* v. *Larkins* (1831), 8 Bing. 108; *Palmer* v. *Marshall* (1831), 8 Bing. 79. Referred to: *De Wolf* v. *Archangel Insurance Co.* (1874), L.R. 9 Q.B. 451.

As to incorporation of usage in a marine policy, see 22 Halsbury's Laws (3rd Edn.) 18–20; and for cases see 29 Digest (Repl.) 91 et seq.

Cases referred to in argument:

I *Noble* v. *Kennoway* (1780), 2 Doug. K.B. 510; 99 E.R. 326; 29 Digest (Repl.) 49, *46.*

Ougier v. *Jennings* (1800), 1 Camp. 505, n., N.P.; 29 Digest (Repl.) 196, *1363.*

Action on a policy of insurance on the ship *Courier* and her freight and cargo, "lost or not lost, at and from any port or ports in Newfoundland to one port of discharge in Portugal, or to any port or ports in the United Kingdom."

The policy was effected on August 28, 1807. The *Courier* arrived at Newfoundland in June, and was employed till Oct. 13 in banking, or fishing on the banks

of that coast. She then began to take in her homeward bound cargo and she sailed for England on Dec. 22, but soon after foundered in a gale of wind. The defence was that the underwriters had not been informed that the ship was to be employed in banking while at Newfoundland, and that, by the banking, their risk was greatly increased as the policy being "lost or not lost, at and from" attached immediately on the ship's arrival at Newfoundland; and even if it did not, from the delay occasioned by the banking the voyage home was turned from a summer into a winter one.

At the trial, several witnesses long acquainted with the Newfoundland trade were called, who proved that, according to the established usage of the Newfoundland trade, ships after their arrival on the coast were either employed in banking or took an intermediate voyage to Quebec or some of the adjacent settlements before they began to take in their homeward cargo and that, during the banking or intermediate voyage, they were covered by a separate and distinct policy; a policy of the present sort was understood to attach when the ship began to take in her homeward bound cargo.

Sir Vicary Gibbs and *Gaselee* for the plaintiff.
Park and *Scarlett* for the defendant.

LORD ELLENBOROUGH, C.J.—The rule is that the broker must communicate what is in the special knowledge of the assured, not what is in the middle between them and the underwriters. He is not bound to make a laborious disclosure of what is known to all. Is it notorious, then, that ships in this trade on their arrival at Newfoundland are either employed in banking, or take an intermediate voyage? If so, it must be presumed to be equally in the knowledge of both parties. According to the general import of the words "at and from," the policy would attach on the ship's first mooring in a harbour on the coast, but it doubtless may be explained differently by usage; and as between these parties, the policy must be taken to be the same as if it had been expressed to attach on the expiration of the banking or intermediate voyage. The underwriters were not liable for any antecedent loss and cannot complain of what was previously done as a deviation, although there should be exceptions as to the usage that would be immaterial. Things are presumed to go on in their ordinary course; and, if a usage be general, though not uniform, the underwriters are bound to take notice of it.

Verdict for plaintiff.

A

Ex parte BOUSSMAKER

[Lord Chancellor's Court (Lord Erskine, L.C.), August 14, 22, 1806]

[Reported 13 Ves. 71; 33 E.R. 221]

Bankruptcy—Proof—Debt—Claim by enemy alien—Suspension of payment till B *end of war.*

The contractual rights of an alien are merely suspended by war, and may be enforced on the restoration of peace. In bankruptcy, therefore, a claim by an enemy alien will be admitted, the dividend being retained by the trustee in bankruptcy [or, it is submitted, paid to the Custodian of Enemy Property].

C **Notes.** Considered: *Willison* v. *Patteson* (1817), 1 Moore, C.P. 133; *Porter* v. *Freudenberg*, *Kreglinger* v. *Samuel and Rosenfeld*, *Re Merten's Patents*, [1914–15] All E.R. Rep. 918. Applied: *Rombach Baden Clock Co.* v. *Gent* (1915), 84 L.J.K.B. 1558. Considered: *Rodriguez* v. *Speyer Bros.*, [1918–19] All E.R. Rep. 884; *Schering, Ltd.* v. *Stockholms Enskilda Bank Aktiebolog*, [1946] 1 All E.R. 36. Referred to: *Daimler Co.* v. *Continental Tyre and Rubber Co.*, [1916] 2 A.C. 307; *Naylor, Benzon & Co.* v. *Krainische Industrie Gesellschaft*, [1918] 1 K.B. D 331.

As to proof in bankruptcy by an alien enemy, see 2 Halsbury's Laws (3rd Edn.) 479; and for cases see 4 Digest (Repl.) 377.

Petition by creditors to be admitted to prove a debt under a commission of bankruptcy. The commissioners refused to admit the debt on the ground that the E creditors applying to prove were enemy aliens.

Perceval in support of the petition.

LORD ERSKINE, L.C.—If this had been a debt arising from a contract with an alien enemy it could not possibly stand, for the contract would be void. But if the two nations were at peace at the date of the contract, from the time of war F taking place the creditor could not sue: but, the contract being originally good, upon the return of peace the right would survive. It would be contrary to justice, therefore, to confiscate this dividend. Though the right to recover is suspended, that is no reason why the fund should be divided among the other creditors. The point is of great moment from the analogy to the case of an action; and it is true, a court of law would not take notice of the objection without a plea. It must appear G upon the record. Has the case of a contract originally good, and the right suspended by war, never before occurred? Yet I do not know an instance of an application by an alien enemy to the court to keep the fund until his right to sue should survive. The policy, avoiding contracts with an enemy, is sound and wise: but where the contract was originally good and the remedy is only suspended, the proposition that, therefore, the fund should be lost, is very different. Let a claim H be entered; and the dividend be reserved.

Order accordingly.

ATTORNEY-GENERAL *v.* COOPERS' CO.

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), July 13, 14, 15, 16, 30, 1812]

[Reported 19 Ves. 187; 34 E.R. 488]

Charity—Surplus income—No express gift of surplus—Application by court cy-près.

Where a fund is exhausted by the purpose declared at the time of the gift, but is afterwards increased by its improved annual value, the will containing no direction as to the surplus thus created, the court reserves to itself the disposition of the surplus with the view of taking care that it shall be applied cy-près under the control of the court.

Charity—Administration—Duty of trustees and court to secure to objects of founder the full benefit founder intended to them—Poor children deprived of education.

It is the duty of the trustees and of the court in administering a charity to secure to the objects of the founder of the charity according to his true meaning the full benefit he intended to them. So, where there had been deviations from the will of the founder of a charity school by separating the school from the master's house, the taking by the master of private pupils so as to deprive the poor children of the master's attention, etc., the court directed that such deviations should be corrected.

Charity—Education—School—Master—Removal by court—Failure of duty from misunderstanding.

It is not the habit of the court to remove a master of a charity school where there has been any misunderstanding as to his duty, but when that duty is prescribed, the master must determine either to hold the situation doing the duty, or to discharge himself.

Charity—Administration by the court—Duty towards beneficiaries.

Although the beneficiaries have not complained it is the duty of the court in administering a charity to see whether there is any cause for complaint.

Notes. The Charities Procedure Act, 1812, has been repealed by s. 28 (9), s. 48 (2) Sched. 7, of the Charities Act, 1960 (40 HALSBURY'S STATUTES (2nd Edn.) 159, 176, 187).

Referred to: *A.-G.* v. *Stamford* (1842), 1 Ph. 737.

As to rules applicable to creation of charitable trust, surplus income, see 4 HALSBURY'S LAWS (3rd Edn.) 303 et seq.; and for cases see 8 DIGEST (Repl.) 443 et seq. As to removal of master of endowed school, see 13 HALSBURY'S LAWS (3rd Edn.) 668 et seq.; and for cases see 19 DIGEST (Repl.) 640 et seq.

Information praying directions for reforming and regulating a charity school; restoring the school, the removal of the master, if necessary; or such alterations as might be calculated for the benefit of the charity and providing a proper school, etc. The answer excused the alterations which had been made, alleging that the school-house was overflowed, etc., that all the alterations were made at the master's expense, and that the new school was built out of the increased fund on an adjoining piece of ground given by the master.

The information stated the foundation of a charity school at Egham in 1708 by the will of Henry Strode, directing a school-house to be built upon a piece of ground pointed out, and, if that should not be conveyed, then upon such other ground within the parish as his executors could purchase for the building thereof, for the teaching and edifying the poor children of Egham gratis. After the school-house was built, the residue of the fund of £6,000 was to be laid out on estates, and part of the produce was to be for maintaining the school and a school-master; and the residue was to be laid out in building almshouses on the said piece of ground.

A decree was pronounced in 1708 for the regulation of the charity; and another decree in 1753 declared that the objects to be placed in the almshouses ought to be poor persons of the parish of Egham, to be nominated by the Coopers' Company, who were appointed the trustees and visitors; and vacancies to be filled up by their nomination from time to time. It was further stated that the whole lower part of the house was originally the schoolroom, but in the late master's time, at his request, part was divided off in 1785, which was not complained of from the ignorance of the church wardens, etc.; that the present master, a clergyman, by permission of the company removed the school, building a new schoolroom at some distance, and converted the whole house into a dwelling-house for himself; that he did not teach personally and had declared his intention to discontinue it, employing an usher who was not a proper person. Further that one of the poor men's almshouses, which were contiguous to the house, was contracted for the purpose of making a passage for the boys; that the house, having been converted at a considerable expense from its original purpose, was made not fit for the residence of the master of such a school; that the increase of the fund ought to be applied for the benefit of the charity, etc.

Sir Samuel Romilly, *Leach* and *Horne* in support of the information.
Richards and *Wetherell* for the defendants the Coopers' Company.
Hart and *Johnson* for the master.

LORD ELDON, L.C.—The Charities Procedure Act, 1812, has provided a much less expensive mode of application in charity cases, by petition, on which the proper inquiries may be directed. The object of this foundation is clearly defined to be a school for the education of poor children of the parish of Egham gratis, to be devoted, and the schoolmaster to devote himself, to that object. The decree has with great propriety reserved further directions with reference to the surplus. Where the fund, being actually exhausted by the purpose declared at the time, is afterwards increased by the improved annual produce, the court always reserves the determination how that is to be applied. The will in general, containing no direction as to the disposition of a surplus thus created, the court holds that the testator who gave the whole value of the fund, such as it was at the time, to a charitable purpose, has divested all claims of his representatives; and the court reserves to itself the disposition of such a surplus with the view of taking care that it shall be applied under the control of the court as nearly as possible to the uses and purposes to which the testator meant his property to be subservient: and for another reason also; that with regard to this surplus a question may arise between the school and the alms-people. It is impossible not to admit that some increase of salary is necessary now beyond the sum of £40, which was considered necessary in 1708: but, having due regard to that, the court and the trustees must recollect that they have not the power to augment the benefits of one part of the institution without similar attention to the other objects. The consequence is that, if there is to be an increase for the one, there must be a contemporaneous increase for the other; not by increasing the number of persons, until due care is taken for the maintenance of those already established; and, when that is secured, the number of the objects may be increased.

This case produces none of those difficulties that have very much embarrassed the court upon school charities, as this is upon the evidence indisputable; that in the origin of this charity, as it was understood to be created by the testator, and as it has been administered under the decree operating upon his will, it is a charity providing a school, not a grammar school, for the benefit of the poor children of the parish of Egham to be educated gratis. Accordingly, the subjects of instruction seem to have been the elements of reading, writing, and arithmetic; and in a degree that habit has been introduced into this school which formerly prevailed in most free and grammar schools within my knowledge, that attention has been given to the religious education of the children; which is perhaps the best part of education; and I observe with regret a relaxation in the duty of catechising and reading prayers

to the children: a practice, I am sorry to say, not so universal now as it was formerly the regular habit of these schools. A

The late master appears to have at length taken private pupils. In the administration of this charity it was all along understood that there was no objection, and there can be no reasonable objection to the employment of an usher. If a clergyman was to be the master, writing and arithmetic as well as reading, forming a part of the instruction, it was very difficult without employing an usher to carry on the B objects of the establishment. I do not enter into the consideration how far private pupils may tend to break in upon the utility of a charity having this sole object, the education of the poor children of the parish of Egham gratis, and whether with reference to that object the master may be permitted to take private pupils: but he must consider himself devoted to that object; and anything inconsistent with the due execution of that duty to the utmost extent in which its execution can be made C useful to the poor children, who are to be educated gratis, is what this court will not permit to be carried on in that school. It follows of course that, if the object of the defendants in the alterations made in the school was that the school-house should become a school for private pupils, and that building at the end should be the school for the poor children, and both those objects should be carried on without as much personal attention to the poor children as if the master was constantly present dur- D ing school hours, they have misunderstood this testator; as, though it appears to me that the master may employ an usher, and this court, construing the will, may in the event of a surplus go the length of assisting that, yet, if a person of the highest talents takes the situation of master of this school, he must recollect that it imposes on him the duty, whatever else he may attend to, of giving as much attention to the gratuitous education of the poor children as if he had no other object. My clear E opinion is, therefore, that no one can hold this situation who will not devote all his time and his entire attention to that purpose, whether he employs an usher or not; and it is the duty of the trustees and of this court to secure to the objects of the founder of this charity, according to his true meaning, the full benefit he intended for them.

With regard to that part of the prayer of this information which relates to the F removal of the master, it is not the habit of this court to remove, where there has been any misunderstanding as to the duty: but, when that duty is prescribed, the master must determine either to hold the situation, doing the duty, or to discharge himself.

The alterations in the house clearly have proceeded on mistake: but I desire not to be understood as imputing to the defendants any purpose of abusing this charity. G I understand the testator as meaning to provide, not the establishment of a school merely, but a house in which there shall be a school and the master residing. Considering it as in the founder's view useful to the children that the master should reside in the house where they were to be educated, neither the master, the trustees, nor the court are at liberty to judge whether he duly estimated the degree of utility belonging to that purpose, and to substitute their will for his. Suppose him not to H have considered that as an indispensable object: the fact is that the house having been actually devoted from the first institution until the death of the late master to the purpose of teaching within its walls, repairs became necessary. I pass over what happened in the first instance, where it was necessary to find a temporary place instead of the school, and the consideration whether it was quite eligible: they must do the best they can; and I am not satisfied upon the evidence that a better I temporary place could have been obtained. When, however, the repairs were completed, the boys ought to have been brought back to the school; at least the house ought to be kept in such a state that it might be used for their benefit until some other place, equally adapted, had been found and purchased for the use of the charity, if that was within the power of the trustees; for suppose before the conveyance of this piece of ground the master had died, what was then to become of the boys? Could this court, or the trustees, bound to act as this court would, permit

all these alterations, destroying one school before another permanent school was provided for this permanent charity, if that was within their power?

See then what are now the circumstances. A piece of land is conveyed: whether such in its nature, quantity, and form that it can be applied for the purposes of the school is a subject of dispute and of rational doubt upon the plans and papers before me. It is impossible to give my sanction to what has been done; and, unless some plan can be laid before me as beneficial to the charity, to which the master is bound to give up the whole of his time as if he had no other occupation, and securing that object by an expenditure that I am justified in making, not confined to the benefit of the master alone, but applying the surplus to all the objects, not being justified in giving the master anything without giving something to the alms-people, or increasing the school without adding to their comforts, I must, in the way least embarrassing and distressing to the persons engaged, undo what has been done, I believe without any bad intention, but not in the due execution of this trust.

I forbear observing on some parts of this case, not very correctly regarded as subjects of this information; though, if with respect to the school it is right, I will not say the other subjects were improperly introduced. I very much approve the conduct of the relators in not examining any of the alms-people: but, administering a charity, I cannot lay down that, as they do not complain, no attention is to be given to the object as it regards them. The court is not only to attend to an actual complaint, but to see whether there is any cause of complaint. I do not like reducing an old man's room from eight to five feet; and there are some other circumstances that may be the subject of general regulation.

[His Lordship delivered out minutes, declaring that the school at Egham was provided for the teaching of poor children of that parish gratis; that the master of the school was appointed to teach such poor children gratis; and it was not agreeable to the true intent of the founder of the school that such master should engage in teaching others, or in any employment, if such teaching or employment should prevent his giving due or sufficient attention to teaching such poor children; that it appeared to have been part of the establishment of the charity, sanctioned by this court, that the school for teaching such poor children should be in the school-house; and that, if the will of the founder, and the establishment of the charity so sanctioned, would under any circumstances authorise the Coopers' Company or this court to direct the teaching of the poor children of the parish in any place other than the school-house, the removal of the school out of the school-house under the circumstances, in which it took place, was an undue act in the administration of the charity. The parties agreed upon the directions as to the inquiries concerning the past and future management of the charity estate.]

Order accordingly.

WATERS *v.* TAYLOR AND OTHERS

[Lord Chancellor's Court (Lord Eldon, L.C.), November 19, 20, 1807, February 12, March 5, 21, 1808]

[Reported 15 Ves. 10; 33 E.R. 658]

Partnership—Disputes between partners—Appointment by court of receiver and manager.

Principles on which the court will consent or will decline to appoint a receiver and manager of a partnership business

Notes. Applied: *Roberts* v. *Eberhardt* (1853), Kay, 148. Referred to: *Automatic Self Cleaning Filter Syndicate Co.* v. *Cuninghame*, [1906] 2 Ch. 34.

As to the appointment of a receiver and manager of a partnership business, see 28 Halsbury's Laws (3rd Edn.) 554–557; and for cases see 36 Digest (Repl.) 590 et seq.

Cases referred to:

(1) *Ex parte Ford* (1802), 7 Ves. 617; 32 E.R. 248, L.C.; 45 Digest (Repl.) 209, *145.*

(2) *Street* v. *Rigby* (1802), 6 Ves. 815; 31 E.R. 1323; 2 Digest (Repl.) 466, *298.*

Bill for foreclosure of a mortgage, specific performance of an agreement, and other relief.

The plaintiff claimed as executor of one Gould who was entitled by assignment from the defendant, Taylor, in 1803, to seven sixteenth parts of the Italian Opera House and as mortgagee of the remaining shares which continued to be the property of Taylor. The bill prayed a foreclosure of the mortgage, a specific performance of an agreement, and further relief upon deeds executed in 1792, 1803, and 1804, and a motion was made by the plaintiff that the defendant might be removed from the management and restrained from interfering and receiving the profits; that a proper person might be appointed manager with the same powers as Gould and Taylor had or such other powers as the court shall think fit; that a receiver might be appointed; and that proper directions might be given for payment of the money.

The plaintiff in support of his application alleged that the defendant had in several instances neglected his duty as manager; that he did not, and, from the embarrassed state of his affairs, could not, attend in person; and was never at the theatre except on Sunday. He stated various breaches of covenant and instances of mismanagement; that the defendant had not sent the money received to the bank; that he had engaged performers and other persons without consent contrary to the deed; that he discharged the treasurer and a person who acted as deputy manager without a salary, engaging another as ballet-master and deputy manager at a salary of £1,200 per annum; that he engaged one performer at a salary of 5,000 guineas for the season, 3,000 guineas being sufficient, with liberty to her to sing at other places; and permitted the ballet-master also to act in the same capacity at the theatre in Drury Lane. The defendant denied the charges of mismanagement; justified his conduct in the particular instances pointed out by the plaintiff; referred his absence to threats of personal violence and of an arrest by the plaintiff; stated that no loss had been incurred by his absence; that he had been manager for twenty-five years and had reduced the debts of the concern from a very large amount to £23,000; and represented that the management had always been carried on by deputy, and it was better it should be so on account of unreasonable demands by the performers upon the principal with which the deputy could not be expected to comply.

The general title, embracing all the interests in the theatre, stood upon the deed of 1792. The interests of the parties to this cause were regulated by the subsequent deeds of 1803 and 1804. The general effect of the deed of 1803 was that Gould was to have the sole, exclusive, and entire management and conduct of the theatre during the joint lives of himself and Taylor as long as Gould should think fit subject

to certain restrictions; the sole privilege of selling the boxes, contracting with performers, etc.; and, generally, to do all such other acts, etc., as fully and effectually as Taylor before that period had been accustomed to do; that Gould from that period should act as sole proprietor as Taylor had previously acted; that he should give his personal attendance; that if either should sell his interest or go abroad the management was to devolve upon the other; and that, if Gould should decline the management it was to be in them jointly or in such person as they should appoint. After the death of both it was to go according to the appointment of their executors, and in the event of the death of Gould, Taylor was to become the manager.

Among various provisions with reference to the management it was declared that no more than the sum of £500 should be expended in the preparation of any one opera, and that no engagement with a performer should be finally concluded, and no banker, treasurer, receiver, or servant, should be removed without the consent of the other part-owner and, if the part-owners could not agree upon a person to fill any such office or station, that should be considered a matter in difference for arbitration, each party to name one arbitrator, and, if either should refuse to name a person for ten days, then the person, nominated by the other as arbitrator, should decide. Besides several special provisions for arbitration if they should not agree upon the price of the boxes and in various other instances of probable dispute, there was a general clause that, if any doubt, question, difference, or dispute, should at any time arise between the parties or their executors touching the construction of those presents, any clause or any account to be settled, or the measures to be taken in any event not expressly provided for, or in any other manner whatsoever touching the management or conduct of the theatre or the appointment or the duty of the manager or any other person employed, and such doubt could not be settled among themselves, it should be determined by arbitration with the usual provision that the arbitrators should choose an umpire, order attendance, take evidence on both sides, and use all other ways and means to enable them to decide upon the matter in question as they should think fit. It was provided that the award should be binding and conclusive and be observed and kept by them accordingly, without any suit whatsoever, and should be made a rule of the Court of King's Bench.

Sir Arthur Piggott, *Fonblanque*, *Hart*, and *Johnson*, for the plaintiff, supported the motion.

Richards, *Sir Samuel Romilly*, *Leach*, and *Wetherell*, for the defendant, opposed the motion.

The parties afterwards went to arbitration, and an award was made deciding, among other points, that the performers had been engaged without the consent required by the deed, and in the particular instance at an improper salary under the circumstances of the theatre; that the personal attendance of Taylor was required by the deed; and that he could not delegate the functions of manager, but that no loss or injury from his non-attendance was shown. The application to the court was afterwards renewed, with the consent of the trustees, by a motion to remove Taylor from the management; to restrain him from receiving the profits; to appoint another manager; to restore the treasurer whom he had removed; and that the money received should be paid into a bank.

Mar. 5, 1808. **LORD ELDON, L.C.**—Upon this motion the question whether a manager is to be appointed by this court, to be invested with the same powers that Gould and Taylor had, depends upon the point whether, according to the contract regulating the powers of a manager, this court can give such powers. The court cannot go beyond the contract of the parties or a due application of the general principles of equity in cases to which the express contract does not apply. The application is also in the alternative that the court may give the manager such other powers as the Master may give, and that a receiver may be appointed with proper directions for payment of the profits. What are the

directions which the court is to give for that purpose is not in any degree explained, and it must depend upon the rights, interests, covenants, and contracts of all persons who have any interests whatsoever in the opera house, and can under those covenants and contracts call upon the person receiving the profits to dispose of them according to the contract, the trustees, who are defendants, representing, not only all the great variety of persons, interested, but also the representatives of Gould and the defendant Taylor as entitled to the residue.

In *Ex parte Ford* (1) I had great difficulty in making the arrangement, and on this occasion I cannot learn otherwise from these voluminous deeds what would be the proper directions for the management of such a concern so unwieldy that the court does not well know how to deal with it. There are but two modes: first, considering it as a concern in property to be regulated according to the course that prevails in other causes between suitors in general, and on that principle I could do no more than refer it to the Master to look into all the deeds and state upon the whole in what manner and for whose benefit the profits received ought to be applied. I mark this circumstance as a serious difficulty, occurring in the outset of this application and pointed out by the ordinary practice, as in the usual case the court is never expected itself to look through the title deeds and arrange the interests and claims with a view to the proper application of the rents and profits.

One object of this motion is an injunction to restrain the defendant Taylor from interfering, and obstructing Jewell in acting as treasurer and from receiving any money at the doors otherwise than by the hands of that person. The obvious consequence, if this motion succeeds, is that there will be no manager until one shall be appointed and approved. The difficulty upon that is that the treasurer, receiving the money each night at the doors, would be under considerable difficulty to know what he was to do with it, upon all these instruments, until the court can tell him what is to be done with it. If, for instance, no performer can be engaged but by the joint consent of these parties, could he venture to pay any performer? These instances show the infinite difficulty that must occur in the management of the business here.

Whatever may be the law of this court as to the capacity of parties by stipulation to deprive themselves of the right to resort to a court of justice in the first instance, and taking the law to be that a man cannot bind himself to forbear to come here until an arbitration has been had: *Street* v. *Rigby* (2), in almost every line of this deed of 1803, upon which the suit is instituted, the parties have expressed the greatest anxiety to keep out of court if they could in any manner arrange their disputes by arbitration. Accordingly, I thought it within the scope of my discretion to give the recommendation that has been given in every case where it was proposed to make this court the manager of any joint concern, giving the parties an opportunity of preserving themselves from the ruin that must be the necessary consequence of an active interference of the court. That led to the arbitration, the award stating that the personal attendance of Taylor was required by the deed and that no loss or injury from his non-attendance hitherto had been made out. I agree with the arbitrators that his personal attendance is required, and I think this court is not entrusted with the right even to discuss whether his non-attendance had or had not occasioned any loss, both parties having stipulated for his attendance, and in many cases a loss, which cannot be shown, may follow his non-attendance. The arbitrators, however, have not certified their opinion that he should cease to be the manager, or whether, if his future attendance is required, as I think it is, he can give it, and, if not, whether another manager should be appointed, nor am I by this award furnished with any means of knowing what another manager, if appointed, is to do. I can collect that only from the instrument.

With reference to the other points of the award, stating that Taylor cannot delegate the functions of manager without consent of the plaintiff, that the person appointed stage manager was not fit to be employed in that capacity, that Taylor has no power as manager finally to conclude any engagement with any performer

without the plaintiff's previous consent in writing or to discharge the treasurer or other officers without his consent, the questions are very different whether Taylor could employ any other person to assist him and whether that person is to be paid out of the trust fund. I can give no directions for payment of the money but such as the Master shall upon all the deeds consider the proper expenditure under the covenants, and, giving such directions, I must order the person who receives the money, to keep it, until the report is made, who, therefore, can make no disbursement except upon his own view and at his own personal hazard. What is to be the rule for the application of the funds, if it is not to be found in the deeds? Is the Master, or is the court, to select the performers to be engaged, and to say what are excessive and unprecedented salaries? I do not deny that the court may, if the parties insist upon it, be forced to decide from what part of Europe performers are to be brought and at what salaries, and it would not be unlikely that it might have to determine in 1809 what performers should be employed and what salaries allowed, in 1808, yet it is not in the power of this court to decline to act on the ground that the contract is absurd and gives such clashing powers that the consequence of acting must be the ruin of the parties. If the parties choose to abide by the contract, a court of justice must execute it let the consequence be what it may.

The parties to this deed of 1803, unless they meant that arbitration should determine all differences that might arise, could not have formed an instrument more directly insuring the destruction of the concern by the interference of this court. They might not agree as to the course of management or whom they should jointly appoint to be manager. The manager, when appointed by them jointly, can do no one act without their joint consent, nor can he, or any person employed, be without their consent turned out. Upon this deed, if it stood alone, the question would be what a court of equity is to do with it. It is compared to the cases of partnerships, West India estates, and other cases in which this court puts in a middle man, and a notion seems to be conceived that this court is to be employed in carrying on any concern. In the instance of a partnership, if the partners cannot agree, each excluding the other, that state of circumstances, operating as a dissolution, puts an end to the partnership, and this court then interposes to wind-up the concern and with that view will appoint a person to collect and manage until an end can actually be put to the concern. So, a manager of a West India estate is appointed, not for the purpose of carrying it on, but to enable the court to give relief when the cause shall be heard. The same principle, however, upon which a covenant is inserted that this concern shall proceed for forty-two years, and if the parties cannot agree, the Lord Chancellor is to appoint a manager, will justify an expectation that this court is to carry on every brewery and every speculation in the kingdom. Such a covenant will not induce the court to act. If the court should appoint a manager, that would not produce a different effect. The parties might still differ upon the engagement of performers, the appointment of salaries, or other points, and the deed says that the manager shall not engage any performer. Of course, the treasurer cannot pay, without consent, and this court will not permit a receiver to lay out more than a very small sum at his own discretion. At least an inquiry would be directed whether a salary of £5,000 is a provident application. The same necessity of consent in every appointment, from a banker to a door-keeper, may produce disputes upon which the same course must be taken.

The clear result is that upon the footing of this deed, unconnected with the paramount title, the court cannot manage this concern. The parties, conscious that they so ill understood their arrangements and so little foresaw the difficulties to which they led that their deed ought not to give the rule, desire the court to take upon itself the management, giving the person who shall be appointed manager, not the powers prescribed by the deed, but such powers as this court shall think fit. If these two parties only were interested, and, representing that they could not carry on the concern, desired a sale, this court would, for the purpose of regulation in the intermediate time, with a view to the relief ultimately to be

given, appoint a person to manage, but this application is made upon a deed under which it is absolutely impossible, that this concern can proceed, desiring that during these reversionary terms this court shall be the manager which may with equal reason be desired in every brewery and all the joint concerns in the kingdom. Another difficulty is that, if this deed cannot furnish the means of arrangement so as to carry on this undertaking for their benefit, it does not follow, that this court is to interpose upon its own notion of what powers should be exercised for their benefit. In that case the court must look at the title, as it is, without these stipulations, and then it is an absolute mistake to conceive that these trustees are trustees only for the annuitants and persons having boxes and privileges in this theatre. They are trustees for the residuary interest as much as for the rest.

On the whole it is quite impossible that this court can appoint a manager with such powers as the court thinks proper. Suppose the manager appointed. Could the court say that he might incur a greater expenditure than these trust deeds in general authorise? If a performer required £500 for one night, and the deed said that the nightly expense should not exceed a certain sum, it would be impossible to sanction such a payment. The whole, therefore, which the court could do is to refer it to the Master to look into the general title, to state the charges and encumbrances; what payments are, and what are not, warranted by the instruments; how such payments are to be made; and what expenditure would be reasonable and proper for the benefit and interest of all concerned. I cannot feel my way to comply with any part of this motion except as to the application by the hand that is actually to receive the money, and for that purpose I cannot do anything unless I am informed how the person who receives the money can part with it consistently with the application of the funds of this property as provided by these instruments, and what application will be consistent with them. If such an application can be pointed out, I will hear it; otherwise I can do nothing.

The motion was renewed, with consent of the trustees.

Mar. 21, 1808. **LORD ELDON, L.C.**—This must be considered as a suit for a foreclosure, for directions as to the interim management, and for a specific performance of the covenant in the deed of 1803. With respect to the foreclosure, it is within the province of the court to appoint a receiver if it can do any good, expressly declaring that the appointment is not to interfere with the rights, interests and remedies of those who have claims paramount both these parties. As to the other objects of this bill, there is no possibility of specifically performing such a covenant as this, the parties having made that consent necessary which the court cannot compel them to give. The only relief, therefore, that can be given, when the cause shall be heard is the foreclosure. Considering the nature of this property, can the plaintiff call upon the court to assume the management of the theatre in the meantime? See, how usefully the court would act. The very ground, taken by this bill, supposes that there is no performer of whom the court can take notice, alleging that all the performers have been engaged contrary to the provisions of the deed. The court then, for the purpose of executing a foreclosure, finding that the parties have entered into deeds that cannot regulate the concern, is in the meantime to do what it can with it, taking upon itself to engage all the performers, beginning by shutting up the house, and directing a reference to the Master to inquire what performers ought to be engaged, upon what terms, and to state the circumstances. That, considering the time that must elapse in the inquiry, is an application of the principle calculated for preserving property to the destruction of it. As to the trustees, no relief is prayed against them. They have not filed a bill, and the case is not aided by having them parties. Suppose they should file a bill. The questions would then arise, who are to be the banker and treasurer, and how the funds are to be applied depending upon these deeds of August, 1792, and March, 1804. My opinion is that this court has no jurisdiction to manage this concern merely for the purpose of carrying it on. The court will order it to be sold

or foreclosed, will deal with it as property, but no further. The result is that this is an application to the court by motion under a bill for a foreclosure, to be the receiver, treasurer, contractor with the performers and others, and the manager in every sense of this theatre. I do not see my way to make such an order, and, if I did, I must by acting ruin all concerned. They have still the locus pœnitentiæ, and, if they will not settle their own interests, it is immaterial, whether the consequences shall be produced by their own acts or by mine.

No order was pronounced.

BROOME *v.* MONCK

[Lord Chancellor's Court (Lord Eldon, L.C.), March 19, 25, April 8, 1805]

[Reported 10 Ves. 597; 32 E.R. 976]

Will—Real estate—Devise—General devise of real estate—Inclusion of estate in which testator acquired equitable title after will—Failure of vendor to make good title—Right of devisee to investment of purchase price in other land.

An estate in which a testator has acquired the equitable title passes under a general devise of his real estate.

By his will the testator devised to the plaintiff all his freehold, copyhold, and leasehold estates for the term of ninety-nine years with a remainder over. Subsequently, he contracted for the purchase of an estate, and later still he made a codicil to his will directing that the purchase should be carried into execution, that the purchase money should be paid out of his personal estate, and that the estate so purchased should go to the like uses as were expressed in his will concerning his other real estate. After the testator's death it was found that the title to the estate was defective, and, therefore, the contract was not carried to execution.

Held: the plaintiff was not entitled to an order that the amount of the purchase money should be invested in the purchase of other land to be conveyed to his use.

Notes. Considered: *Morgan* v. *Holford* (1852), 1 Sm. & G. 101. Referred to: *Hudson* v. *Cook* (1872), L.R. 13 Eq. 417; *Re Rix, Steward* v. *Lonsdale* (1921), 90 L.J.Ch. 474.

As to property which is capable of disposition by will, see 39 Halsbury's Laws (3rd Edn.) 859–865; and for cases see 48 Digest (Repl.) 26 et seq.

Cases referred to:

(1) *Whittaker* v. *Whittaker* (1792), 4 Bro. C.C. 31; 29 E.R. 762; 20 Digest (Repl.) 376, *986.*

(2) *Lacon* v. *Mertins* (1743), 3 Atk. 1; 26 E.R. 803, L.C.; 40 Digest (Repl.) 40, *222.*

(3) *Buckmaster* v. *Harrop* (1802), 7 Ves. 341; 32 E.R. 139; on appeal (1807), 13 Ves. 456, L.C.; 40 Digest (Repl.) 38, *213.*

(4) *Earl of Coventry* v. *Coventry* (1742), 2 Atk. 366; 26 E.R. 621, L.C.; 48 Digest (Repl.) 398, *3461.*

(5) *Green* v. *Smith* (1738), 1 Atk. 572; West temp. Hard. 561; 26 E.R. 360, L.C.; 40 Digest (Repl.) 191, *1531.*

(6) *Noyes* v. *Mordant* (1706), Gilb. Ch. 2; 25 E.R. 2; sub nom. *Noys* v. *Mordaunt*, 2 Vern. 581; Prec. Ch. 265; 20 Digest (Repl.) 456, *1677.*

(7) *Streatfield* v. *Streatfield* (1735), Cas. temp. Talb. 176; 1 Swan. 436, n.; 25 E.R. 724, L.C.; 20 Digest (Repl.) 458, *1687*.

Bill filed by Richard Pinniger Broome, a nephew and devisee of Richard Broome under the latter's will, praying a specific performance of a contract entered into by the testator for the purchase of an estate for £7,925, and an order that the testator's executors might be decreed to pay the residue of the purchase-money beyond the deposit at the sale by auction out of the assets, and, if the defendants, the vendors, were not able to make a good title, or for any other reason the contract could not be carried into execution, that the amount of the purchase-money might be invested in the purchase of other lands, to be conveyed to the like uses as were expressed in the will concerning the testator's real estate.

By the will, which was previous to the date of the contract, the testator gave all his freehold, copyhold, and leasehold estates, to the plaintiff, Richard Pinniger Broome for the term of ninety-nine years if he should so long live, and from and after his decease to the heirs of his body, and, for want of such issue to the right heirs of Richard Pinniger Broome for ever.

On June 26, 1802, the testator contracted for the purchase in question, the particulars expressing the usual terms that the remainder of the purchase-money beyond the deposit should be paid upon a good title being made. On July 24 following he made a codicil, duly executed to pass real estates, reciting the contract since the execution of his will and directing that it should be carried into execution, that the purchase-money should be paid out of his personal estate, and that the estate so purchased should go to the like uses as were expressed in his will concerning his other real estates. The defendant, Christopher Broome, another nephew of the testator, claiming under a bequest of the residue of the personal estate to be laid out in the purchase of real estates and settled to his use for life with remainders to the heirs of his body, and in default of such issue to his right heirs, said by his answer that, if a title could not be made, no part of the personal estate ought to be applied in the purchase of any other estate for the benefit of the plaintiff. Upon the Master's report the title proving defective, the cause came on for further directions upon the claim of the plaintiff to the benefit of the contract.

Fonblanque and *Wear* for the plaintiff.
Romilly, *Thomson* and *Bell* for the defendant.

LORD ELDON, L.C.—The question is: What are the equities of the parties, regard being had to what the court must declare to be the purpose of the testator upon the will and codicil? The will devises freehold estates to uses in which uses the plaintiff would have partial benefits, viz., a term of ninety-nine years if he shall so long live with remainders over, and the testator afterwards disposes of the residue of his personal estate which he directs to be laid out in land to be settled to other uses. Therefore, when he had concluded the will he had declared that such land as he actually had should devolve in a certain course and the land to be purchased with the residue of his personal estate should go to other persons, and he was content that, if he should die the moment afterwards, the different branches of his property should go in those different modes. Afterwards he entered into a contract for the purchase of an estate, the particulars containing one condition, implied in almost every contract, but expressed in this, that he was to become the owner of the estate if a good title should be made. He was placed, therefore, in circumstances, in which from that moment until his death, or until the agreement should break off, he was capable of devising the estate as being in equity the owner.

The question was very materially argued as if immediately after the contract he had re-published the will, and, if he had said, he gave all his messuages, lands, tenements, and hereditaments to the uses to which the freehold estate was given by the will, it would be difficult to argue that he had not in a different form

expressed in effect everything he said by his codicil; for, if he had devised in that manner, the plaintiff would have taken this estate, provided a good title could be made, under that disposition, and the executors would have been bound to pay for it for the benefit of the plaintiff. That duty of necessity is imposed upon them, whether expressed or not. It was also materially observed that every devise of land, whatever particular or by the words "all my messuages, lands, tenements, and hereditaments," is a specific devise and must be so, for the devisor as to real estate of inheritance can devise only what he has and he may devise it if he has it at the date of the will and continues to have it until his death. A devise of land of inheritance, in whatever form, is specific. The first question, then, is whether the doctrine of this court is, and the dicta in *Whittaker* v. *Whittaker* (1) will establish, that, if a man having lands and having acquired an equitable title in other land by contract makes a disposition of all his messuages, lands, tenements, and hereditaments by which unquestionably he will specifically devise the estate in which he has acquired the equitable title, if afterwards it becomes clothed with the legal interest, the effect of that is that he devises, not only the lands he has in law or equity, but also those lands which he has not either in law or equity, and the question is whether it will be construed to mean that he gives all the lands he has, and all he supposes he shall have in equity, upon the supposition that he has them, but, if that supposition should turn out to be ill-founded, the court is to conclude that he gives, not only those lands he has, and in which he fancies he has aquired an equitable title, but, that it is a direction to operate through all its consequences as if he had stated that, if those estates could never be conveyed, his executors should lay out a sum of money, equal to the price of lands he had agreed to purchase, upon any other lands. That is a very strong and new doctrine.

As to the decision in *Whittaker* v. *Whittaker* (1), it went upon a principle, involving nothing of that kind, for it was simply this case. Sir Robert Mackreth, having a good title which he was quite ready to convey, had contracted to convey to the testator of the defendants. Whittaker, therefore, became the owner in equity. Nothing had passed between the parties in his life. When he died, all question between the real and personal representatives was closed by his death without rescinding the contract. But Sir Robert Mackreth had a right to say that the contract should be performed in a reasonable time and should not hang over him for ever, and, therefore, he had a right to demand that it should be made good in a given time or that it should be given up. With reference to the question between the real and personal representatives and Sir Robert Mackreth the court said, without prejudice to any questions as between the representatives themselves, it was not fit that Sir Robert Mackreth should be held to the agreement. But that was an agreement which up to that moment the court declared bound all the parties if all would execute it, and, therefore, bound Whittaker at his death, and consequently his representatives. Therefore, not determining the interests as between Mackreth's real and personal representatives if he had died, that decree decided only, first, that an individual should not be held bound for an unreasonable time and, secondly, if the party with whom he contracted died with the interest in equity in him the effect of that decision should make no difference between his representatives real and personal, for he was vested with a complete demand provided a good title could be made. It would have been very different if Whittaker could never have had a good title from Sir Robert Mackreth, for then it would have been very difficult to say that as between the real and personal representatives the quantum of objection can possibly be material if it amounts to so much of objection that the person they both represent could have said there was sufficient to authorise him to refuse to take the estate, and all those cases must be decided upon the same principle if all of them furnish an objection to that amount. If the vendor could have said that the vendee should take the estate, having an allowance out of the purchase-money, that gives a different turn

to the argument. As between the heir and the personal representatives, *Lacon* v. *Mertins* (2), *Buckmaster* v. *Harrop* (3), and other cases, establish the general principle that, whatever is the state of liability of the party himself to take at his death must be the state of liability to be considered upon questions between those representing him after his death, and, if at his death he could not be compelled to take, clearly the heir could not say to the executor: "I will have the estate; and you shall pay for it." So the case of a devisee claiming the estate and the party to pay for it, the party, upon whom the personal estate devolves, not by the act of the party, but by operation of law, as if he dies having devised his real estate and intestate as to his personal estate: again, if having disposed of both, for there is no principle for the devisees of the real estate to be more favoured than an express legatee of personal estate. There is as much intention that the latter shall take the personal estate (I do not state it as to a mere residue, but a given sum) as that the real estate shall go to the devisee by the act of the devisor.

The first question among all these parties is if the testator was not bound, can the devisee say he will have, not the benefit of the contract as the devisor meant to have it, but as he might have reduced it if he had thought proper, with reference to which he stood neuter all his life, or may the devisee say he will have it because the testator might have had it, such as it was. That is to be considered with reference to general cases and to the particular case. It is put thus. Suppose the title defective as to one-sixth only and good as to five-sixths of the estate. It must also be put the other way, and then it must be said that, though under his will previous to the contract for the estate to be enjoyed with the mass of inheritance, he meant his personal estate to be laid out another way, yet, if the person with whom he contracted had nothing but a lease for ninety-nine, or even twenty-one, years, the person, to whom he meant to give the benefit of that contract might have said that, though nothing was mentioned but a contract for the fee-simple, yet, finding only a term, he shall disturb the personal estate in order to have what is so different from what the testator intended. It is very difficult to make that out.

The cases of election do not apply until the previous question is determined, for, if it is made out that this testator has given so much as will buy this estate or some other estate for the plaintiff, that is not a case of election, for then so much personal estate as may be necessary to buy this or some other estate is expressly taken away. Election is where the testator gives what does not belong to him, but does belong to some other person, and gives that person some estate of his own by virtue of which gift a condition is implied either that he shall part with his own estate or shall not take the bounty. Here the question is not that, but whether he has taken away from the defendant part of that personal estate which was the testator's and was given to be laid out in the purchase of land.

The case will turn upon this. How far the dicta, supposed to have fallen from Lord Alvanley in *Whittaker* v. *Whittaker* (1), can be supported by authority or principle. It must go this length, that where a man having legal estates and equitable estates under a contract devises all his messuages, lands, tenements, and hereditaments, and dies, standing quite neuter as to the equitable estates under the contract until his death, the court must say that those words operate to the same effect as giving all his lands, etc., legal and equitable, provided the latter were conveyed, and, if not, then the interpretation is a wish to give all if they can be had specifically, and, if not, then he devises the legal estates such as he can pass and such of his equitable estates as he or his representatives after his death shall be able to procure a title to, and as to all the rest it is a direction to the executors, and against those to whom the testator has given the personal estate, to lay out so much as shall be necessary, not to procure a title to that estate, but to procure a title to any other estate they can procure. If it does not amount to that, I do not see how the case is to be made out, for I agree, if he had directed that out of his personal estate a sum of money should be laid out in the purchase of a real estate, that there is no doubt it must be laid out, or, if it was to be laid out

A in a particular county, there the court has gone upon this, that it is to be taken that there is some estate in that county, and, therefore, it may be procured. But if it is to be in a particular parish, there are the conflicting opinions of LORD THURLOW and LORD ROSSLYN. LORD THURLOW thought the money could not be laid out anywhere else; LORD ROSSLYN thought it might be laid out elsewhere if no land could be procured in the parish.

B My difficulty here is whether a person, devising his equitable estate, does by that not only give the equitable estate he supposes his, but includes in that a direction to purchase other estates; if it turns out that he was mistaken in supposing that estate, contracted for, to be his, whether he is not only to be taken to mean that his contract should be executed, but also, as he has said so much, this court is further to infer that, though the title to that estate cannot be made, another C estate shall be purchased, a question which has never been so determined. In *Earl of Coventry* v. *Coventry* (4), exchange being the subject, in which in case of eviction the party evicted would take the estate given in exchange, LORD HARDWICKE thought that the intention upon the whole was that that estate should be bought for those to whom he finally gave it, if it could be, but, if not bought, they should have the other estate to go in lieu of it. I have a strong inclination, D that this is carrying the doctrine of this court much further than has been done before, but I will consider these cases.

Mar. 25, 1805. **LORD ELDON, L.C.**—At the date of the codicil which was made after the contract the testator was in equity the owner of this estate if it could be effectually conveyed to him, and a simple re-publication of the will with E the general words "all my freehold, copyhold, and leasehold estates" would have operated to pass the equitable title if afterwards, in his life or after his death, it became clothed with the legal estate. It is of necessity that, where a person has contracted to sell, if the vendee dies before the contract is executed, in which case of necessity a question arises between the representatives of the vendee to the consequence of such an accident the vendor must be taken to look at the time of F making the contract, and he has no reason to complain, even if a dispute between the heir and executor brings forward an investigation of the title, as, the contract being to be executed at a future period, it is incident to such a contract that questions may arise by the death of either party between individuals who have rights as between each other before it can be decided how the question by a third party against both can be decided. If a good title could have been made in this G case there would have been no question, for then the common doctrine must have applied where a person acquires the equitable title by the contract, and dies before payment. If a good title can be made, whether he dies with or without a will, it must be made, and the personal estate must pay for the advantage of the devisee in the one case or of the heir in the other. Upon that principle a reference was directed to the master as to the title, and the result is that a good title cannot be H made.

Two questions arise upon that: first, whether the devisees are entitled to take the estate with a bad title if they think proper, and the person representing the testator as to his personal estate can be compelled by the devisee to pay, either the whole purchase-money for the estate, connected with a bad title, or out of the purchase-money so much as it is worth, so connected with a bad title. Then I an ulterior question occurs, whether that devisee could say that he would have, not only the estate connected with a bad title, at its worth, but also so much more as the difference between the value of the estate as it is and the purchase-money, agreed to be given for it with a good title, to be laid out in land, which is the same as claiming to reject it, but, doing so, claiming either by force of the codicil, or the equity independent of it, to be entitled to have the whole sum of £7,925 laid out in other lands to the same uses.

As to the first question, I have not met with any case that has induced me to

suppose that, if this were between the heir and the personal representative, it would be possible for the heir to say, though the title was doubtful, yet, being the real representative, he is entitled to take it, as it is, though the ancestor never meant so to take it or intimated any purpose of retiring from that situation in which he had a right either to insist upon a good title or to refuse the estate, and, though there is no proof that the ancestor would have paid for the estate with a bad title, yet the heir can insist that the personal representative shall pay for it out of the assets. None of the cases cited gives any colour for that. *Green* v. *Smith* (5), indeed, seems to state a doctrine quite inconsistent with that, which is accurate in ATKYNS as to this point, for I find it in MR. JODDRELL'S NOTES, shortly stated in the same way, viz., that, where the ancestor after the date of the will agrees for a purchase, the heir would have a right if there was a good title, otherwise, if not; but it would be going far to say that, though he cannot have the land, he shall have the money to be laid out in other land. That is the declaration of LORD HARDWICKE, stating the distinction between that proposition and this, that where a man has agreed to lay out money in land generally, and devises his real estate before such purchase is completed, the money agreed to be laid out will pass to the devisee, for that is not the case of a devise of real or personal estate which the testator has, but is a testamentary declaration how a real estate is to be acquired. *Green* v. *Smith* (5), also in MR. JODDRELL'S NOTES, affirms the same proposition.

Then it is said that there is a difference between an heir and a devisee, and the two cases cited upon that are *Earl of Coventry* v. *Coventry* (4), and *Whittaker* v. *Whittaker* (1). As far as *Whittaker* v. *Whittaker* (1) contains any doctrine necessary to the decision, it is a decision which, taken with the doctrine connected with and necessary to determine it, proves no more than this, just the converse of the proposition I have stated and equally prevailing in the case of heir or devisee. It is clear in both cases that, if a man contracts for a purchase and the vendor has a good title, by force of the contract in equity it becomes his real estate, and, therefore, if he dies without a will, it descends upon his heir; if with a will, his will containing words to pass it, his devisee will take, and either has a right to call for an application of the personal estate to the payment of the money. In *Whittaker* v. *Whittaker* (1) from the moment of the contract, subject only to a question which it was admitted did not exist there, for the vendor could make a title unquestionably, Whittaker was owner of the estate in equity and Sir Robert Mackreth of the price. One point independent of any question about title was whether the vendor had not a right either to have the contract executed in a reasonable time, or to be delivered from the obligation. In the life of Whittaker there was no controversy between them, but it was understood during his life that by force of the contract both were bound. Whittaker at his death was in equity the owner of the estate, and, therefore, there was no difference upon the question in such circumstances as affecting an heir or a devisee. Whittaker had been engaged in a considerable trade, and his personal estate was under circumstances so complicated that the purchase-money could not be collected. Therefore, four or five years after his death, till which time Sir Robert Mackreth admitted that Whittaker was to be considered owner, a bill was filed by Sir Robert Mackreth to have the contract executed, or delivered up. LORD KENYON decided, and was right in deciding, that the contract should be delivered up, but upon principles, leaving undisturbed any question that could arise between the real and personal representative, and there is no doubt that, if the real representative could then have said he was ready out of his own pocket to pay, the court would have decreed him the estate and have given him an equity afterwards to call upon the personal estate to reimburse him. It is quite clear that, if the real representative had been an heir instead of a devisee, the question would have been just the same, for, the title being good at the death of Whittaker, and no question between the parties to the contract during his life, the real estate in equity would have descended upon the heir, and

A there was a clear right in the party to leave the estate to descend as he thought proper.

It is true that there are many passages in the report of that case going much further and a considerable length to establish that the case of a devisee is to be distinguished from that of an heir, and that in the case of a devisee it is to be understood that, the vendee having the estate at the time of the devise in the B sense in which he has it in equity, though it fails because ultimately he cannot have it, yet such a devise is to be understood as a direction, not only that the devisee shall take, but that, if he cannot, the executors shall purchase another estate for that devisee. This doctrine is very important, and somewhat new, but, when LORD ALVANLEY is represented to state it to that length, it becomes me to doubt whether the inclination I feel to the contrary opinion is well founded. If the C doctrine is, as it appears stated, all this follows, that, if the testator, instead of this codicil, had simply republished the will which would speak from that time, then in the construction of this court the devise of all his freehold, copyhold, and leasehold estates, would go to the extent that it would be a devise, not only of all the legal estates he had at the date of the will and of the equitable estate under the contract in these very lands, but that those words must have been construed D exactly as if he had said that he gave all his freehold, copyhold, and leasehold estates, meaning those of which he was then seised in law and this estate of which he conceived himself seised in equity, and also, if he should be mistaken in that, if that equitable estate could not be conveyed, meaning, under those general words, that his executors should out of his personal estate buy some other estate for the benefit of those to whom he had given his freehold estate. That is a very strong E proposition.

It is said that that proposition is made out by *Earl of Coventry* v. *Coventry* (4). The facts are fairly stated in ATKYNS. LORD HARDWICKE has not entered in his NOTE-BOOK the principle of his decree, but only that he decreed for the plaintiff. But in MR. JODDRELL'S NOTE the judgment is probably better given than in ATKYNS. The cases of election referred to in that case, *Noys* v. *Mordaunt* (6), and *Streatfield* F v. *Streatfield* (7), prove nothing more than the familiar doctrine that, if I give an estate belonging to A., which I have no power to give without his concurrence, and give any estate to A., it shall be understood to be given upon condition, that he shall permit my will to take effect as to the other. If, therefore, *Earl of Coventry* v. *Coventry* (4) contained a case of election, the application of those cases is correct, but whether they were correctly applied, depends altogether upon whether the G testator had expressed his intention in such a manner as to raise a case of election, for, if he had called upon the person who was his heir at his death to convey anything that belonged to that heir in that character, he could call upon him to convey nothing but that, which was the testator's, and, therefore, if there was any expression in that will affecting property in the hands of the heir which was the testator's, it would pass by the intention declared, not by election. So, if this codicil calls H upon the residuary legatees of the personal estate to give up something that without their concurrence he could not give to the devisees of the freehold estate, their own property, and they withheld it, this court would compensate out of that personal estate, so given, the devisees. But the question here, and in *Whittaker* v. *Whittaker* (1), is what room there was for the application of that doctrine, for the only question is as to the intention by the codicil to say that he gives to the devisee of the free- I hold estate by the will the estate purchased under the contract if it should become his, or to say, what he might without raising a case of election, being only the expression of his own intention as to the manner of disposing of his own personal property which he had full power to dispose of, that he not only gave the estate if it was his, but, if it should turn out not to be his, desires the residuary legatees to lay out such a sum of money in the purchase of any other freehold estate the devisee should choose to take. If in *Earl of Coventry* v. *Coventry* (4) it was determined that the intention was to give the manor of

Twigmore to those who would have taken the other estate, the purpose of an exchange being perfectly clear, if upon the whole will, attending to the circumstance that it was a provision for children, that intention appeared to give Twigmore as a consideration for the purchase of a real estate, even named, but, where nothing was said about title, that case was rightly decided. But that is not the case of a person devising as here, viz., an individual at the moment of devising having a specific real estate to dispose of, having by his will given all his real estate in one course, and his personal estate, to be laid out in land, in a different course, and having between his will and codicil entered into this contract for the purchase of an estate and agreed to have it if a good title could be made; and the question arising as to his intention by the codicil, referring to the contract, directing execution, etc., if a good title could be made; and, if it cannot, the question is whether in that event, as well as the other, the personal bounty to the residuary legatees should be cut down to the amount of the purchase-money. If not, it is impossible to sustain the claim of the devisees. Where there is a general direction to lay out money in land, the testator takes it for granted that land can be procured. If a particular estate is pointed out, he considers a title can be made. Upon the point whether, that failing, it may be laid out in other lands, after a difference of opinion between Lord Thurlow and Lord Rosslyn, it is established, that it may, that the particular estate pointed out is only the mode directed for executing the primary intention for a purchase.

The doctrine, therefore, is only this, that the testator directs what he believes capable of being done in all events, though not in the precise mode, and the court follows that up, holding that that, being directed to be done, it shall be considered as done. It is quite a different point whether, if I have a contract for a particular estate, and direct that, if it becomes mine, it shall go in a certain course, and, if it never becomes mine, yet money to be laid out in another estate is to go in that direction. Suppose, I have an estate and wish to buy a small estate in the neighbourhood with a house and contract for that estate, meaning it for my eldest son, and suppose that no title can be made, it may be the most distant thing from my purpose to take away that value from my other children for the eldest son, if that particular object cannot be obtained. On what ground is it to be inferred that, if I cannot succeed in that object, I also mean any other estate to be purchased, not one which I had an inclination to buy, but one which my heir-at-law may, contrary to my intended disposition between him and the rest of my family, choose. The situation of the parties also is altered, for the vendor might be a debtor by specialty in respect of the contract. Instead of that, the codicil only directing execution of the contract, the testator being under circumstances in which he might withdraw from the contract as it could not be executed, yet after his death, to make good the question between the heir or devisee and the personal representative, a construction is made changing the vendor's situation as a debtor by specialty, and considering the testator as out of mere bounty acquiring another estate which he never thought of and would not have devised. His object might have been to buy that estate as contiguous or for other reasons which might demonstrate his purpose to have that estate only. It is very difficult to maintain the doctrine in *Whittaker* v. *Whittaker* (1), which went beyond what was necessary for the decision.

My opinion, therefore, as this is a new case, and not falling in with that doctrine or some of the passages I have now referred to is given with great doubt and deference, and, therefore, if you are dissatisfied you may have it argued again. But, I think, it is carrying the doctrine upon equities, supposed to be founded in the intention, much further than a legitimate construction of this codicil authorises, to say, if this estate cannot be bought, it amounts to a direction to buy some other estate.

Upon the second question, my opinion is the same as I expressed before—that, if I am right in placing the devisee in the situation of the heir, he cannot say he will take an estate the ancestor would not be obliged to take, and, if the objection

amounts to more than that which would enable the vendor to say that the vendee shall take compensation, if it goes further to entitle the vendee to refuse, that must decide the condition as to this point between his real and personal representatives immediately after his death. Therefore, if no title can be made, the devisees are not entitled to take this estate without a good title, or to have another estate bought for them.

April 8, 1805. The case was re-argued on the part of the plaintiff. Counsel for the defendant declined to address the court again.

LORD ELDON, L.C.—This case is new in specie, of great importance and difficulty. Therefore, I wished it to be argued again. I cannot get over this difficulty. If a contract is entered into for the purchase of an estate under hand and seal, that estate by force of the contract becomes the estate of the purchaser, and it will go to his heir who will take it free from all debts by simple contract. The vendor is a creditor by specialty, and, if the whole personal estate would be just sufficient to pay for the estate, which was the substance of the contract, the heir would take the estate and the creditors by simple contract would be disappointed, for there would be a contract by covenant under hand and seal with which the executor could be charged at law. But, how would it be if the proposed vendor could not maintain an action, the title being defective? If he could not recover the money at law, will this court hold that, as such contract was entered into and the benefit of it devised, that shall be considered a devise, not only of the land so contracted for, but a devise of any land, that can be purchased with that money, and, if so, will the court give that effect to the contract and the will that will prejudice simple contract creditors? If that is not the effect as to simple contract creditors, upon what principle can it be said that this is the doctrine, if there are simple contract creditors, and not, if there are no such creditors? In the cases cited there was no doubt that, if the title had been good, the estate would have descended upon the heir against simple contract creditors, but it was held that, if the title was not good, the heir could not insist upon anything, and the consequence is that, the title being bad, the simple contract creditors might have been paid out of the purchase-money that in the case of a good title would have been laid out in land. It is very difficult to say there is a difference between the heir and devisee where the title of simple contract creditors comes in question, and, if not, the case must be pursued to the consequence, viz., that this is the doctrine of the court, if there are simple contract creditors, and is not the doctrine if there are none. I cannot alter the opinion I have expressed.

Order accordingly.

A

ROCHE *v.* O'BRIEN

[Lord Chancellor's Court in Ireland (Lord Manners, L.C.), December 2, 3, 5, 1808, June 8, July 5, 19, 1810]

[Reported 1 Ball & B. 330]

B

Undue Influence—Expectant heir and reversioner—Sale of inheritance to experienced attorney—Heir in embarrassed circumstances—No knowledge of value of property—Setting aside conveyance—Public policy.

Where a tenant in tail in remainder of an estate, who appears to have been much embarrassed in his circumstances and in the situation of an expectant heir in great distress, enters into a dealing for the sale of his inheritance to an experienced attorney who knows the extent and value of the lands, of which matter the tenant in tail is ignorant, there being no valuation, no survey, and no one to advise the vendor, a court of equity does not look very minutely into the circumstances, but on grounds of public policy will set aside the conveyance: per Lord Manners, L.C., of Ireland.

C

D

Undue Influence—Confirmation of transaction entered into under undue influence—Need for person confirming to be fully informed of rights and true circumstances—Freedom from influence under which he entered into transaction.

To constitute the confirmation of a transaction which would otherwise be set aside as having been obtained by undue influence the person confirming must be fully apprised of his rights, fully aware of the true circumstances and quite free of the influence under which he entered into the original transaction: per Lord Manners, L.C., of Ireland.

E

Notes. As to undue influence, see 17 Halsbury's Laws (3rd Edn.) 672 et seq.; and for cases see 25 Digest (Repl.) 277 et seq.

Cases referred to:

F

(1) *Cann* v. *Cann* (1721), 1 P. Wms. 723; 24 E.R. 586, L.C.; 35 Digest (Repl.) 101, *50*.

(2) *Cole* v. *Gibson* (1750), 1 Ves. Sen. 503; 27 E.R. 1169, L.C.; 12 Digest (Repl.) 279, *2142*.

(3) *Crowe* v. *Ballard* (1790), 2 Cox, Eq. Cas. 253; 3 Bro. C.C. 117; 1 Ves. 215; 30 E.R. 118; 1 Digest (Repl.) 536, *1654*.

G

(4) *Cole* v. *Gibbons*, *Martin* v. *Cole* (1734), 3 P. Wms. 290; 24 E.R. 1070, L.C.; 25 Digest (Repl.) 301, *1085*.

(5) *Earl of Chesterfield* v. *Janssen* (1751), 2 Ves. Sen. 125; 1 Atk. 301; 1 Wils. 286; 28 E.R. 82, L.C.; 25 Digest (Repl.) 273, *823*.

(6) *Stephens* v. *Lord Bateman* (1778), 1 Bro. C.C. 22; 28 E.R. 962, L.C.; 12 Digest (Repl.) 223, *1659*.

H

(7) *Stapilton* v. *Stapilton* (1739), 1 Atk. 2; 26 E.R. 1, L.C.; 24 Digest (Repl.) 1122, *49*.

(8) *Curwyn* v. *Milner* (1731), 3 P. Wms. 292, n.; 24 E.R. 1071, L.C.; 25 Digest (Repl.) 296, *1013*.

(9) *Shirley* v. *Martin* (1779), 4 Bro. Parl. Cas. 145, n.; 3 P. Wms. 74, n.; 12 Digest (Repl.) 279, *2142*.

I

(10) *Hatch* v. *Hatch* (1804), ante p. 74; 9 Ves. 292; 1 Smith, K.B. 226; 32 E.R. 615, L.C.; 25 Digest (Repl.) 302, *1095*.

(11) *Lord St. John* v. *Lady St. John* (1803), 11 Ves. 526; 32 E.R. 1192, L.C.; 27 Digest (Repl.) 215, *1718*.

Also referred to in argument:

Morse v. *Royal* (1806), 12 Ves. 355; 33 E.R. 134, L.C.; 12 Digest (Repl.) 125, 778.

Baugh v. *Price* (1752), 1 Wils. 320; 95 E.R. 640; 25 Digest (Repl.) 300, *1076*.

Bill to set aside a lease of land and a compromise of disputes.

Thomas Roche, the father of the plaintiff, being entitled to an estate tail in remainder in certain lands expectant on the death of his father, by indenture bearing date Nov. 6, 1770, in consideration of £100, granted in fee-farm to the defendant Denis O'Brien and his heirs for ever those lands, containing 380 acres, at the annual rent of £260 to commence on the death of his father, and covenanted to levy a fine and suffer a recovery to the uses of the deed and that the defendant should be at liberty to surrender the lands on any gale day, giving six months' previous notice. On this deed, which was executed by both parties, was an endorsement signed Thomas Roche and not attested, whereby it was mutually covenanted between the same parties that the lands should be surveyed, and, if they contained more than 380 acres, the defendant should pay an additional yearly rent of 13s. 8d. per acre for the surplus. If it was found that the land was of a lesser quantity, the rent was to abate in the same proportion.

It appeared that Thomas Roche was of a weak and indolent disposition, much addicted to drinking and in great distress when he executed the deed. He lived on bad terms with his father, and no intercourse existed between them. With the nature and value of the lands demised he was entirely unacquainted, and he resided at a considerable distance from them. The defendant O'Brien was a practising attorney; he had married a relation of Thomas Roche, had acquired a considerable influence over him, and stated in his answer that previous to making a proposal for the lands he had inquired into their value and circumstances. In 1776 Thomas Roche granted an annuity of £60, charged on those lands, to one Johnson. In 1777 he levied a fine in confirmation of the fee-farm grant. In 1783 O'Brien entered into possession of the lands on the death of the father of Thomas Roche who, in the same year, suffered a recovery in pursuance of the covenant in the deed of 1770. The distress and embarrassment of Thomas Roche increasing, he was in 1785 arrested for debt, and during his confinement, which continued until his death, he was supported by small sums of money advanced by O'Brien who about this period settled an account with him of several sums advanced by him since the year 1770 and of the rents due since the death of his father, a balance appearing in favour of O'Brien.

On Oct. 16, 1786, Thomas Roche died, leaving a widow; the plaintiff, his eldest son and heir-at-law; and Alexander Roche his second son, his only children. By his will bearing date April 17, 1786, he devised to the defendant and his heirs for ever all his estate in the above-mentioned lands subject to annuities to the defendant during the lease of £67, payable prior to every annuity charged on the lands; and to the plaintiff and his brother two annuities of twenty guineas each during their lives, on the death of each their respective annuities to sink into the inheritance. The testator gave a legacy of £50 to I. Byrne, to be paid so soon as the defendant should be repaid all sums due him at the death of the testator, and all the rest of his real and personal estates, he devised and bequeathed to the defendant whom with R. Weir he made executors. He appointed his wife guardian of his sons, but made no provision for her.

Immediately after the death of Thomas Roche a suit was instituted in the Prerogative Court by the widow against the executors, impeaching the will. In December, 1789, it was set aside, and administration granted to the widow who in the same year filed a bill on behalf of the plaintiff, then a minor, to set aside the fee-farm grant and the will of Thomas Roche so far as it related to the real estates. The defendant answered the bill, and in 1792 proposed to the plaintiff, who had then just attained the age of twenty-one, to compromise the suit. He communicated the proposal to his solicitors, who, in their depositions, stated that they advised the plaintiff to accede to the proposal to get rid of vexatious and expensive suits with the defendant and to get something with which to support himself; that the plaintiff was induced to enter into the compromise by the distressed situation of his affairs and poverty; and that they had no doubt of the justness of the plaintiff's

case, but they were induced to give their advice from their knowledge that the plaintiff was unable to bear the enormous expense of prosecuting the suits; and that the defendant O'Brien would defend the suits in a most vexatious and litigious manner.

A deed was, accordingly, prepared by the plaintiff's solicitors, which, on July 18, 1792, was executed by the plaintiff, his mother, and the defendant. It recited the fee-farm grant and the endorsement on it; that on the death of Thomas Roche, the defendant set up a will alleged to have been made by Roche which had been set aside; the bill filed to set aside the fee-farm grant, and the will; that the defendant had proposed, on condition of the plaintiff agreeing to stop all further proceedings in the suit, to relinquish the will, and all benefit and title under it and to pay £200, the plaintiff agreeing to release all arrears of rent due by the defendant to May 1, and to confirm the fee-farm grant, the defendant releasing the plaintiff from all claims. The indenture then witnessed that for barring the title and interest of the defendant under the pretended will and for the consideration aforesaid the defendant released all claim to the real and personal estates of Thomas Roche, except the fee-farm grant, and the plaintiff, in consideration of £200, released all arrears of rent up to May 1. The defendant executed his bond for £200, the consideration in the deed, and it appeared that the plaintiff was obliged to have him arrested before he could obtain payment. It also appeared that from the death of Thomas Roche no rent had been paid by the defendant.

In 1791 Johnson, to whom Thomas Roche had, in 1776, granted the annuity, not being able to obtain payment from the defendant distrained the lands for the arrears. The defendant replevied in the name of the tenant, demurred to the avowry, and afterwards suffered judgment to be entered for the amount of the arrears. To those proceedings the plaintiff was not a party. In 1793 Johnson filed a bill against the plaintiff for the arrears of the annuity. The plaintiff in his answer contested the validity of the grant as being made without consideration, and in 1794 he filed a cross-bill against Johnson and the defendant, O'Brien, to set it aside. In 1799 the annuity was decreed void, and the defendant O'Brien was restrained from setting up the judgment in the replevin cause, or any bar subsequent to 1794 against the plaintiff who was decreed entitled to costs.

The defendant continuing to withhold the rents reserved on the fee-farm grant, the plaintiff in April, 1799, brought an action of covenant for the arrears since 1792, amounting to £1,690. To this defendant pleaded payment, and at the trial claimed to be entitled to credits prior to the deed of 1792, and insisted that, as the lands demised contained but 257 acres, the rent should be reduced to £175 4s. 5d. Those points being ruled against him, he took a bill of exceptions to the opinion of the judge. The bill of exceptions was afterwards argued in the Court of Common Pleas, and overruled. The defendant then lodged a writ of error, and filed a bill in the Court of Exchequer for an injunction and to be allowed the credits he was refused at law. The plaintiff answered, the defendant took exceptions to his answer, and obtained an injunction for not answering the exceptions. On Oct. 5, 1801, articles were executed by the plaintiff and the defendant reciting that O'Brien was tenant to the plaintiff at the rent of £175 per annum or thereabouts; that several suits were then depending between them concerning the arrears of rent claimed by the plaintiff and several credits claimed by the defendant, among others for payments made by him in discharge of the annuity claimed by Johnson which had been charged on the lands, and for expenses claimed by the defendant in defending the lands against the annuity. To put an end to the suits it was agreed that in lieu and satisfaction of credits claimed by the defendant the plaintiff would reduce the rent £40 per annum, that the defendant would pay or secure to the plaintiff £300 in discharge of all arrears of rent, and that the parties should forthwith dismiss all bills and suits depending between them without costs, and release each other from all debts and demands whatever. Those articles were witnessed by a clerk of the defendant. By a deed bearing date Jan. 11, 1802, executed by the same

parties, and attested by two of the defendant's clerks, those articles were carried into execution.

The present bill was filed in June, 1804, to set aside the fee-farm grant of 1770, the deed of compromise in 1792, and the subsequent deed and articles, as fraudulent.

Dec. 5, 1808. **LORD MANNERS, L.C.**— This is a bill brought by the plaintiff, impeaching several deeds executed by him and his father to the defendant. The first, and, indeed, the most material deed, is one bearing date Nov. 6, 1770, whereby Thomas Roche granted in fee-farm to the defendant, lands to which, on the death of his father, he would be entitled, containing 380 acres, at a rent of £260 per annum. There is endorsed on the indenture a memorandum that if the lands should fall short of the quantity stated, the rent should be reduced at the rate of 13s. 8d. for every acre deficient. I must here remark that a clause of this description might prove most injurious to a person in the situation of Thomas Roche; he had never been in possession, and was only entitled to an estate in remainder expectant on the death of his father.

If this were a recent transaction, no doubt could be entertained of the plaintiff's title to relief. At the time of the fee-farm grant, Roche was tenant in tail in remainder of this estate. He appears to have been much embarrassed in his circumstances, and in the situation of an expectant heir in great distress he enters into a dealing for the sale of his inheritance with the defendant, an experienced attorney, who states that at this period he knew the value and extent of the lands. In such a transaction the court does not look very minutely into the circumstances, but upon grounds of public policy will set aside the conveyance. Here, however, if it were necessary to examine all the circumstances of the dealing in order to impeach and invalidate the deed, there would be very sufficient proof. The party selling was ignorant of the extent and value of his property, the purchaser knew both; there was no valuation, no survey, no one to assist this ignorant and distressed man, but he was to sell at a fixed acreable rent to commence at a future and uncertain period. It is a gross fraud upon the face of it.

It is insisted on the part of the defendant that this deed has been so repeatedly confirmed by the acts of Thomas Roche, the father, and also by the plaintiff himself that, however impeachable in its origin the transaction might be, the plaintiff cannot now be relieved against it, or, if that defence should not avail, he insists upon length of time as a bar. As to any confirmation of this sale by Thomas, the father, the acts relied upon are the fine and recovery, suffered by him in pursuance of the covenant in the deed of 1770. The fine was levied in the lifetime of the tenant for life, and the recovery was merely a part of the original transaction, both done in ignorance of the value of his property, in ignorance of the original transaction being impeachable, in the same distress, and under the same influence, an influence which continued to the day of his death and is most strikingly manifested by that unnatural will disposing of his property from his children who could have done nothing to offend him, and in favour of the defendant who had done everything to defraud him.

It is laid down in *Cann* v. *Cann* (1) and *Cole* v. *Gibson* (2), that in order to constitute a confirmation the party confirming must be fully apprised of his rights, and in *Crowe* v. *Ballard* (3), where a young man in the lifetime of his father sold a legacy at an under-value, and the person to whom he sold it afterwards obtained a bond from him which was contended to be a confirmation, LORD THURLOW observes (3 Bro. C.C. at p. 120):

"If a gentleman of rank, fortune, and honour, under age, and in distress or otherwise, gives a bond, and afterwards conceive that he has made a hard bargain, and knowing that the bond is bad, will give a new bond, that will maintain the possession of the right of the holder of the bond, and this act shall

be said to be a confirmation; but not any act done under the influence of the former transaction, and the opinion that the bond is good."

How very forcibly the latter part, which defines what is not a confirmation, applies to the acts of Thomas Roche. I am, therefore, of opinion that nothing done by him up to the period of his death in 1786 can be considered as confirming the deed of 1770. At this time, the plaintiff was a minor, and no act of his could be binding until he attained his age of twenty-one, which was in 1792.

Let us consider the situation the plaintiff was in at that period. A sentence had been pronounced in the ecclesiastical court setting aside the will of his father, and there was in this court a bill impeaching the deed of 1770 and also the will. Thus situated, the plaintiff is induced to execute the deed of 1792, which on the authority of *Cann* v. *Cann* (1), is contended to be a confirmation as it is there laid down that where two parties are contending in this court, and one releases his pretensions to the other there can be no ground to set it aside because the party releasing may have a right. But a deed of confirmation, or of compromise, must be entirely free from fraud, for one fraudulent deed cannot set up another. This deed of 1792 did not contain a true statement of all the facts, and, therefore, can be no bar to the relief sought, as the plaintiff at the time was not conusant of his rights. If a party deliberately confirm all his former acts, being fully apprised of his rights, equity will not relieve him. In *Cann* v. *Cann* (1), it is stated (1 P. Wms. at p. 727):

"If the party releasing, is ignorant of his right, or if his right is concealed from him by the person to whom the release is made,"

it cannot be binding, and cases of confirmation or release stand upon the same principle. In *Cole* v. *Gibbons* (4), there was nothing concealed from the party, and the release was his free act. In *Earl of Chesterfield* v. *Janssen* (5), BURNET, J., speaking of a confirmation, says (1 Atk. at p. 344):

"I know of no case, where this court, though they might have relieved in the original contract, have relieved against the confirmation of it, where there is no pretence of fraud or imposition in obtaining it; but if there was anything of that complexion in the confirmation, there indeed it is considered only as a continuation of the first fraud."

This deed of 1792 was made between the plaintiff and O'Brien, it recites the deed of 1770 and the clause for the survey. Since 1783 O'Brien had been in possession, and by his answer he states that he had informed himself of the value and nature of the lands. The plaintiff did not know the value of the lands or that there was a deficiency of one-third of the quantity stated in the lease, or that the rent was to be reduced, nor can it be imagined that anyone who advised in the transaction entertained an idea that this young man, then just of age, in great distress, who had never received any rent from O'Brien, was parting with his rights for a rent that was to be reduced to £175 per annum.

The plaintiff, afterwards bringing the action for the full amount of the rent, proves that he had no conception that it was to be so reduced and was in complete ignorance. That circumstance distinguishes this from all the cases referred to. Until 1799, when O'Brien for the first time had those lands surveyed, and the deficiency ascertained, the plaintiff was under the impression that he was entitled to the reserved rent of £260. Can it be imagined that he would have acceded to the terms proposed if he had been aware of that fact? Certainly he would not. I am, therefore, of opinion that down to this period, no act done by the plaintiff was binding on him.

Then come the articles in 1801. It appears that there was a constant scene of litigation between those parties, and this is a settlement of accounts. Next is the deed in January, 1802, but both of these transactions are on the face of them so unfair and unjust that they cannot bind the rights of the parties. The plaintiff was in the greatest distress. Indeed the payment to Johnson, which is made the consideration for reducing the rent to £40 per annum, is enough to set aside those

deeds. I, therefore, notwithstanding those deeds, consider the plaintiff now before the court, as if none of them had ever been executed, impeaching the deed of 1770, thirty-four years after it was executed.

Can length of time be in this case a bar? I admit that at first it may appear alarming that a transaction shall after so many years be investigated as being an attempt to do private justice at the expense of public policy, and if it had not been satisfactorily proved that in this case fraud has been heaped upon fraud and that the plaintiff's father had continued under the influence and in the possession of the defendant till the day of his death; if it had not been proved satisfactorily that the plaintiff, in the same distress as his father and ignorant of his rights, had been also grossly imposed upon, I certainly could not grant relief. But I am fully convinced that the deed of 1770 is bad, that the acts relied upon are not acts of confirmation; that the length of time has been accounted for; that the greatest portion of it elapsed while the plaintiff's father was in the situation of an expectant heir, and that until his death he was in the power and under the control of the defendant. I am, therefore, of opinion that the plaintiff has now a right to impeach the deed of 1770; and that, without impugning any principle of public policy, I ought to decree this deed to be set aside.

A petition was presented by the defendant stating that since the decree was pronounced it had been discovered from an answer put in before the execution of the deed of 1792 by the plaintiff to a cross-bill filed by O'Brien that the plaintiff was fully apprised that the lands demised by the deed of 1770 contained but 257 acres, and that the rent was to be reduced accordingly, upon which the cause now came on to be re-heard.

Plunket and *Edward Pennefather* for the plaintiff.

Saurin, *Bushe*, *Burne* and *Driscoll* for the defendant.

July 19, 1810. **LORD MANNERS, L.C.** This cause has been re-heard on the validity of the deed of 1792. It was on the former hearing assumed that the plaintiff, when he executed this deed, was ignorant that a reduction was to take place in the rent from £260 to £175. This circumstance considerably influenced the opinion then delivered by the court, it having been afterwards discovered that the plaintiff at the time of the execution of that deed was apprised that a reduction would take place. On that ground I thought it right that the defendant should be at liberty to lay his case before the court again that I might have an opportunity of reconsidering my former opinion.

The question is whether the deed of 1792 was a confirmation of the deed of 1770, or rather a compromise of the rights of parties then in litigation and, therefore, a bar to the relief sought by the present bill. This is the principal question for I do not find it contended that the decree is in other respects erroneous, or that either from the acquiescence of Thomas Roche or from the length of time that elapsed, the deed of 1770 was binding. I will, therefore, assume that on the death of Thomas Roche in 1786, the plaintiff, his son, was entitled to the relief he now seeks. He was then a minor, and in 1792 he attained his full age. O'Brien was then in possession of the lands under the fee-farm grant and claimed to be entitled to an annuity under the will, which as to the personal estate, had been set aside in the ecclesiastical court, and in this court a suit had been instituted to set aside this will and the deed of 1770. This was the situation of the parties when the deed of 1792 was executed. By it O'Brien agreed to give up all his rights under the will, and the plaintiff, in consideration of this, agreed to confirm the deed of 1770.

First, then I am to consider this as a confirmation, which it is contended to be by counsel for the defendant. *Cann* v. *Cann* (1), *Cole* v. *Gibbons* (4), and *Crowe* v. *Ballard* (3), have been relied on to show that it is a confirmation binding on the plaintiff and that I am not at liberty to set it aside on account of inadequacy. It is very true that if a party sui juris, fully apprised of all the circumstances connected with the execution of a former deed, of his own free will chooses to confirm it, the

court is not at liberty to question the sufficiency of the consideration. In *Crowe* v. *Ballard* (3), no new contract was entered into; what was there contended to be a confirmation was a continuation of the original transaction. In this case a new contract is entered into with a party who was in great distress and is a compromise of his rights. It is contended by counsel for the defendant that a deed entered into by parties apprised of their rights in order to put an end to a suit cannot be set aside although the consideration be inadequate, and in support of this principle he relies on *Stephens* v. *Lord Bateman* (6).

That was the case of two co-heiresses, one of whom (Mrs. Stephens) had, while under age, made an improvident match. The moiety she was entitled to was settled on herself, her husband, and their issue in strict settlement. The other sister, conceiving the moiety was forfeited by the marriage, brought an ejectment to recover it, and the question was whether a forfeiture had been incurred. It certainly was a very serious question. Thus situated Mrs. Stephens and her husband, under the advice and opinion of counsel, enter into a deed, compromising their rights for a very inadequate consideration from which by the bill they sought to be relieved. Lord Thurlow stated (1 Bro. C.C. at p. 26):

> "The question is whether there be sufficient ground to set aside the conveyance. It is manifest it was a hard bargain, but . . . the cases are express that the court will not set aside the conveyance on that ground only . . . There is no doubt the bargain is unequal; but the whole is reduced to this, that the parties being apprised of what they were about, and having advised with counsel, have made a bargain which now appears unequal."

The bill was dismissed. There, doubtful rights constituted the subject of compromise, and I admit that, so long as a right is in doubt, inequality in a compromise cannot be considered.

In *Stapilton* v. *Stapilton* (7), Lord Hardwicke says it is a sufficient foundation for an agreement, but what doubtful right was the subject of compromise in this case? Those persons under whose advice the plaintiff acted have been examined, and, indeed, if this transaction had not taken place in the presence of professional men, it could not have admitted of an argument, but do these attorneys state that doubtful rights were the subject of compromise? No. On the contrary they state that no doubt whatsoever existed, but that from the distressed and embarrassed situation of the plaintiff they were induced to recommend to him to accept the terms. This I think is a complete answer to all that has been urged on the ground of the transaction being a compromise.

I am then told that the plaintiff has by subsequent acts affirmed this deed, and has thereby precluded himself from relief. The first act relied on is in 1799 when the plaintiff brought an action in the Court of Common Pleas against O'Brien for the arrears of rent reserved on the fee-farm grant. Here we find this unfortunate young man, whom distress and poverty had in 1792 compelled to accept any terms O'Brien thought fit to offer, now forced to bring an action for the rent in arrear from that period. I am sure the acts of O'Brien can never be relied on as affirming the contract, or in pursuance of the terms of it, for to this action he takes defence denying the right of the plaintiff to call on him for rent, and it appears that at this time the defendant held the same oppressive hand over him as in 1792. The subsequent deeds are not much relied on, and indeed I think with much propriety. This is not, then, a case where the acts of the parties can be contended to be in affirmance of the compromise. If O'Brien had uniformly paid and the plaintiff regularly received the rent, a considerable doubt might have arisen, for there would have been an acquiescence which would have had considerable weight. But here the plaintiff is resisted in his attempt to derive any profit from the estate so obtained from him. Admitting that mere inequality in a compromise is not a sufficient ground to set it aside, that principle cannot be contended to apply to this case where we find O'Brien in possession of this property, having full command over the plaintiff by withholding

A the rents, and able to dictate any terms he pleased, to which, it is proved, the plaintiff by his distress was compelled to accede, for his solicitors state that that, and that only, induced them to recommend to him to accept the terms, and we find O'Brien afterwards contesting his rights to those very rents and refusing to perform his part of the deed of compromise.

B The observation of BURNET, J., in *Earl of Chesterfield* v. *Janssen* (5) is very applicable to this case. There Mr. Spencer entered into no new agreement, but, being in possession of the estate and sui juris, confirmed the original bond, "and thus made himself a judge by voluntarily giving a new security." He then adds (2 Ves. Sen. at p. 146):

> "Supposing the court would relieve against this in its original; whether it will, when altered by the party in the strongest manner, not unapprised, and with his eyes open. There is no case of a contract so confirmed, which was not illegal (but such as the court would have relieved against in its original existence), where the court has relieved against the confirmation; unless obtained by fraud or oppression, and then it has been considered as a continuation of the first oppression."

C

D In the same case LORD HARDWICKE uses nearly the same expression. He says (ibid. at p. 159):

> "The material inquiry is whether this was done after full information, freely without compulsion. . . ."

He, and every one of the judges that assisted him put it on this, that Mr. Spencer E was out of embarrassment, sui juris, and chose to confirm it.

There is another case, *Curwyn* v. *Milner* (8), before LORD KING, which comes nearer to this than any I have met. There an expectant heir borrowed money on condition to pay double the amount if he survived his father. He did survive, and paid the money, and he was relieved, though after he had paid the money, it being for fear of an execution. What were the apprehensions of the plaintiff F on entering into this agreement? That the suit could not be prosecuted, the bill must be dismissed with costs, and that he would be taken in execution. This was what induced the solicitors to advise it, and, indeed, considering the desperate state he was in, I think they were right on that account in advising him to accede to the compromise. In *Curwyn* v. *Milner* (8), the plaintiff had actually paid the money, and the court made the defendant refund it. Surely, that was a stronger G measure than to set aside an agreement compelled by distress, the terms of which were never observed by O'Brien.

I have brought down a note of a case taken by me before I was called to the Bar, decided in the Court of Exchequer, in 1779, *Shirley* v. *Martin and Littlehales* (9).*

H "Lady Anderson, a widow, was left a considerable property by her husband, and had employed Martin, an attorney, to manage her affairs. Being anxious to change her situation, she informed him her intention was to marry. This he communicated to his friend Littlehales, also an attorney, who had a Mr. Shirley for his client, a mere fortune-hunter. The two attorneys agreed that Shirley should marry Lady Anderson, which he did, and for this they got the bonds of Shirley for £5,000. These were from time to time renewed, I and fresh securities were given in lieu of the former by Shirley, who at last filed a bill to restrain proceedings on the bonds, and to be relieved against them. SKINNER, C.B.: 'The original transaction was a marriage brokage bond, and no acts of the parties can make that valid in equity. It is, however,

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* There is a short statement of this case in MR. COX'S NOTE, 3 P. Wms. 74. In *Hatch* v. *Hatch* (10) (9 Ves. at p. 299) and *Lord St. John* v. *Lady St. John* (11) (11 Ves. at p. 537), LORD ELDON appears to refer to it by the title of *Shirley* v. *Ferrers*, as deciding, that on grounds of public policy, relief will be granted to a particeps criminis.

unnecessary to determine on this ground, for here the party throughout was not sui juris, every step was a continuation of undue practice, and improper advantage taken of necessity, by which Mr. Shirley was compelled to enter into terms which he would not have listened to if he could otherwise have extricated himself from the difficulties in which he was involved.' "

Here, when the solicitors advised the compromise, it was not upon a fair estimate of the rights of their client, but it was on the ground of his necessities; not upon any doubt as to his title, but his inability to assert his rights. I am, therefore, of opinion, that the subsequent acts, being a continuation of the oppression originally practised, cannot amount to a confirmation or a compromise. I do not dispute the principles established by the cases relied on, nor do I think I trench on the authority of them by deciding that nothing done by the plaintiff amounts to a confirmation of the original transaction. Considering, therefore, this case on the different grounds that have been so ably urged in argument, I am of opinion, that, taking it either as a confirmation or a compromise, the plaintiff is entitled to relief.

Decree affirmed.

HAVELOCK *v.* GEDDES

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Le Blanc and Bayley, JJ.), February 9, 1809]

[Reported 10 East, 555; 103 E.R. 886]

Shipping—Freight—Recovery—Condition precedent—Fulfilment of covenant by owner to make ship tight, staunch and strong—Liability for freight during repairs—Discharge of ship from charterers' employment—Loss by fire.

By a charterparty the owner of a ship let her to freighters for twelve calendar months certain and for such longer period as the freighters should retain her. The owner covenanted that the ship would, at his own expense, be forthwith made tight, staunch and strong, and well and sufficiently equipped and manned for a voyage of twelve months, and that she would be so kept during the continuance of the charterparty. The freighters covenanted to pay the owner freight in certain proportions at the end of monthly periods and to pay an allowance for additional men, the residue of which, after part payment, was not to be paid until the ship's discharge or her return from her voyage. The freighters took the ship, employed her for several months, and then alleged that she had not been made tight, staunch, and strong so that in consequence it became necessary to unload and repair her which took some six months. Afterwards the ship was taken on a voyage to St. Domingo with twenty additional men where, after the expiration of ten months but before the expiration of the twelve months, she was wholly lost due to fire. On a claim by the owner for payment of freight at the end of ten months, and for payment for the additional men, the freighters contended that the ship had not been "forthwith" made tight, staunch and strong so that they were deprived of her use during the six months when she was being repaired, and that they were not liable to pay the residue of the allowance for the additional men because the ship was lost and burnt before her return.

Held: (i) the fulfilment of the covenant by the owner forthwith to make the ship tight, staunch and strong was not a condition precedent to the recovery of freight when the freighters had taken her into their service and used her for a certain period, but merely gave the freighters a right to such damages as they could prove they had sustained while the ship was under repair; (ii) the

freight ran during the time of repair of the ship, and, accordingly, the freighters were not entitled to make any deduction on that account; (iii) the residue of the allowance for the additional men must be paid by the freighters because the loss of the ship by fire at St. Domingo was a discharge of her from the freighters' employment as if by the act of the freighters.

Notes. Distinguished: *Crozier* v. *Smith* (1840), 1 Man. & G. 407. Considered: *Tully* v. *Howling* (1877), 2 Q.B.D. 182; *Inman Steamship Co.* v. *Bischoff*, [1881–5] All E.R. Rep. 440. Referred to: *Fothergill* v. *Walton* (1818), 2 Moore, C.P. 630; *Clipsham* v. *Vertue* (1843), 5 Q.B. 265; *Thompson* v. *Gillesy* (1855), 5 E. & B. 209; *McAndrew* v. *Chapple* (1866), 14 W.R. 891; *Stanton* v. *Richardson*, *Richardson* v. *Stanton* (1872), L.R. 7 C.P. 421; *Jackson* v. *Union Marine Insurance Co.* (1873), L.R. 8 C.P. 572; *Kopitoff* v. *Wilson* [1874–80] All E.R. Rep. 609; *The Europa*, [1904–7] All E.R. Rep. 394; *Sea and Land Securities, Ltd.* v. *Dickinson & Co.*, [1942] 1 All E.R. 88; *Universal Cargo Carriers Corpn.* v. *Citati*, [1957] 2 All E.R. 70; *Hong Kong Fir Shipping Co., Ltd.* v. *Kawasaki Kisen Kaisha, Ltd.*, [1962] 1 All E.R. 474.

As to construction of charterparties, see 35 HALSBURY'S LAWS (3rd Edn.) 255 et seq.; and for cases see 41 DIGEST (Repl.) 156 et seq.

Cases referred to:

(1) *Porter* v. *Shephard* (1796), 6 Term Rep. 665; 101 E.R. 761; 12 Digest (Repl.) 484, *3605*.

(2) *Glazebrook* v. *Woodrow* (1799), 8 Term Rep. 366; 101 E.R. 1436; 12 Digest (Repl.) 472, *3521*.

(3) *Constable* v. *Cloberie* (1625), Palm. 397; Poph. 161; Lat. 49; 81 E.R. 1141; sub nom. *Conustable* v. *Clowbury*, Noy, 75; 41 Digest (Repl.) 157, *37*.

(4) *Bornmann* v. *Tooke* (1808), 1 Camp. 377; 170 E.R. 991, N.P.; 41 Digest (Repl.) 192, *277*.

(5) *Boone* v. *Eyre* (1779), 1 Hy. Bl. 273, n.; 1 Wms. Saund. 320 c; 2 Wm. Bl. 1312; 126 E.R. 160; 12 Digest (Repl.) 472, *3526*.

Demurrer to an action of covenant on a charterparty of affreightment dated Sept. 5, 1806.

Under the charterparty, the plaintiff, owner of the ship *Lord Duncan*, let her to freight to the defendants for twelve calendar months certain from Sept. 24, 1806, and from thence for such longer period, if any, as the defendants should think fit to keep and retain the same, on the conditions and covenants thereinafter contained. The plaintiff covenanted that the ship should be navigated and furnished with fifty persons, and such further number not exceeding 100 as should be required by the defendants; the owner being reimbursed by the freighters for such additional number according to the average rate of wages and provisions expended on the whole; and that the ship, during the time she should be navigated and employed under the charterparty, should be under the entire control of the defendants so far as related to all orders for sailing, destination and delay. The defendants covenanted to pay to the owner for the hire and service of the ship for the term of twelve calendar months and such longer period as they should keep the same, the freight and rate following, viz., 24s. per calendar month per ton, being £1,119 12s. per month, commencing from Sept. 24, 1806, and ending when the ship should be returned to the river Thames and there by the freighters declared to be discharged; it being understood that the freighters should not be at liberty to discharge the ship abroad, although she might be abroad at the expiration of the twelve calendar months or at any other place, but within the port of London; and that the freight should be paid in the proportions and at the periods following, viz., two months' freight at the execution of the charterparty either in cash or by accepted bills of the freighters at three months from Sept. 24, two months more at the end of six calendar months from Sept. 24, two months more at the end of ten calendar months, two months more at the end of fourteen calendar months

should the ship be so long employed, and in like manner two months more at the end of every succeeding two calendar months until the ship should be discharged, and immediately on such discharge the balance to be paid by the freighters in cash, or their acceptances at three months. They further covenanted that the freighters should pay all port charges, tonnage duties, dock dues and all other duties and dues, except lights and pilotage which were to be paid by the owner; that they would reimburse to the owner the charges for additional men beyond fifty as before mentioned; two calendar months allowance for such additional men to be added to the first payment of freight, but the residue of such allowance not to be paid until the ship's discharge or return from her first intended voyage, and in like manner for any other foreign voyage or voyages.

By virtue of the charterparty the defendants, on Sept. 24, took the ship into their service and kept and retained her therein until she was afterwards and while she was so in their service and after the expiration of ten, but before the expiration of twelve months from Sept. 24, viz., on Aug. 22, 1807, at St. Domingo, without any default of the owner, master or mariners, consumed by fire and wholly lost, and was thereby prevented from returning to London. The plaintiff, after averring that the ship during all the time she was so kept and detained in the service of the defendants was navigated and furnished with fifty persons and such further number not exceeding 100 as was required by the defendants, and was during all that time under the entire control of the defendants as to all orders for sailing, destination and delay, assigned three breaches: (i) that though the defendants paid the plaintiff the two months' freight payable at the execution of the charterparty and also the two months' freight at the end of the first six calendar months, yet they did not pay the two months' freight at the end of the ten calendar months; (ii) that the defendants had not paid to the plaintiff any subsequent freight; (iii) that although on Oct. 24, 1806, the defendants required the plaintiff to put on board, and he did put on board, twenty additional men beyond the fifty, who all sailed in the ship on a foreign voyage to St. Domingo and continued on board from thence until the loss of the ship, and although according to the average rate of wages and provisions expended on the whole the defendants became liable to pay to the plaintiff £8 per month for every such additional man, yet the defendants had not reimbursed the plaintiff for any of them.

The defendants craved oyer of the charterparty, by which it appeared further that the plaintiff covenanted that the ship, at his expense, should be forthwith made tight and strong and well and sufficiently equipped, manned and fitted, etc., for a voyage or voyages of twelve calendar months to foreign parts; and should during the continuance of the charterparty be kept tight and strong, and well and sufficiently equipped, etc., and victualled, concluding with a mutual general covenant for performance; and particularly, the plaintiff binding to the defendants the ship, freight, tackle, etc. (the perils and dangers of the seas, rivers, etc., all inevitable accidents whatever, and capture by enemies, and the detention and restraint of rulers, etc., being excepted), and the defendants binding to the plaintiff the goods put on board the ship. The defendants pleaded, inter alia, (i) that the ship was not at the expense of the plaintiff forthwith or within a reasonable time after the charterparty made tight and strong, and well and sufficiently equipped, etc., for a voyage or voyages of twelve calendar months to foreign parts, whereby she was delayed and hindered from proceeding on a voyage from London to St. Domingo and was detained on her voyage at Portsmouth for an unreasonable length of time, viz., for four months, during all which time the defendants lost the use and benefit of the ship, and were put to great expense in repairing her and making her tight and strong, and fitting her for such voyage; and also that thereby certain goods of the defendants on board the ship were wetted and damaged; wherefore they prayed judgment of the plaintiff's action. (ii) as to the first breach, that during the twelve calendar months therein mentioned, viz., on Nov. 1, 1806, certain goods of the defendants were shipped on board the vessel to be carried

from London to St. Domingo, and that at the time of shipping them the vessel was not tight and strong, and well and sufficiently equipped, etc., but was decayed, leaky, defectively provided and in an unseaworthy state for performing the voyage, in consequence whereof it became necessary to unload and repair her, and she was afterwards unloaded and repaired before she could proceed on and perform her voyage; and by means of the premises the ship was unemployed by and wholly unservicable to the defendants for a great part of the six calendar months from Sept. 24, 1806, viz., for four calendar months part thereof. The defendants then averred that they paid to the plaintiff for the hire and service of the ship for the residue of the six calendar months the freight in the charterparty mentioned. (iii) a plea the same in substance as the last, omitting only to state that the defendants paid for all the time the ship was not wholly unserviceable to them or unemployed and averred that the ship was not in the actual service and employ of the defendants or retained in such service under the charterparty for ten calendar months in the whole from Sept. 24, 1806, until she was consumed by fire, which fire happened without any default in the defendants. (iv) as to the second breach, that the ship after the charterparty was made was not employed by them or in their service until the end of fourteen calendar months from Sept. 24, 1806; but while she continued in their service and employ and before the end of fourteen calendar months, etc., viz., on Aug. 22, 1807, in parts beyond the seas near St. Domingo, the ship, without any default of the defendants, was consumed by fire and wholly lost. (v) as to the last breach, that the defendants reimbursed to the plaintiff two calendar months' allowance for the additional men beyond fifty put on board, etc.; and further, that, after making the charterparty, the ship sailed on a voyage from London towards St. Domingo, being her first intended voyage outwards under the charterparty with a cargo of goods of the defendants' on board, and that afterwards, on Aug. 22, 1807, in parts beyond the seas near St. Domingo, the ship was, without default of the defendants, burnt and wholly lost and never did return from St. Domingo.

The plaintiff in his replication demurred to pleas (i), (ii) and (iii), and assigned for special causes of demurrer that the defendants in each of those pleas had attempted to put in issue immaterial facts and had insisted on divers covenants of the plaintiff as conditions precedent to the performance of their own covenant; whereas they were separate and independent covenants, and the breaches of covenants alleged against the plaintiff in those pleas were no answer to or justification of the breaches of covenant of which the plaintiff complained. To plea (iv), the plaintiff replied that the defendants, after making the charterparty, viz., on Nov. 18, 1806, dispatched the ship with a cargo on a voyage to the island of St. Domingo, and that the ship afterwards and after the expiration of seven calendar months from Sept. 24, 1806, and before she was so burnt and wholly lost, viz., on May 4, 1807, arrived at St. Domingo, and delivered her cargo, and completed the voyage. As to so much of plea (v) as related to the two calendar months' allowance for the additional men, the plaintiff took issue on the reimbursement of such allowance; and as to the residue of the plea he replied that, before the ship was consumed by fire, to wit, on Aug. 20, 1807, the ship had arrived at St. Domingo and completed the intended voyage. The defendants joined in demurrer on pleas (i), (ii) and (iii), and demurred generally to the replications to plea (iv) and the latter part of plea (v), on which there was also joinder in demurrer.

Gaselee for the plaintiff.

Marryat for the defendants.

Cur. adv. vult.

LORD ELLENBOROUGH, C.J., delivered the following judgment of the court, in which he stated the declaration, and continued: The defendants craved oyer of the charterparty, by which it appeared that the plaintiff covenanted that the ship, at his expense, should forthwith be made tight, staunch and strong, and well

and sufficiently equipped, manned, etc., for a voyage or voyages of twelve calendar months and should, during the continuance of the charterparty, be kept tight, staunch, etc., and well and sufficiently equipped, manned, etc., and it is on this covenant that the defendants have grounded several of their pleas. The first plea on which any question arises states that the ship was not forthwith after making the charterparty made tight, staunch, etc., and well and sufficiently equipped for a voyage or voyages of twelve calendar months; per quod she was hindered from proceeding on a certain voyage from London to St. Domingo and detained an unreasonable length of time, during all which time the defendants were deprived of the use of the ship and were put to great expense in making her tight, staunch, etc., and fitting her for her voyage, and divers goods of the defendants which were put on board her were wetted and damaged.

To this plea, which is pleaded to the whole of the demand, the plaintiff has demurred, and the question on it is whether the defendants are entitled to insist that the forthwith making the ship tight, staunch, etc., was a condition precedent. The defendants did not repudiate the ship because she was not immediately made tight, staunch, etc., but took her into their service and employed her; and, after having navigated her for several months, they say that, because this was a condition precedent and was not performed, they are not liable to pay anything. They do not pretend that the non-performance has damnified them to the extent of the payment they wish to evade; and to be sure, if this were a condition precedent, the neglect of putting in a single nail for a single moment after the ship ought to have been made tight, staunch, etc., would be a breach of the condition and a defence to the whole of the plaintiff's demand. We are clear, however, that the defendants, who took the ship into their service and employed her in an unimpaired state, have no right to insist that the "forthwith making her tight," etc., was a condition precedent.

Whether a particular covenant is to constitute a condition precedent depends on the intention of the parties as it is to be collected from the instrument in which the covenant is contained, as is laid down in *Porter* v. *Shephard* (1) and in *Glazebrook* v. *Woodrow* (2). It would be an outrage to common sense to say that it could have been the intention of these parties that, if the defendants took this ship, as a ship in their employ under the charterparty, they should be at liberty afterwards to insist that the making her complete in every particular, and that forthwith without any delay, was a strict condition precedent on the part of the plaintiff. The cases cited are also decisive on the point. *Constable* v. *Cloberie* (3) shows that a covenant to sail with the first wind is not a condition precedent. *Bornmann* v. *Tooke* (4) proceeds on the same principle. *Boone* v. *Eyre* (5) lays down a very sensible general rule that where mutual covenants go to the whole consideration on both sides, they are mutual conditions, the one precedent to the other; but where they go only to a part and a breach may be paid for in damages, there the defendant has a remedy on the covenant and shall not plead it as a condition precedent. Had the plaintiff's neglect here precluded the defendants from making any use of the vessel, it would have gone to the whole consideration, and might have been insisted on as an entire bar because the consideration for the defendants' covenant to pay the freight would then have failed in toto; but, as the defendants have had some use of the vessel notwithstanding the plaintiff's neglect, the plaintiff's covenant is to be considered as going to a part only. The consideration has not wholly failed, and the covenant cannot be looked on as having raised a condition precedent, but merely gives the defendants a right under a counter action to such damages as they can prove they have sustained from this neglect. For these reasons, we are of opinion that this plea cannot be supported and that the demurrer to it must be allowed.

The next plea submitted to the consideration of the court is pleaded to the first breach only. It states that, during the twelve months mentioned in the charterparty, divers goods were shipped on board the vessel to be carried from London to St.

Domingo; that at the time of shipping them the vessel was not tight, staunch, etc., and sufficiently equipped, etc., but on the contrary was decayed, leaky, ill-fitted and in an unseaworthy state; that in consequence thereof it became necessary to unload and repair the ship; that by means of the premises the ship became unemployed by and unserviceable to the defendants for a great part of six calendar months; and that the defendants have paid for the hire and service of the ship for the residue of the said six calendar months. There is another plea similar to this, except that it does not state that the defendants paid for all the time the ship was not unserviceable to them or unemployed; and it avers that the ship was not in their service or employ for ten calendar months in the whole. To these pleas the plaintiff has also demurred, and the question on them is whether the defendants have shown such a neglect in the plaintiff as will excuse them from the payment of the freight which the first breach claims.

These pleas are founded not on the stipulation "forthwith to make" the vessel tight, staunch, etc., but on the stipulation to "keep" it so; and it is not alleged that there was any defect at the commencement of the twelve months for which the vessel was hired but that, at the time of shipping the goods during the twelve months she was not tight, etc. It is, therefore, perfectly consistent with the allegations in these pleas that the ship had been put into a perfect state and thoroughly equipped immediately after the execution of the charterparty: that she was so when the defendants took her into their service; but that she became otherwise (which might be from one of the accidents to which all vessels are subject) while in the defendants' employ. It is indeed consistent with these pleas that the vessel might have performed a voyage for the defendants before this defect occurred and, as it is a general rule that pleas are to be taken most strongly against the party pleading them inasmuch as it is probable he would state his case as favourably for himself as the facts would permit, we should be warranted in assuming this to be the case. The pleas do not state that there was any delay in making the repairs, or that it was through any default in the plaintiff that the defect had occurred. The question then is whether, because the plaintiff has undertaken to keep the vessel tight, etc., the defendants have a right to deduct anything out of the freight they are to pay in respect of the time which may be taken up in making good such defects as may occur during the period for which the vessel is hired. We are of opinion they are not. From the accidents to which ships are liable, it was in the ordinary course of things to expect that this ship might want repairs in the course of her voyage; and, when the defendants were making their bargain, they should have stipulated to deduct for the time which might be exhausted in making those repairs if they meant to make that deduction. Without such a stipulation, we think the true construction of the charterparty is that, while those repairs are going on, the ship is to be considered as in the defendants' service, and the defendants liable to continue their payments. As these pleas, therefore, do not show that it was owing to any default in the plaintiff that the defect in the ship occurred or that there was any delay in repairing it, we are of opinion that no deduction is to be made from the freight on that account; that these pleas, therefore, are bad, and that the demurrer to them must be allowed.

The next plea on which a question arises is pleaded to the second breach (which claims freight beyond the expiration of six calendar months), and this plea is that the vessel was not in the service or employ of the defendants until the end of fourteen calendar months, but within that time was, without any default in the defendants, consumed by fire. To this the plaintiff has replied that the vessel sailed for St. Domingo, delivered a cargo there after the end of seven calendar months and was not burnt till afterwards. To this replication there is a demurrer; and the defendants contend that the stipulations in the charterparty which fix the times for paying the freight, make the right to the portions of freight payable at those times depend on the then safety of the ship, and that the loss of the vessel before any one of those periods destroys the right, except for such freight as was

previously payable. That a loss, for instance, after the end of six months but before the end of ten would have precluded the plaintiff from claiming more in the whole than four months' freight, and that a loss after ten months and within fourteen would have confined the plaintiff to six months' freight. It is to be remembered, however, that the charterparty stipulates that the defendants should pay a given freight per calendar month; and the times fixed for its actual payment can only be considered as postponing for the defendants' convenience the actual payment of a sum then due to a future period; not as creating a contingency whether it should ever be paid at all. Each month's freight, therefore, was earned and became completely due at the end of each month; and it was nothing but the actual payment that was postponed. We are, therefore, of opinion that this plea is also bad, and that the demurrer to the plaintiff's replication must be overruled.

The last question arises on the last breach which is for the allowance of the extra men; of that allowance two months was to be added to the first payment for freight, and the residue was not to be paid till the ship's discharge or return from her first intended voyage and in like manner for any other foreign voyage or voyages. The defendants' plea to this breach is, as to the first two months' allowance, payment; and as to the residue, that the ship sailed on a voyage to St. Domingo and was burnt and lost before her return. The plaintiff has taken issue on the payment; and as to the residue has replied that the ship arrived at St. Domingo and completed that voyage. To this there is a demurrer; and the defendants insist that, as the ship never was discharged and never returned, nothing beyond the first two months' allowance became payable. But we are of opinion that the destruction and loss of the vessel was, within the true intent and meaning of this charterparty, a discharge of the vessel from the further prosecution of the adventure and employment in which she was engaged; and that, on that event, the residue of extra allowance became payable as if the discharge had taken place by the act of the defendants themselves, and that the defendants must be understood to have discharged the vessel when they could by no possibility any longer employ her.

We are, therefore, of opinion in favour of the plaintiff on each of the several points raised by these pleadings.

Judgment for plaintiff.

HUNT *v.* SILK

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), November 9, 1804]

[Reported 5 East, 449; 2 Smith, K.B. 15; 102 E.R. 1142]

Contract—Rescission—Breach of contract—Part performance by other party—Impossibility of putting parties in statu quo.

A. agreed to let a house to B. in consideration of £10, to repair it and to execute the lease within ten days, B. to have immediate possession, execute a counterpart, and pay the rent. B. took possession and paid the £10 immediately, but A. failed to execute the lease and do the repairs, notwithstanding several applications to him after the ten days had elapsed. B. quitted the house, giving A. notice of rescission of the agreement in consequence of A.'s default, and brought an action to recover back the £10.

Held: where a contract was to be rescinded it must be rescinded in toto and the parties put in statu quo; as B. had partly executed the agreement by occupying the premises beyond the time when the repairs were to have been done, the parties could not be put in statu quo and it was too late to rescind the agreement, and B.'s action must fail.

Notes. Followed: *Beed* v. *Blandford* (1828), 2 Y. & J. 278; *Blackburn* v. *Smith* (1849), 2 Exch. 783. Distinguished: *Standish* v. *Ross* (1849), 3 Exch. 527. Applied: *Thorpe* v. *Fasey*, [1949] 2 All E.R. 393. Referred to: *Heilbutt* v. *Hickson* (1872), L.R. 7 C.P. 438; *London and County Banking Co.* v. *London and River Plate Bank* (1887), 4 T.L.R. 179; *Cornwall* v. *Henson* (1900), 69 L.J.Ch. 581; *Abram Steamship Co.* v. *Westville Steamship Co.*, [1923] All E.R. Rep. 645; *Rowland* v. *Divall*, [1923] All E.R. Rep. 270.

As to money had and received, see 8 Halsbury's Laws (3rd Edn.) 235–252; and for cases see 12 Digest (Repl.) 614–623.

Case referred to:

(1) *Giles* v. *Edwards* (1797), 7 Term Rep. 181; 101 E.R. 920; 12 Digest (Repl.) 257, *1993*.

Motion to set aside a nonsuit in an action for money had and received, tried before Lord Ellenborough, C.J.

By an agreement dated Aug. 31, 1802, the defendant, in consideration of £10 to be paid at the time of executing the after-mentioned lease and for other considerations therein stated, agreed that within ten days from the date thereof he would grant to the plaintiff a lease of a certain dwelling-house for nineteen years (determinable by the plaintiff in five, ten or fifteen years) from Sept. 29 then next (but possession to be immediately given to the plaintiff) at the yearly rent of £63. The defendant also agreed to make certain alterations in the premises at his own expense and that the premises, fixtures, and things should at the time of executing the lease be put in complete repair. In consideration of the aforesaid the plaintiff agreed to accept the lease at the rent and in manner aforesaid, and to execute a counterpart and pay the rent. The plaintiff took immediate possession of the premises under the agreement, and paid the £10 at the same time in confidence that the alterations and repairs stipulated for would be done within the ten days, but that period and some days after having elapsed and nothing being done, notwithstanding several applications to the defendant to perform the work, the plaintiff quitted the house, giving the defendant notice of his having rescinded the agreement in consequence of the defendant's default. He brought this action to recover back the money he had paid. Lord Ellenborough, C.J., however, thought that the plaintiff was too late to rescind the contract, and that his only remedy was on the special agreement, and, therefore, directed a nonsuit. The plaintiff moved to set it aside.

Reader for the plaintiff.

LORD ELLENBOROUGH, C.J. Without questioning the authority of *Giles* v. *Edwards* (1), which I admit to have been properly decided, there is this difference between that and the present case, that there by the terms of the agreement the money was to be paid antecedent to the cording and delivery of the wood, and here it was not to be paid till the repairs were done and the lease executed. The plaintiff there had no opportunity by the terms of the contract of making his stand to see whether the agreement were performed by the other party before he paid his money, which the plaintiff in this case had, but instead of making his stand, as he might have done, on the defendant's non-performance of what he had undertaken to do, he waived his right, and voluntarily paid the money, giving the defendant credit for his future performance of the contract, and afterwards he continued in possession notwithstanding the defendant's default. Where a contract is to be rescinded at all, it must be rescinded in toto, and the parties put in statu quo. But here was an intermediate occupation, a part execution of the agreement, which was incapable of being rescinded. If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed, and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account? This objection cannot be got rid of: the parties cannot be put in statu quo.

GROSE, J., agreed.

LAWRENCE, J.—In the case referred to, where the contract was rescinded, both parties were put in the same situation they were in before. For the defendant must at any rate have corded his wood before it was sold. But that cannot be done here where the plaintiff has had an intermediate occupation of the premises under the agreement. If indeed the £10 had been paid specifically for the repairs, and they had not been done within the time specified, on which the plaintiff had thrown up the premises, there might have been some ground for the plaintiff's argument that the consideration had wholly failed, but the money was paid generally on the agreement, and the plaintiff continued in possession after the ten days, which can only be referred to the agreement.

LE BLANC, J.—The plaintiff voluntarily consented to go on upon the contract after the defendant had made the default of which he now wishes to avail himself in destruction of the contract. But the parties cannot be put in the same situation they were in, because the plaintiff has had an occupation of the premises under the agreement.

Rule refused.

PICKERING *v.* BUSK

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Le Blanc and Bayley, JJ.), January 27, 1812]

[Reported 15 East, 38; 104 E.R. 758]

Agent—Authority—Implied authority—Agent clothed with apparent authority by principal—Sale of goods—Goods sent to place where ordinary business of agent is to sell—Principal bound by sale.

Strangers can only look to the acts of parties and to the external indicia of property, and not to the private communications which may pass between a principal and his broker. If, therefore, a person authorises another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. A broker's engagements are not limited to his actual authority. He may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject-matter. If the principal sends his commodity to a place where it is the ordinary business of the person to whom it is confided to sell, it must be inferred that the commodity was sent thither for the purpose of sale, and the principal will be bound by a sale.

Notes. Considered: *Martini* v. *Coles* (1813), 1 M. & S. 140. Distinguished: *Shipley* v. *Kymer* (1813), 1 M. & S. 484; *Guichard* v. *Morgan* (1819), 4 Moore, C.P. 36; *Coleman* v. *Riches* (1855) 16 C.B. 104. Approved and Applied: *Collen* v. *Gardner* (1856), 21 Beav. 540. Distinguished: *Brady* v. *Todd* (1861), 9 C.B.N.S. 592. Considered: *Cole* v. *North Western Bank*, [1874–80] All E.R. Rep. 486. Distinguished: *Johnson* v. *Crédit Lyonnais Co.* (1877), 3 C.P.D. 32. Applied: *Eastern Distributors, Ltd.* v. *Goldring* [1957] 2 All E.R. 525. Referred to: *Lloyds Bank, Ltd.* v. *Bank of America National Trust and Savings Association*, [1937] 3 All E.R. 312.

As to implied authority of an agent, see 1 Halsbury's Laws (3rd Edn.) 164 et seq.; and for cases see 1 Digest (Repl.) 357 et seq.

Cases referred to:

(1) *Paterson* v. *Tash* (1743), 2 Stra. 1178; 93 E.R. 1110; 1 Digest (Repl.) 397, *578*.

(2) *Wright* v. *Campbell* (1767), 4 Burr. 2046; 1 Wm. Bl. 628; 98 E.R. 66; 41 Digest (Repl.) 259, *754*.

Also referred to in argument:

McCombie v. *Davies* (1805), 6 East, 538; 2 Smith, K.B. 557; 102 E.R. 1393; subsequent proceedings, 7 East, 5; 3 Smith, K.B. 3; 103 E.R. 3; 1 Digest (Repl.) 396, *570*.

Parker v. *Patrick* (1793), 5 Term Rep. 175; 101 E.R. 99; 37 Digest (Repl.) 16, *136*.

Wilkinson v. *King* (1809), 2 Camp. 335, N.P.; 33 Digest (Repl.) 491, *476*.

Rule Nisi obtained by the plaintiff for a new trial in an action of trover for hemp, tried before Lord Ellenborough, C.J.

Swallow, a broker in London engaged in the hemp trade, had purchased for the plaintiff, a merchant at Hull, a parcel of hemp then lying at Symonds's wharf in Southwark. The hemp was delivered to Swallow at the desire of the plaintiff by a transfer in the books of the wharfinger from the name of the seller to that of Swallow. Shortly afterwards, Swallow purchased for the plaintiff another parcel of hemp lying at Brown's quay, Wapping, which latter parcel was transferred into the names of Pickering (the plaintiff) or Swallow. Both those parcels of hemp were duly paid for by the plaintiff. Swallow, however, while the hemp remained thus in his name, having contracted with Hayward & Co. as the broker of Blackburn & Co. for the sale of hemp and having none of his own to deliver, transferred into

the names of Hayward & Co. the above parcels in satisfaction of that contract, for which they paid him the value. Hayward & Co. shortly after became bankrupts. The plaintiff, discovering these circumstances, demanded the hemp of the defendants, their assignees, and, on their refusal to deliver it, brought an action of trover. LORD ELLENBOROUGH, C.J., was of opinion on this evidence that the transfer of the hemp by direction of the plaintiff into Swallow's name authorised him to deal with it as owner with respect to third persons; and that the plaintiff, who had thus enabled him to assume the appearance of ownership to the world, must abide the consequence of his own act. A verdict was thereupon found for the defendants, with liberty to the plaintiff to move to set it aside. The plaintiff subsequently obtained a rule nisi.

Garrow, *Topping* and *Taddy* for the defendants, showed cause against the rule.
Sir Vicary Gibbs, *Park* and *Abbott* for the plaintiff, supported the rule.

LORD ELLENBOROUGH, C.J.—It cannot fairly be questioned in this case but that Swallow had an implied authority to sell. Strangers can only look to the acts of the parties and to the external indicia of property, and not to the private communications which may pass between a principal and his broker; and if a person authorise another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect to the subject-matter; and there would be no safety in mercantile transactions if he could not. If the principal sends his commodity to a place where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse sends it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one sends goods to an auction room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser safe.

The case of a factor not being able to pledge the goods of his principal confided to him for sale though clothed with an apparent ownership, has been pressed on us in the argument, and considerably distressed our decision. The court, however, will decide that question when it arises, consistently with the principle on which the present decision is founded. It was a hard doctrine when the pawnee was told that the pledgor of the goods had no authority to pledge them, being a mere factor for sale, and yet since *Paterson* v. *Tash* (1), that doctrine has never been overturned. I remember MR. WALLACE arguing in *Wright* v. *Campbell* (2), that the bills of lading ought to designate the consignee as factor, otherwise it was but just that the consignors should abide by the consequence of having misled the pawnees. The present case, however, is not the case of a pawn, but that of a sale by a broker having the possession for the purpose of sale. The sale was made by a person who had all the indicia of property; the hemp could only have been transferred into his name for the purpose of sale; and the party who has so transferred it cannot now rescind the contract. If the plaintiff had intended to retain the dominion over the hemp, he should have placed it in the wharfinger's books in his own name.

GROSE, J.—The question whether the plaintiff is bound by the act of Swallow depends on the authority which Swallow had. This being a mercantile transaction, the jury were most competent to decide it; and if I had entertained any doubt, I should rather have referred the question to them for their determination. But I am perfectly satisfied; I think that Swallow had a power to sell.

LE BLANC, J.—The law is clearly laid down, that the mere possession of personal

property does not convey a title to dispose of it, and, which is equally clear, that the possession of a factor or broker does not authorise him to pledge. But this is a case of sale. The question, then, is whether Swallow had an authority to sell. To decide this, let us look at the situation of the parties. Swallow was a general seller of hemp. The hemp in question was left in the custody of the wharfingers, part in the name of Swallow and part in the name of the plaintiff or Swallow, which is the same thing. For what purpose could the plaintiff leave it in the name of Swallow but that Swallow might dispose of it in his ordinary business as broker? If so, the broker having sold the hemp, the principal is bound. This is distinguishable from all the cases where goods are left in custody of persons whose proper business it is not to sell.

BAYLEY, J.—It may be admitted that the plaintiff did not give Swallow any express authority to sell, but an implied authority may be given, and if a person put goods into the custody of another whose common business it is to sell, without limiting his authority, he thereby confers an implied authority on him to sell them. Swallow was in the habit of buying and selling hemp for others, concealing their names. And now the plaintiff claims a liberty to rescind the contract because no express authority was given to Swallow to sell. But is it competent to him so to do? If the servant of a horse-dealer with express directions not to warrant do warrant, the master is bound, because the servant, having a general authority to sell, is in a condition to warrant and the master has not notified to the world that the general authority is circumscribed. This case does not proceed on the ground of a sale in market overt, but it proceeds on the principle that, the plaintiff having given Swallow an authority to sell, he is not at liberty afterwards, when there has been a sale, to deny the authority.

Rule discharged.

MIDDLETON *v.* DODSWELL

[Lord Chancellor's Court (Lord Erskine, L.C.), December 24, 1806]

[Reported 13 Ves. 266; 33 E.R. 294]

Executor—Misconduct—Endangering property of estate—Appointment of receiver.

Administration of an estate is not to be taken from an executor on slight grounds, but if there appears a manifest abuse of the trust by wasting the property, not from a single act, but an habitual and prospective course of dealing bringing the property into danger, the court will treat the executor as every other trustee and will appoint a receiver.

Notes. Considered: *Brouell* v. *Reed* (1842), 1 Hare, 434.

As to appointment of receiver in place of executor, see 32 Halsbury's Laws (3rd Edn.) 397; and for cases see 39 Digest (Repl.) 29.

Cases referred to:

(1) *Dyot* v. *Morgan* (1806), cited in 13 Ves. at p. 266; 33 E.R. 294; 47 Digest (Repl.) 285, *2479*.

(2) *Jacob* v. *Hall* (1806), cited in 13 Ves. at p. 267.

Motion for a receiver.

A motion was made before answer for a receiver, upon affidavit by the son of the testator, one of the residuary legatees, stating that one of three executors and devisees in trust had let part of the trust premises to the barrack board at Hull in his own name only, reserving a rent of £480 to himself alone; that large sums had

been received by him and were not laid out upon the trusts of the will, viz., in real securities or the public funds; that a bond had been taken in the names of two of the executors only for the produce of the sale of some shares in ships; and that the property in his hands was in danger of being lost or misapplied.

Leach in support of the motion.
Wingfield for the two executors consenting to the motion.
Heald for the executor resisting the motion.

LORD ERSKINE, L.C.—I shall grant this motion. In *Dyot* v. *Morgan* (1), in which I refused a similar application, I stated my view of this subject: that it is for the testator, not the court, to say in whom the trust for administration of the effects shall be reposed, and though a suit may be instituted by a party having an interest in the effects, it does not follow that the trust created by the testator is to be set aside. But this court does exercise a concurrent jurisdiction with the spiritual court, upon the principle that executors and administrators are trustees, and in that character come under the control of this court by its ordinary jurisdiction. The administration is, therefore, not upon slight grounds to be taken from an executor. In the case I have mentioned the testator directed his executor to pay over the rents and profits of his estate to his wife for life, and after her death to his children. Part of the estate consisted of leasehold houses, one of which the executor had let to a painter (the same trade which the testator had carried on) for fourteen years, stating by his answer that he intended to let the other premises. Why should he not? He was trusted by the testator, and was the hand to receive and make the payments for the benefit of the widow and children, and the providence of management was confided to his care.

But if a manifest abuse of the trust by wasting the property appears, which does not [*sic*] appear in this instance, not from a single act, but an habitual and prospective course of dealing bringing the property into danger, can it be said that this court is not to treat an executor as every other trustee, and an executor may say that unless he is proved to be insolvent the court is to overlook the misapplication and refuse a receiver? To the proposition thus nakedly stated the answer is obvious. Lord Eldon's decision in *Jacob* v. *Hall* (2) must have been the same that I shall make, that to induce the court to interfere especially before answer, a strong, special ground must be made. It is true the time is not come at which he is bound to put in an answer, but he appears by counsel and comments upon the affidavit, though he makes no affidavit himself. Yet if it rested there I should not grant the motion. I ground the order upon this, that there is what may be considered, though perhaps not the strongest way of expressing it, an affidavit that the property is in danger from insolvency, existing or expected, by which only it can be in danger. Another ground is that the testator did not trust this executor alone, but in conjunction with two other persons, who are also executors and devisees in trust. Their consent gives great strength to the application. Agreeing, therefore, that the administration is not to be taken from an executor upon slight grounds, I must in this case make the order for a receiver.

Order accordingly.

WHELDALE *v.* PARTRIDGE

[Rolls Court (Sir Richard Pepper Arden, M.R.), May 20, 24, 1800]

[Reported 5 Ves. 388; 31 E.R. 643]

[Lord Chancellor's Court (Lord Eldon, L.C.), March 17, 18, 1803]

[Reported 8 Ves. 227; 32 E.R. 341]

Equity—Conversion—Money settled on trust to buy land—Investment until purchase—Death of settlor, no purchase having taken place.

To convert personal property from the state in which it is found at the settlor's death, the character of land must, by the trust, be imperatively and definitively affixed to it.

E. and S., a husband and wife, by a post-nuptial settlement granted to W. £1,200 on trust to lay out the money in the purchase of land as soon as convenient, such land to be settled on such trusts as E. and S. might appoint, and in default of appointment on trust for the right heirs of S. It was agreed that until the purchase W. should invest the money and pay the interest to E. for life and after his death, if S. survived E., to S. absolutely, and if S. died before E., then, subject to E.'s life interest on trust for the maintenance, etc., of any children of the marriage until such child attained twenty-one years of age, the residue to be divided equally between them. In the event of S. leaving no children surviving her, then on trust for those persons which S. should by will or deed appoint. W. invested the £1,200 in securities in which it had since remained. S. died without issue, leaving her husband who died shortly afterwards. No appointment was executed by will or otherwise. On a bill filed by the heir-at-law of S. claiming the £1,200 as realty,

Held: the money was not impressed with the character of realty and clothed with real uses immediately on the execution of the instrument, and was not, therefore, to be considered as land.

Notes. Referred to: *Re De Lancey* (1869), L.R. 4 Exch. 345; *Re Gordon, Roberts* v. *Gordon* (1877), 6 Ch.D. 531.

As to conversion, see 14 Halsbury's Laws (3rd Edn.) 576 et seq.; and for cases see 20 Digest (Repl.) 354 et seq.

Cases referred to:

(1) *Ackroyd* v. *Smithson* (1780), 1 Bro. C.C. 503; 28 E.R. 1262; sub nom. *Akeroid* v. *Smithson*, 2 Dick. 566; 3 P. Wms. 22, n., L.C.; 20 Digest (Repl.) 410, *1320*.

(2) *Fletcher* v. *Ashburner* (1779), 1 Bro. C.C. 497; 28 E.R. 1259; 20 Digest (Repl.) 356, *815*.

(3) *Walker* v. *Denne* (1793), 2 Ves. 170; 30 E.R. 577; 20 Digest (Repl.) 360, *856*.

(4) *Pulteney* v. *Earl of Darlington* (1796), 7 Bro. Parl. Cas. 530; 3 E.R. 344, H.L.; 48 Digest (Repl.) 534, *4990*.

Appeal to the Lord Chancellor by way of a re-hearing on the plaintiff's petition from a decree of Sir Richard Pepper Arden, M.R., sitting for the Lord Chancellor, dismissing a bill filed by the plaintiff as heir claiming certain property as real estate.

By deed poll dated Mar. 30, 1770, reciting the recent marriage between Edward Wilby and Susanna West, that before the marriage Susanna West was seised in fee of certain lands in Lincolnshire devised to her by her father, and that on the request of Edward Wilby, she had consented to the sale thereof and had executed proper conveyances for that purpose, in consideration thereof Edward Wilby had paid to Senior West in trust for him and Susanna, his wife, £1,200, part of the money raised by the sale, to be disposed of as after mentioned, Edward Wilby and his wife granted the £1,200 to West, his executors, etc., on the trusts and

to and for the uses, intents and purposes after declared, and did consent and agree that the same should be disposed of and applied accordingly: that is to say, that Senior West, his executors or administrators, should lay out the money in the purchase of lands and tenements in the county, of as good value as he or they could obtain as soon as conveniently might be, and should cause such lands when purchased to be settled and conveyed to such use and uses as Edward Wilby and Susanna should by any deed or writing under their hands and seals, executed by them in the presence of two or more credible witnesses, direct and appoint; and for want of such direction and appointment then to the use of the right heirs of Susanna for ever. Further, it was agreed that Senior West, his executors and administrators, should in the meantime, until such purchase and settlement could be made, put out at interest the £1,200 on such security as Susanna should approve in his and their names, and pay the interest thereof from time to time to Edward Wilby and his assigns during his life; and after his decease to pay and apply the principal money and interest in such manner as therein mentioned, i.e., if Susanna should happen to survive Edward Wilby, then in trust that Senior West, his executors or administrators, should after the death of Edward Wilby pay all the money, principal as well as interest, to Susanna and her assigns, to be disposed of at her free will and pleasure. If Susanna should die before Edward Wilby and leave any child or children, then in trust that Senior West, his executors, and administrators, after the death of Edward Wilby, should apply and dispose of all the money for and towards the maintenance and education of such child or children, until he, she or they, should attain the age of twenty-one years and then the residue of such principal money should be equally divided among them. But if such child or children should have attained that age at the time of the death of Edward Wilby, that then Senior West, his executors, and administrators, should pay the principal money, and such interest as should then happen to be in arrear and unpaid, to such child or children, to be equally divided among them, if more than one, or their legal representatives. But if Susanna should happen to die before Edward Wilby, and leave no child, then in trust that Senior West, his executors and administrators, should, after the death of Edward Wilby, pay the principal money and all the interest thereof unto such person or persons as Susanna should by her last will or by any other writing, appoint.

By the same deed, Senior West covenanted to dispose of and apply the £1,200 and interest on the trusts and to the uses before declared; and Edward Wilby covenanted not to intermeddle or interrupt him in such application. By a bond of the same date West became bound in the penalty of £2,400, to be void, if he, his heirs, executors, etc., should perform the covenants to be performed on his part by the deed.

West, in pursuance of the trust with the approbation of Wilby and his wife, invested the £1,200 in securities granted on the acre taxes under an Act of Parliament of 5 Geo. 3 for draining and improving the fen lands in Lincolnshire; on which that sum remained ever since. Susanna Wilby died in 1780 without issue, leaving her husband surviving. He died afterwards. No appointment was executed by will or otherwise.

The bill was filed by the devisees in trust and executors of West Wheldale, one of the co-heirs at law of Susanna Wilby at the time of her death, claiming a moiety of the trust money, as to be considered as land.

The whole was claimed by the executors of Edward Wilby on the ground that it vested absolutely in Susanna Wilby and she had a disposing power over it, but as she had not executed that power, on her death it vested in her husband.

Another question arose between defendants as to the other moiety which was claimed by Susanna Hall on the ground taken by the plaintiffs, as only sister of the whole blood and heiress-at-law of William Lawson, the other co-heir of Susanna Wilby at the time of her death. A claim was also made on that moiety by two sisters of the half blood of Susanna Hall and William Lawson, insisting

A that they together with her, as being the only surviving children of William Lawson the elder, were, with West Wheldale, the co-heirs at law of Susanna Wilby at the death of Edward Wilby; that Edward Wilby was entitled to an estate for life and, therefore, the reversion or remainder to the heirs of Susanna Wilby could not take effect or fall into possession till his death. Further, that William Lawson, the younger, having died in the life of Edward Wilby, was never actually seised
B of any estate of inheritance in that moiety.

Sir John Mitford for the plaintiff.

Mansfield and *Alexander* for the defendant Susanna Hall.

Richards and *King* for the sisters by the half blood of William Lawson the younger.

C *Graham* and *Short* for the executors of Edward Wilby.

May 24, 1800. **SIR RICHARD PEPPER ARDEN, M.R.** -The question is whether, on the true construction of this deed, this sum of £1,200 is to be considered as land or money. In determining that question the only consideration must be whether the character of land has been affixed to this property, so that
D the plaintiff, as one of the heirs of Susanna Wilby, has a right to have this property conveyed to him as heir.

The rules and principles by which this case is to be decided are so well known, and the doctrine was so much considered and so fully discussed in the able argument of Lord Eldon in *Ackroyd* v. *Smithson* (1), that it is almost unnecessary to state them. I will, however, repeat the words of Sir Thomas Sewell in *Fletcher*
E v. *Ashburner* (2) (1 Bro. C.C. at p. 499):

> "Nothing is better established than this principle: that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property, into which they are directed to be converted; and this, in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement,
F or otherwise, and whether the money is actually deposited, or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund or the contracting parties may make land money, or money land."

Nothing can be more clear than that principle, and the only question in every
G case similar to this is whether the character of land or money be definitively or imperatively affixed to the property, or whether it be left as matter of uncertainty in what manner the owner of the property intended it to descend. The question, therefore, is whether Edward Wilby and Susanna have, in the circumstances, declared their intention that this property should be land and settled with the ultimate remainder to the heirs of Susanna. All the cases were fully
H considered by the Lord Chancellor in *Walker* v. *Denne* (3) and the rule I have just considered and taken from *Fletcher* v. *Ashburner* (2), was commented on by his Lordship. I have now to decide whether this character of land is imperatively and definitively impressed on this fund, and whether in the circumstances it is to be so considered.

It is perfectly clear that, if this money had been laid out in land during the
I life of the husband and wife, it must have been considered as real estate. However, I confess it appears to me that after her death it had no such character as land impressed on it in such a manner as to entitle the heir at this time to call on the court to declare that it was to all intents and purposes land. After her death it was to be received and enjoyed as money; if she survived it was even to be received by her as money. I am, therefore, of opinion that the heir is not now entitled to come into this court to convert the property, in order to give it a descendible quality of which he is to have the benefit. If it should not be laid out during the joint lives of the husband and wife, there are evident marks of their

intention that it should be considered as personal property and be received by her as such; and then it is a most extraordinary thing to say, her heir has a right to take it as a different species of property.

According to the opinion I have formed it is not necessary to consider what would have been the effect of the limitation, supposing this to be real estate.

The bill must, therefore, be dismissed without costs.

The cause came on to be re-heard on the petition of the plaintiffs, complaining of the decree pronounced by LORD ALVANLEY (then SIR R. P. ARDEN, M.R.).

Romilly and *Grimwood* for the plaintiff: The principle is clear that land may be considered as money, or money as land, according to the intention. This court considers that which is contracted to be done and which ought to be done, as done. By the deed this property was to be real estate, and there was no authority in the husband and wife to convert it into personal property. The trustee was bound by the trust to purchase land, as soon as conveniently might be, without the concurrence or authority of the husband and wife. It does not depend on their agreeing what the uses should be. Nothing was to be previously done by them. The direction as to what was to be done in the meantime, shows that was only a temporary purpose, "until such purchase and settlement could be made."

If the husband had died immediately after the execution of the deed, the subject must have been considered land. What then happened in this period of ten years altering the nature of the property? What act or what acquiescence by the wife that can have that effect, can be shown? It is certainly difficult to understand what these parties meant. The direction is to purchase, not land generally, but land in Lincolnshire which was intended as a substitution for the former property of the wife in that county. Some delay, therefore, was necessary and was looked to. An implication arises from the original nature of the property, real estate belonging to the wife. The result is, that the character of land is definitively and imperatively given to this property.

Mansfield and *Alexander* for the defendant Susanna Hall, sister of the whole blood of William Lawson the younger, co-heir of Susanna Wilby at the time of her death, also contended that this was real estate.

Richards and *Trower* for other defendants, half-sisters to Susanna Hall, claimed the fund also as real estate, insisting that the husband being tenant for life, with remainders to the children, and in default of children to the wife and her heirs, it descended to her heir subject to the estate for life of her husband and, therefore, these defendants being sisters by the half blood to Susanna Hall and William Lawson, the younger, by the death of the latter in the life of Edward Wilby, the rule "Possessio fratris," etc., was excluded; and these defendants with their half-sister were entitled as co-heirs of William Lawson, the elder, at the death of Edward Wilby.

Spencer Perceval and *Roupell* for the executors of Edward Wilby, supported the decree: The question is whether on the whole instrument this property which the court finds money has been imperatively and distinctly, by the intention clearly expressed, converted into land. Being money, some clear, definite and distinct intention must be shown by which the court, called on by the heir to convert it, is to be guided. The instrument being admitted to be imperfect, unintelligible and inaccurate, it is difficult to say that there is anything so distinct that the court can lay hold of as imperative.

The effect of the covenant of the trustee and the bond is merely that he will apply the fund according to the true intent and meaning of the instrument and not, as insinuated, absolutely to lay it out in land. Many other uses, besides those to which this construction confines it, were introduced before this covenant; and it may be contended that it applies to all those. Why should the construction be according to the most defective part of the instrument, giving no direction as to the rents and profits? The intention must be collected from the whole. The true

intention is a provision to lay out the fund in land and, in that case, to be subject to the joint appointment. The subsequent provision, in the meantime, is not only until such purchase, but also until such settlement could be made. On the whole of the language and provisions, the intention appears to have been to retain the power to themselves, giving an option to them to make it either the one or the other, as convenience and the situation of their family might require.

This is a post-nuptial settlement and, therefore, all are volunteers and their rights strictly equal and legal. The subject is now money and is given by the law to the personal representatives of the husband. The object of the bill is to convert it from that character in which the law finds and has disposed of it. In such a case the court does not interfere to convert property from one species to another. For that purpose there must be a consideration, a purchaser of some kind or a clear intention. The claim of the heir must be on a clear ground. If it is doubtful and equivocal, the court will not interfere for him and all the authorities require an imperative direction.

It cannot be considered that this was originally land, the estate of the wife. It cannot be admitted that this was land at the time of the settlement, having been previously sold, the purpose and consideration not appearing. The description of this property at that time was a sum of money, £1,200, to be put in settlement, not to be taken to the trustee himself, to any certain specific uses, but for the uses of the joint appointment of the husband and wife; for no other purpose than to give it to some very remote person who could not at the time have been in contemplation. The trustee could not invest it on any uses without a previous specific direction and declaration of uses. Their object was merely to retain the absolute control over the land. They had no definite object in view. The last limitation means only that they do not know what to do with it.

Romilly replied.

LORD ELDON, L.C.—There must be great doubt whether, in this case, the principle on which we are all agreed is really applied according to the intention of the parties. The case is exceedingly difficult. I avow that my mind is subdued by the difficulties presented on the part of the heirs and the difficulties on the other side are as considerable. On the whole, therefore, I have not confidence sufficient to reverse this decree.

To state the facts as favourably as I can for the heirs, I will take it that the wife was prevailed on by the husband to join him in the sale of her estate. Suppose that the money was paid to him, it is reasonable on the recitals to say that, if paid to him, it was on some agreement that to the extent of £1,200, she and the persons who would be her heirs, should not fare the worse for conforming to his wishes by parting with the whole. That agreement would bind him to the extent of the obligation under which he is to be considered by the execution of this instrument. Her interest, therefore, I will take to be founded on contract and suppose that she might have compelled the execution of this instrument by herself or the trustee. I do not say that it is clear on the circumstances appearing but, taking it that the husband came under a contract, then the objection to her being a volunteer would not apply, the money being in the hands of a third person who was bound to lay it out.

If the deed had concluded at the first declaration of the trust, according to the appointment of Wilby and his wife, and, for want of appointment, to her right heirs for ever, it would immediately on the execution have impressed this money with real qualities, and the peculiarity of the words "lying in the said county" would not have taken it out of the rule in general cases impressing it with real uses and qualities. Where money is directed to be laid out in land generally, some time must always be necessary. It could not be laid out that instant. If it rested here also, and land had been proffered before they had made up their minds as to the uses, it would have been in the due execution of the trust to have taken a

conveyance to such uses as they should appoint. And if, before they had made up their minds as to the destination by a limitation of the uses, the trustee or either of the parties had asked the court in what way in the meantime or for want of direction the estate was to be conveyed, the court must have considered, on the whole, what were to be the limitations expressed or implied in this deed.

There may be cases where the simple words "to the right heirs" would authorise the court to direct the limitation to the party himself, and other cases where it would not, but, as the use in those must either be expressed in the directing instrument or appear by implication, the court must find out in whom it is, and the settlement must be moulded so as to preserve that limitation to the heir. I am also disposed to say, notwithstanding the opinion of LORD ROSSLYN in *Walker* v. *Denne* (3) and other modern authorities, that if this instrument is to be taken to impress this fund with real qualities immediately on the execution, in the question between the heir and executor, the money being once clearly and plainly impressed with real uses as land, and one of those uses being for the benefit of the heir, the impression will remain for his benefit. To put an end to that impression, it must be shown either that the money was in the possession of a person who had, in himself, both the heirs and executors, or he must do some act to denote a change of his intention as to the devolution of the property on either; and it is not correct to say that the court does not interpose between volunteers, if they give to the executor that money which the instrument has given to the heir.

Pulteney v. *Earl of Darlington* (4), in the House of Lords, a case on which all the great lawyers were consulted, went no further than this, that if the property was at home in the possession of the person, under whom they claimed as heir and executor, the heir could not take it; but if it stood out in a third person, he might. The question in that cause was not on the equity between the heir and executor, but whether the money was at home. In the older cases there is no doubt that if a real use was once impressed on the property, it went through all the limitations until it was at home in the pocket of the party, or any act [was] done by him to remove that impression, so as to entitle the executor. The slightest act would do; a declaration, a writing, LORD THURLOW said in *Pulteney* v. *Earl of Darlington* (4), but still something must be done.

If there were nothing more in this deed than I have stated, this property would, immediately on the execution of the deed, have been impressed with real qualities and clothed with real uses and the money would have been land. The question is, however, whether, notwithstanding that is the general doctrine, there may not be a particular case in which enough appears on the instrument to show that the parties did not mean that it should be absolutely impressed with real qualities and clothed with real uses immediately on the execution, but either that or that it should remain personalty in an event to which they looked in case the purchase was not actually made.

The inference is less strong where the money is to be laid out in a county than in a parish. Suppose, however, it was to be laid out in a parish as soon as conveniently could be and the parties showed, on the face of the instrument, that they adverted to the difficulty of procuring lands in that parish for a long period, and dealt with the property as money until that difficulty could be removed; further, that in the interval they looked to some events in which the principal was to be paid over. In those circumstances the intention must be taken to be that the instrument should not immediately on the execution impress the property with real qualities and clothe it with real uses. Such a case has happened, and I have a note of it. Frequent applications were made to the court that the money should be laid out elsewhere, which, after several refusals, was at last granted. There may be some doubt of the authority of that case but the limitation of the place may unquestionably be a circumstance of evidence on the face of the instrument as to the intention to impress the fund with real qualities and clothe it with real uses the moment the deed is executed.

A It is truly observed that the intention to provide for the eldest son in one event and in others for the other children, is not unnatural. I agree, no improbability arises from that. On the other hand it is clear as far as the instrument goes, though it cannot be doubted, the power was reserved with a view to children, and the limitation to the right heirs was with a view to the eldest son or to daughters, if there should be no son. Let these limitations put neither under any obligation B to provide for any children, for by their joint appointment, they might have given or sold the estate to anyone; and so the wife surviving, and taking under the limitation to her and her heirs, other persons less connected with her might have been her heirs. They were very ill advised but the purpose was not unwise. If the wife had proposed to her husband that an estate in Lincolnshire should be procured, representing that she was anxious to provide for him and the children and, as to C more remote heirs, desiring only that whether it was money or land, she should have a power to give the property to those who should be in the relation of heirs to her, and not desiring more than that power. Over this property, as money, she has a larger and more beneficial power than as land for, if the joint appointment was executed and the last limitation was made to her, she could have given it to no one, and dying during the coverture, it must have gone according to the law.

D On the direction "in the meantime," etc., in an ordinary case I should agree to the construction of the heir. If there were nothing more to explain the necessary meaning of the words, they would have no more effect on the real uses with which the property was before clothed than the ordinary words in every settlement, expressing that the interest and dividends shall go as the rents and profits of the lands, if purchased, would have gone. In this instance, however, the application E in the meantime is not only of the interest, but also of the principal. If, therefore, those words are to be applied in the ordinary sense, it must be also said that if, after the principal was paid over, a purchase could be found, the principal ought to be brought back, because the natural sense of the words, unless a contrary construction can be made on the whole instrument, is that the principal is to be applied in the meantime in the same manner as the interest. But the intention F could not be to bring back the principal, if absolutely paid over, in order to execute the purposes of the former part. These words, therefore, are not here used in their ordinary sense, for the principal might be paid as money and not be laid out in land. On the whole, therefore, these words must be applied to such payments under a future direction as are consistent with the idea of a future purchase to be made and separated from such directions as require payment of the money as a G principal fund.

The direction, if she should survive her husband, to pay the principal and interest to her, to be disposed of at her free will and pleasure, is a direction under which the money is to be absolutely paid to her as money. On that, therefore, it is contended that she would have a power of disposition over it according to her pleasure to anyone. Here, admitting that where a clear purpose is expressed in all events, H the court is not in difficulties in other parts to refuse to make the application according to what is clear, all the difficulties must be looked at, in order to determine the clear intention in all events as to the part which is clear; and there is a fair question whether the meaning of the deed is not altogether according to the decree, or whether it is so clear the other way that I am called on to reverse this decree, so much countenanced by authority.

I With that view I may put these cases. Suppose the husband died the next day before a purchase could be made. If the words "in the meantime" are construed in their ordinary sense, it must be said that though the principal was to be paid over to the wife in that event, yet by the effect of those words, if afterwards an estate could be found for the benefit of the heir, it was intended that she should pay back the money. So in the case of children; suppose after the death of the wife, the husband surviving, all the children attained the age of twenty-one, and he and all of them desired the trustee to pay the money, the mother being dead.

If the court was informed that an estate was not then purchased, surely they would not detain the money because, if paid over, in one sense it would be an application in the meantime, as an estate in that county might be obtained. In that event it must be paid back, there being perhaps ten children who had been maintained under this deed, and one is to take the whole.

The use of putting these cases is to show that those words "in the meantime," etc., have not here their ordinary sense. Then there is a strong ground for the decree that if a purchase were procured in a particular period, namely, the life of the husband and wife, it was to be land; but if they did not call for it and died before any purchase, then it was to be money. Then, suppose the husband survived her, every rational purpose for the wife to secure it to herself and her heirs is as rationally secured by this power of appointment by which she might give it to them if she chose.

The difficulties of reversing the decree are great. The argument of those who could claim as heirs only after the death of the husband is out of all sight. The limitations of this deed are according to appointment and, in default of appointment, to the right heirs of the wife. However, I am desired to read it as if it was, in default of appointment to the husband for life with remainder to the wife in fee, and if she dies, still to him for life, with remainder to the children at twenty-one with remainder to some person under a power of appointment with remainder to the right heirs of the wife; and, the instrument expressing that the limitation to her right heirs is to follow that to the joint appointment, I am asked to insert a limitation to all those uses. I cannot do that, and that aids me in saying that this was not an instrument on the execution of it clothing this property with real uses. If it ought to be so considered, I should be of opinion, whether an estate was purchased in the life of the husband and wife or not, that the decree ought to be reversed. But I do not think that is the real meaning of the instrument and, therefore, on the best judgment I can form on this case this decree ought not to be reversed.

Decree affirmed.

A

RAPHAEL *v.* BOEHM

[Lord Chancellor's Court (Lord Eldon, L.C.), March 19, 1803, January 28, August 14, 1804, December 10, 12, 1805]

[Reported 11 Ves. 92; 32 E.R. 1023]

B [Lord Chancellor's Court (Lord Erskine, L.C.), March 9, 10, 1807]

[Reported 13 Ves. 590; 33 E.R. 415]

Executor—Liability—Liability to account—Retention of testator's money—Compound interest—Computation of interest from date on which each receipt of money received—Balance of receipts, with interest, and payments struck each half year.

C By his will the testator provided that his executor, the defendant, should not have any claim for commission or derive any advantage from keeping in his possession any sum of money without accounting for the legal interest (5 per cent.) thereon. He disposed of the residue of his estate on trusts for his children, directing that the interest on the portion of each child should be D applied to the maintenance and education of that child, and that any surplus of the interest should be accumulated for the benefit of the child. On a bill filed by the children against the defendant for an account a decree was made directing a computation of interest at 5 per cent. on all sums received by him, while in his hands; "and that the Master do in such computation make half-yearly rests."

E **Held:** the object of that direction was to charge compound interest, and the decree, though perhaps going further than usual, was under the circumstances properly executed by a computation of interest upon each receipt from the day it was received, the balance of receipts, with the interest so calculated, and payments being struck at the end of the half-year, and that balance, so composed of principal and interest, being carried forward as an item in the F account producing interest.

Notes. Applied: *Dornford* v. *Dornford* (1806), 12 Ves. 127. Considered: *Tebbs* v. *Carpenter*, [1814–23] All E.R. Rep. 561; *Law* v. *Hunter* (1826), 1 Russ. 100. Distinguished: *A.-G.* v. *Solly* (1829), 2 Sim. 518. Considered: *Docker* v. *Somes*, [1824–34] All E.R. Rep. 402; *Cotham* v. *West* (1837), Donnelly, 199. Followed: *Heighington* v. *Grant* (1840), 5 My. & Cr. 266. Considered: *Feltham* v. *Turner* G (1870), 23 L.T. 345. Referred to: *Montgomerie* v. *Wauchope* (1816), 4 Dow. 109; *Binnington* v. *Harwood* (1825), Turn. & R. 477; *Sutton* v. *Sharp* (1826), 1 Russ. 146; *A.-G.* v. *Alford* (1855), 4 De G.M. & G. 843; *Re Barclay*, *Barclay* v. *Andrew*, [1899] 1 Ch. 674.

As to the liabilities of an executor, see 16 Halsbury's Laws (3rd Edn.) 465 et seq.; and for cases see 24 Digest (Repl.) 669 et seq.

H

Case referred to:

(1) *Hall* v. *Hallet* (1784), 1 Cox, Eq. Cas. 134; 29 E.R. 1096, L.C.; 24 Digest (Repl.) 621, *6167*.

Also referred to in argument:

I *Waring* v. *Cunliffe* (1790), 1 Ves. 99; 30 E.R. 249, L.C.; 35 Digest (Repl.) 227, *303*.

Nightingale v. *Lawson* (1785), 1 Bro. C.C. 440; 24 Digest (Repl.) 742, *7279*.

Newton v. *Bennet* (1784), 1 Bro. C.C. 359; 28 E.R. 1177, L.C.; 24 Digest (Repl.) 746, *7321*.

Perkins v. *Baynton* (1784), 1 Bro. C.C. 375; 28 E.R. 1305; 24 Digest (Repl.) 746, *7322*.

Treves v. *Townshend* (1783), 1 Bro. C.C. 384; 1 Cox, Eq. Cas. 50; 28 E.R. 1191; 4 Digest (Repl.) 244, *2203*.

Forbes v. *Ross* (1788), 2 Cox, Eq. Cas. 113; 2 Bro. C.C. 430; 30 E.R. 52, L.C.; 24 Digest (Repl.) 737, *7239*.

Littlehales v. *Gascoyne* (1790), 3 Bro. C.C. 73; 29 E.R. 416, L.C.; 24 Digest (Repl.) 747, *7333*.

Exceptions taken by the defendant to the report of a Master following a decree on a bill by cestuis que trust against an executor for an account.

Edward Raphael, of Madras, by his will gave to each of his executors 1,000 pagodas, declaring that that legacy should be in full for the trouble they might have in performing the duties in his will, and that they should not have any claim for commission or derive any advantage from keeping in their possession any sums of money without duly accounting for the legal interest thereon, according to the legal interest of the country where they acted. The testator disposed of the residue of his estate upon trusts for his children, and directed that the interest of the portions, or such part as his executors should deem sufficient, should be applied to the maintenance and education of each child respectively, and that the surplus of such interest, if any, should be accumulated for the benefit of each child, and make part of his or her estate, and he directed part of his estate to be remitted to England, to be laid out in the funds there for the benefit of his children.

The testator died in June, 1791, leaving executors in India, and Edward Boehm, the defendant, his executor in England. A bill was filed in Michaelmas Term, 1794, by the children of the testator against Boehm for an account. On Dec. 17, 1794, Boehm obtained an order for leave to pay into court £40,000, part of the money in his hands arising from the testator's estate. This was paid in accordingly, and laid out. By his answer he stated that he and his partners had in their hands a large sum of money belonging to the testator, and that about July 1, 1791, there was transferred from the partnership of Boehm & Co. to the account of the defendant as executor of the will the sum of £30,000, part of the testator's property. The defendant afterwards at different times had other sums transferred to his account in like manner, which he set forth in a schedule. One of those sums was £12,000, received by him on Mar. 12, 1792, also from the partnership of Boehm & Co., in which he was engaged, and he had received other sums on account of the testator's estate. He stated that he had paid the debts, etc., the maintenance and education of the plaintiffs, and other sums on account of the estate, but he had not placed any part of the testator's estate in the public funds. He then stated the payment he had made under an order of the court in December, 1794; that the balance in his hands was ready to be paid as the court should direct; and that he was ready to answer interest for the testator's money which he had from time to time in his hands as the court should direct. The usual decree for an account was made, and an inquiry was directed in whose name any and what part of the testator's personal estate in England was at his death; when the same, or any and what part, came to the hands of the defendant; and what sums of money had since the testator's death come to the hands of the defendant.

In answer to that inquiry the report of the Master [Mr. Holford] stated that at the death of the testator there was in the hands of Boehm & Co., as his agents in England, a balance of £30,807 3s. 10d., and that the executors in India continued to make considerable remittances to the partnership, the amount of which, as well as the interest received thereon, after deducting commission was paid over to the defendant as executor in England, and he had accounted for the same, as well as the balance. By an order, pronounced by Lord Loughborough, L.C. [afterwards Lord Rosslyn], on further directions on July 26, 1798, it was ordered that the Master should compute interest after the rate of £5 per cent. per annum on all sums of money, part of the testator's estate, received by or come to the hands of the defendant from the time he received the same respectively during the time the same continued in his hands, except the legacies to the executors and what was expended for maintenance; "and that the Master do in such computation make

half-yearly rests." Under that order the plaintiffs carried in a charge of interest on all sums of money which came to the hands of the defendant from the time he received them during the time they continued in his hands, making half-yearly rests, which charge was allowed. The Master by his report stated that he had computed such interest and in a schedule had set forth an account of all such sums of money, so received by the defendant, specifying the times such money remained in his hands and a calculation of interest thereon, that he had also in such computation made half-yearly rests, and that the interest on such several sums from time to time remaining in the hands of the defendant, calculated down to the date of the report, amounted to £10,996 17s. 11d.

To this report exceptions were taken by the defendant, on the following grounds.

(i) that the Master had not calculated interest and made half-yearly rests as directed by the order, but had from time to time made frequent rests in the course of each half-year; had made half-yearly rests for the purpose merely of charging the defendant with compound interest; and had carried on the account for a considerable time after the defendant had paid all the principal moneys received by him for the mere purpose of charging him with interest upon interest, by those means making the interest amount to a much larger sum than he ought to have done and much more than it would have amounted to if he had calculated such interest according to the directions of the order, and the course and practice of the court in similar cases.

(ii) that the Master had made a rest at every receipt and payment by the defendant, and by so doing had made frequent rests in the course of each half-year, instead of which he ought at the end of each half-year to have taken the amount of all the defendant's receipts and payment respectively in the course of such half-year and to have struck the balance thereof, and that balance, accordingly as it was in favour of or against the defendant, should have been deducted from or added to the balance of the former half-year.

(iii) that the Master had at the end of each half-year carried forward what he had calculated to be due from the defendant for interest and added the same to what was stated to be due for principal; and had from that time calculated interest upon the whole sum, including both principal and interest, whereas he ought not to have added interest to principal or to have calculated any interest upon interest, but ought at each half-yearly rest to have calculated interest on the balance of principal due from the defendant and to have stated the same as a separate charge and not to have added the same to the balance of principal.

By an order, made upon hearing the exceptions on Aug. 14, 1804, Mr. Cox, who had succeeded Mr. Holford, was directed to review Mr. Holford's report as to the calculation of interest, and to state the practice of all the Masters' offices. Mr. Cox by his report stated that he conceived the meaning of a direction to take an account in any particular manner (as, for example, by computing interest on sums received and paid at any given rate either from the actual time of every such receipt and payment, or from the end of any given time after such receipt or payment, or in any other particular manner) and to make yearly or half-yearly rests in the taking of such account was that the accounts should be taken in the manner prescribed up to the end of each year or half-year, and, that a balance should be struck at the end of every such year or half-year according to such mode of taking the account. Such a balance should be considered as the balance of an account then settled, and should be carried down as the first item on the proper side of the next year's or half-year's account in the same manner as if the accounting parties had actually met and settled the account at the end of every such year or half-year in the manner prescribed by such direction, and carried the balance to a new account. The consequence of this would be that, whenever any calculation of interest was directed to be made upon the sums so received and paid, the balance struck at the end of every year or half-year would include the balance of interest as well as of principal, and

in computing interest on such balance as an item in the account of the succeeding year or half-year such computation would include a computation of interest on interest. Therefore, in the present case the late Master pursued the directions of the order by taking the account in the manner stated by his report, and would not have complied with every part of such directions if he had taken the account in any other manner. If he had taken the account in the manner insisted on by the exceptions, viz., not computing any interest on the sums received and paid by the defendant from the time he received or paid the same to the end of the half-year in which the said receipts and payments were made, but at the end of each half-year striking the balance of the moneys received and paid by the defendant in the course of such half-year without any calculation of interest thereon, and adding or deducting such balance to or from the balances of the former half-year, calculated in the same manner, and calculating interest only on such several balances from the times when the same were struck, and making such interest account a separate account, without adding the same or any part thereof at any period to the account of the moneys received and paid, the Master would have deviated from the express directions of the decree which directed the computation of interest to be made from the times when the several sums of money were received by the defendant. This, it was evident, might in many instances be nearly six months before the balance was struck on which and from which time only, as the defendant contended, the computation of interest should commence. In that case the making of rests would have no other effect than that of charging the defendant with a smaller account of interest than he would have been charged with if the computation had been made of simple interest only on the sums received and paid by the defendant from the beginning to the end of the account.

The Master further stated that he endeavoured, but had not been able, to ascertain that there was any general practice in the Masters' offices applicable to the particular directions of this decree, but the general understanding of the Masters with regard to a decree directing rests to be made in taking an account was, that such rests were to be made with a view to computing compound interest and of charging the accounting parties in a stricter manner than that in which they would be charged, if no direction were given for rests. The report concluded by stating that for these reasons the Master had forborne to make any calculation of interest in any other manner than that in which the late Master had calculated interest. On that ground an exception was taken by the defendant.

Sir Thomas Manners Sutton and *Steele*, for the defendant, supporting the exceptions to the first report.

Spencer Perceval and *Hart*, for the defendant, supporting the exceptions to the second report.

Richards and *Thomson* for the plaintiffs.

Jan. 26, 1804. **LORD ELDON, L.C.,** after the argument upon the exceptions to the first report, made the following observations: The question upon the exceptions to the report under this decree is whether the Master in the manner in which he has calculated interest has executed the decree according to the principles of the court. This decree is represented as peculiar in both directing interest to be computed upon the sums as they are from day to day and time to time received, and also in directing half-yearly rests, and further in not directing anything as to sums paid. In the ordinary case of a mortgagee in possession there is a debt de die in diem carrying interest, and it is very easy to make the proper rests, for every receipt forms a rest in discharge first of the interest, then of the principal. But an executor or trustee, having nothing due to him, but being to deal with the property of another as he would be expected to deal with it in a fair course of administration, the court must charge him from time to time with interest, making him allowances, or, if that is thought too strong against an executor, adopts a middle line, affording in

general cases a chance of doing justice. The court has been in the habit of charging interest by directing annual or half-yearly rests, pointing out how that interest is to be charged. What Master Holford has done, which is stated to be the practice of his office, is this. He has computed interest from every day in which every sum was received by the executor. That operation alone, it is obvious, charged him with simple interest at the rate of £5 per cent. upon all his transactions and without any allowance for his payments. But also rests are made at the end of each half-year by stating the whole amount of the interest accruing in that half-year, and adding that to the principal of the next half-year. The defendant is, therefore, first charged with simple interest upon every receipt, and with compound interest from half-year to half-year through the whole course of the proceeding.

Upon the question whether that is right, which is introduced by the exceptions, I am not satisfied by all the inquiry I can make and the attention I have applied to it. The practice is very differently understood. It is absolutely necessary, therefore, once for all to decide it with all the information that can be procured so that the language of the court may be uniformly understood. It is represented to be the understanding in some of the offices that where annual or half-yearly rests are directed the result of the interest for the current half-year or the whole year is carried, not into the principal, but into a separate column so as to have a column of interest, and when you get to the end, you add that column up to the whole of the principal and the aggregate sum constitutes the demand against the executor. The mode, adopted by Mr. Holford, would not be unjust if the principle of the court would allow it, for under such a direction for accumulation, though the court ought to act with great indulgence upon an inquiry whether the executor had in a fair and bona fide management made the most of the fund, and ought to be charged as having made interest of principal as soon as received, yet taking no step for years and keeping the whole in his hands, he acts against his duty. Upon the nature of his duty compound interest ought to be given as much as upon contract or the usage of dealing.

There is another way of putting it which was followed in *Hall* v. *Hallet* (1), which does this monstrous injustice. If, as in this case, the testator leaves £30,000 to an infant of six months old, and after maintenance and education the executor is directed from time to time to convert the interest into principal, and independent of that there are other funds quite sufficient for maintenance, the dividends of the £30,000, being paid into court every half-year, the dividends would form additional principal, in the course of twenty years a great deal more than double the legacy. But, if the executor is at liberty to say he will keep it in his own hands during the whole minority and at the end of it all the court can do is to order the account to be taken with annual rests, the consequence, taking it at £5 per cent., is that the executor would at the end of the first year have £31,500. If that sum of £1,500, the first year's interest, is to be carried into a separate column and not added to the principal and is not to carry interest, that sum, the first year's interest, would lie in the hands of the executor for twenty years, yielding no fruit to the infant. The next year he will have £3,000 in his hands nineteen years without interest, and so on; and, if it is considered what the executor may make of the interest thus long in his hands as a dead capital, the provision for him is as much as that of the infant. It is said, in this instance, if this money had been brought into court, and laid out from time to time in the funds, it would not have been more beneficial. But that is all accident. It might be much more beneficial.

The question, therefore, is extremely considerable, and with so much doubt upon the meaning of a decree of this sort to settle the practice once for all, my intention is to request the Masters to certify to me the practice of their respective offices in executing decrees, which direct accounts to be taken in this manner. If the practice varies it ought to be settled. At the same time I suspect that it will be found that there is rather more direction about interest in this decree than has been usual. I

doubt whether there ever was a decree which both ordered interest upon every sum, as it was received, and also annual or half-yearly rests.

The reference, directed accordingly to Mr. Cox, produced the second report.

Dec. 12, 1805. **LORD ELDON, L.C.,** after argument upon an exception to that report, pronounced the following judgment: The real difficulty is how to construe the words of this decree. Upon the justice of this case, what ought to be the demand I have very frequently and anxiously thought, and, adverting to all the cases in which the court has frequently considered it to be consistent with every view of moral justice that individuals in accountable situations should pay compound interest, though it has not been the habit of the court to give it, I have not the least difficulty in saying that, if I had to make the decree upon this evidence, I should have charged the defendant with compound interest. He was made one of the executors with a legacy for his trouble. The will states in the most express manner that the executors are to make no advantage whatsoever by keeping money in their hands, and expressly as to any such money directs legal interest, i.e., £5 per cent., expressly putting £4 per cent. out of the question, but, further, imposing upon them the necessity of parting with the money in their hands or of paying £5 per cent. As to the particular fund which is the subject of this suit, the testator expressly directs accumulation during the infancy of his children. This is not, therefore, a case of contract in which you can reason upon it as impolitic to encourage usury. It is only that the testator places money in the hands of these persons with an express prohibition to keep it in their own hands, and a direction expressly to place it out in some such way that they can accumulate interest. Therefore, by necessary consequence they keep it against the express direction of the will.

It was argued that, if the directions of the testator had been observed, as far as it was practicable, this executor would thus have been charged to a degree beyond that in which he could have made use of the money for the cestuis que trust. That is strictly true. It was added that the defendant would be contented to be understood as having laid out the money in the 3 per cents. as it could have been laid out, and that the dividends should be considered as having been laid out from time to time, and, therefore, the plaintiffs might take satisfaction in the mode the court would have directed. As to the first of these considerations, if an executor, with an express trust to accumulate, comes with this sort of case, desiring the court not to weigh it in golden scales, but to measure by his general conduct an honest endeavour to execute the trust, this court would not deal out a hard measure to him. But take it as a legacy to an executor, as trustee for an infant, a week old who says he has done nothing during the whole infancy, that he has kept the money without showing an endeavour to lay it out, or, that he had not the means, must the court hold that he is not to be charged in any degree or take the strongest rule they can take? If not the former, the rule must be the latter; for there is no other. Where there is an express trust to make improvement of the money, if he will not honestly endeavour to improve it, there is nothing wrong in considering him, as the principal, to have lent the money to himself on the same terms as those on which he could have lent it to others, as often as he ought to have lent it if it be principal, and as often as he ought to have received it and lent it to others if the demand be interest and interest upon interest. If the demand goes further than that, my opinion is that it is not a wrong principle to go as far, and that this is a species of case in which the court would shamefully desert its duty to infants by adopting a rule that an executor might keep money in his hands without being answerable as if he had accumulated, and, if the court cannot find out from the actual circumstances proved that he has attempted accumulation, and the charge falls more heavily upon him on that account, the fault is his own in not showing what endeavours to improve it he had made.

It is said that the defendant ought to be permitted to redeem himself from this by being considered in the same situation as if the property had been laid out in the

funds and accumulated. The court never will permit that at the conclusion of the executor's account. The consideration is very different where at the beginning of the infancy he lays it out in safety and a course of accumulation, where in one event it may be increased vastly beyond what it may prove in a different event. The court will not permit him to look back and calculate whether it is better for him to abide by that situation in which he ought to have placed himself at the commencement of the trust. The contrary principle may be justified by analogy, for, suppose he had laid out the property in the funds and sold out the stock at a great advance, if at the conclusion of the trust, the price is less than he sold at he could not have offered back the stock, but shall answer for the money if that is for the interest of the cestui que trust.

On these grounds there is no doubt that, if, instead of a computation by the Master of interest upon interest half-yearly, or, as is more usual, yearly (upon which, however, my judgment is bound by the decree), the proper way is to carry out the interest into a separate column half-yearly, and then to cast up the whole, the effect would be enormous injustice. Consider what a beneficial doctrine for the executor this is, and, of course, unfavourable to the cestui que trust. Take this fund as £30,000 in the defendant's hands, the infant cestui que trust being a week old. At the end of the first year the interest of that sum at £5 per cent. would be £1,500. If that sum is carried out into a separate column, it does not carry interest for the subsequent twenty years. If it does carry interest at £5 per cent., unless I give compound interest, in any way of putting it the legacy is nearly as beneficial to the executor as to the infant. That cannot be permitted.

Take it another way. Suppose, the executor is also guardian and no one will file a bill against him as next friend of the infant, see the consequence. When that sum of £1,500 is carried out into a separate column, if a bill was filed, the next day that sum would be brought into court, and from that moment, being principal though produced by interest, would have carried interest during the whole remaining period of twenty years. The principle imposing upon the executor the duty of doing what the court would call upon him to do is not pressed too far, particularly, if the executor is expressly directed to act as the court would act. Therefore, it is impossible to agree to the argument of counsel for the defendant. Further, it was contended that the direction to make annual rests does not authorise the Master to compute interest upon the column of receipts, but is inserted, in order that the court may be able, having regard to the magnitude of these sums, to reason upon the practicability of the executor's making interest of that interest, or, on the other hand, to say they may fairly be considered such sums, and of such a nature, that he could not be called upon to make principal of them.

With regard to the practice, I was amazed to find, how little the meaning of this direction to make rests was understood. I was surprised to hear it asserted that rests are never made to reduce an account, but only to increase an account, for in the case of receivers and all persons accountable I have known those words inserted. In general cases I believe rests are made in order to see whether interest is to be charged, or not. In this instance the court is bound to permit a computation of interest to be made upon the sums from the times they were received, making rests from the times they were received "in that computation", the more bound as the decree directs the account of the personal estate to be taken, and in that account expressly, at what time the sums were received. But, if the Master ought not to have added interest upon the balances of interest without the court's direction, I should have thought that the defendant ought to have been so charged, and the proper mode of taking the account is the mode in which it has been taken, and that reduces it to a mere point of form. As to the bonds [for money lent by the defendant to some of the plaintiffs at 4 per cent.] now produced, that is a consideration proper to be disposed of out of court, but where there is a general fund belonging, not to one, but to a body of plaintiffs, and the direction must apply to the whole, without

reference to the transactions with some of them, the court must adopt a rule applicable to all, and the other is a separate transaction.

That brings it to the meaning of LORD ROSSLYN'S decree, which is expressed in terms that, I apprehend, were never before inserted, and, I hope, never will again be found, in any decree. The mode of directing the account to be taken from the moment of the testator's death upon all the sums received and paid is new. Some time should be fixed at which the principal was to be said be in his hands so that it might be laid out. I doubt also whether the court ever directed interest upon payments and receipts to be computed at the end of the half-year, and then interest to be made principal. I doubt whether that has been ever done in practice. I do not say that it ought not to be done in some cases, and, perhaps, there is not much ground to complain of it in this case. But the course, I believe, has been, not to look at each particular case with regard to the practice of directing rests, but to fix some time at which the party is to be first charged with the principal, and then upon general convenience to make some rests and to call upon the Master to compute interest upon those rests. But this decree has expressly given that direction, and then, considering the nature of the case and the very particular expression as to the computation of interest in this decree, and the great opportunity I have given for a practical exposition upon the words of the decree, upon the whole I am not called upon to say that the Master has done wrong in this particular case.

The exception must, therefore, be overruled, but in such a case as this it is fair that they should divide the deposit.

The defendant presented a petition that the matter should be re-heard, and it came before LORD ERSKINE, L.C., on Mar. 9, 1807.

Spencer Perceval, *Hart* and *Mitford*, for the defendant, in support of the petition.
Sir Samuel Romilly, *Richards* and *Thomson*, for the plaintiffs.

LORD ERSKINE, L.C.—I agree with LORD ROSSLYN in the general principle upon which this decree is founded, and it is not easy to mistake the opinion of LORD ELDON so far as I have collected it from those parts of the judgment that have been read. But I am not quite sure whether some consideration is not required as to one part of the case. It is truly observed by counsel for the plaintiffs that this decree was not pronounced upon the general rule as to the duty of an executor founded upon two principles: (i) that, in order not to deter persons from undertaking these offices, the court is extremely liberal; (ii) that care must be had to guard against abuse.

There is no difficulty upon this will as to the duty of the person acting under it as executor. The testator directs his funds to be administered according to the law of England, subject to the directions of his will. The legal rate of interest of the country I must take to be £5 per cent., that which the law allows as the standard of interest. Accumulation of the surplus beyond the maintenance of each child is directed, and the testator had in view for that purpose the government funds. There is no doubt that, if the executor had immediately on receiving property, particularly that large sum, invested it in the funds to accumulate, according to the express direction and the condition imposed by the will, he could not have been called on to account at the rate of £5 per cent. unless by the fluctuation of the funds the produce had reached that amount, for he would have acted in the plain and direct execution of his trust. But these large sums were drawn out of a situation where they were producing the legal interest required by the will; and yet it is contended that he is not accountable for the legal interest positively directed by the will to be the standard. The executor certainly can never be permitted to state that.

I also agree that this account ought to be decreed with rests. It is clear upon the report of this case, that LORD ELDON would have made the same decree as to the rate of interest at £5 per cent., with half-yearly rests, on this principle, in which I concur, that a trustee, directed to do an act from which the cestui

que trust will derive a particular advantage, not performing that trust, shall be charged precisely in the same manner as if he had performed it. LORD ELDON says that he shall not be permitted to go back and account as if he had invested the property according to his trust. Certainly a trustee cannot be permitted to speculate in that manner instead of performing his trust.

The difficulty I feel on this point is whether, even upon the principle of this will, the executor was called upon immediately to pay in the whole of this sum of £30,000 as if there was no trust to be performed, or whether some account should not be taken, and a time fixed, from which the fund should be considered productive, which can be ascertained only by an account determining what sums he might lawfully retain in the due execution of his trust.

March 10, 1807. **LORD ERSKINE, L.C.**—I shall not make any alteration in this decree. I agree to everything that appears in LORD ELDON'S judgment, and have conversed with his Lordship. He says that, if the cause had come originally before him, he would have found no difficulty in making the decree according to the substance and justice of the case, on this clear principle, in which I perfectly concur, that the duty of this executor does not depend on the general rule as it relates generally to administration of assets, but on the special rule prescribed by this particular will, by which accumulation is directed, the particular mode of accumulation is pointed out, and the executor is told that he is to derive no advantage from the trust. The great object of the testator was the benefit of the infants. If the executor had kept in his hands money to answer the probable purposes of the trust, £10,000 for instance, or any other sum, such that the court could see an intention to administer the trust according to his duty, and the question had been only whether he had reserved too large a sum, I would have given him the most liberal measure. But, not beginning to act on that principle, keeping the whole of the property in his hands, he shall not, as LORD ELDON says, be allowed to look back, and have the account now taken and the allowances made as if he had acted upon a different principle.

My opinion is, therefore, that this account is properly directed, and I am satisfied that, affirming this decree, I decide according to the real justice of the case.

Decree affirmed.

WEBB *v.* RORKE

[Lord Chancellor's Court in Ireland (Lord Redesdale, L.C.), February 18, 1806]

[Reported 2 Sch. & Lef. 661]

Mortgage—Mortgagor and mortgagee—Transactions between—Validity—Lease to mortgagee of part of mortgaged land for 999 years—Low rent—Depreciation of value of equity of redemption.

The influence which a mortgagee has over the mind of the mortgagor owing to the existence of the mortgage debt is such that no dealing between them in relation to the mortgaged property should be allowed to stand if it is disputed by the mortgagor unless the transaction is supported by such evidence on the part of the mortgagee as puts the relation between the parties out of the matter.

Accordingly, where a mortgagor granted to the mortgagee a lease of part of the mortgaged land for a term of 999 years at a low rent which the court described as possibly suitable in a lease of twenty-one years or for a term merely in the nature of an occupation lease, **held,** that such a lease must materially affect the value of the estate upon a sale and consequently diminish the value of the equity of redemption; the court would not compel the mortgagor to prove direct misconduct on the part of the mortgagee, but would take the inequality of the situations of the parties as evidence that the transaction was produced by the influence derived from the mortgage, and would set the lease aside.

Cases referred to:

(1) *Fox* v. *Mackreth* (1788), 2 Bro. C.C. 400, L.C.; affirmed sub nom. *Mackreth* v. *Fox* (1791), 4 Bro. Parl. Cas. 258; 2 E.R. 175, H.L.; 25 Digest (Repl.) 286, *918*.

(2) *Watt* v. *Grove* (1805), 2 Sch. & Lef. 492; 1 Digest (Repl.) 542, **1028*.

(3) *Campbell* v. *Walker* (1800), 5 Ves. 678; 31 E.R. 801; 47 Digest (Repl.) 260, *2285*.

(4) *Whichcote* v. *Lawrence* (1798), 3 Ves. 740; 30 E.R. 1248, L.C.; 47 Digest (Repl.) 260, *2284*.

Bill for an order for the re-assignment or avoidance of a lease, and an account.

Edward Webb, being seised and possessed of part of the lands of Kilgobbin by virtue of a lease for lives, with a covenant for perpetual renewal, on Feb. 17, 1780, executed a mortgage thereof, in which his son, the plaintiff, joined, to Edmund Rorke to secure the sum of £400 lent by Rorke to Edward Webb. On Jan. 30, 1787, they executed another mortgage to Rorke to secure a further sum of £200. Bonds were executed by Edward Webb and the plaintiff as collateral securities upon which separate judgments were entered against them. On May 7, 1791 (both the mortgage debts remaining due), Edward Webb executed a lease of about 29 acres of the mortgaged lands to Rorke, for a term of 999 years at the yearly rent of £50 19s. 5d. In the same year Edward Webb died, leaving the plaintiff his eldest son and heir-at-law. Edmund Rorke died in 1799, leaving the defendant, John Rorke, his heir-at-law and personal representative.

In February, 1802, the plaintiff filed his bill charging that the lease of May 7, 1791, was made at a gross under-value, that Edward Webb, who was then eighty years of age and in a weak and feeble state, was induced to make it by threats held out on the part of Edmund Rorke that in the event of non-compliance, he would file his bill and foreclose the mortgages, and that neither Edmund Rorke, nor his son, had ever paid even the rent reserved by the lease. The bill prayed that the lease and the mortgage deeds and bonds might be brought into court, and that the defendant might be decreed to re-assign the lease to the plaintiff or that the same might be decreed void, and that the defendant might account for the real value of the lands from the date of the lease. The answer stated that the

lands were let at a fair rent, and denied that any threats or undue means had been used by Edmund Rorke to obtain the lease. Upon the value of the lands, the evidence in the case was contradictory. There was some slight evidence of threat, but that ground was not pressed.

The cause came on to be heard before LORD REDESDALE, L.C., on Feb. 23, 1805, when his Lordship directed the following issues to be tried in the Court of Common Pleas:

"(i) Whether the lease of May 7, 1791, was granted by Edward Webb to Edmund Rorke freely and voluntarily for the purpose of making the most advantage of the lands therein comprised, or was obtained by Edmund Rorke from Edward Webb, by means of the influence which Rorke had over Webb by means of the debt owing to Webb as mortgagor of the lands. (ii) Whether the rent reserved by the lease was the full and fair rent which might have been obtained from a solvent tenant upon a demise of the lands for 999 years, or not."

These issues came on to be tried on May 4, 1805, when the jury found:

"That the lease of May 7, 1791, was granted freely and voluntarily for the purpose of making the most advantage of the lands therein comprised, and was not obtained by means of the influence which Rorke had over Webb by means of the debt owing by Webb as mortgagor of the lands. And that the rent reserved by the lease was the full and fair rent which might have been obtained from a solvent tenant upon a demise of said lands for 999 years."

An order for rehearing was obtained by the plaintiff upon which the cause now came on to be reheard.

Driscoll, *W. Johnson* and *Smith* for the plaintiff.
Stewart, *Burston* and *Ball* for the defendant.

LORD REDESDALE, L.C.—I frequently have had occasion to turn this subject in my mind since I have sat in this court. Cases of this kind, I confess, were rather new to me. I do not recollect the question ever to have arisen in England upon a lease executed by a mortgagor to a mortgagee, and I think this must have been owing to a general impression that a lease under such circumstances, if disputed, could not stand. I cannot otherwise account for it, considering how natural it is for persons who deal usuriously to endeavour to gain advantages in every possible way. I have seen such variety of contrivances to evade the laws against usury that I am fully persuaded that the reason I had not that experience on this particular subject during thirty years' practice in England which I have had since I sat here is that in England it had always been considered that such a lease could not be supported.

It is said that cases of this description are new in this country, but that is no reason why the question should not be decided. Crescit in orbe dolus. Cases cannot always be found to serve as direct authority for subsequent cases, but, if a case arises of fraud or presumption of fraud to which no principle already established can be applied, a new principle must be established to meet the fraud as the principles on which former cases have been decided have been from time to time established as fraud contrived new devices, for the possibility will always exist that human ingenuity in contriving fraud will go beyond any cases which have before occurred. But I do not think there is any occasion in this instance, to resort to a new principle. The principle on which this case is to be decided is, I think, clearly and plainly established, and I think I was mistaken before and ought not to have directed the issues I did direct. They were taken up rather hastily under the impression that when they came before a jury, the case would be seen in its proper light. Unfortunately, when the case did come before a jury the question sent to them was quite wide of the point. Indeed, this frequently happens upon the trial of issues directed by courts of equity from the different habits of investigation which prevail in courts of law and equity, and from the judge at law not

being apprised of the view with which the issue was directed. I have witnessed this often in England, and so much is it felt that the Court of Exchequer there always endeavours to have issues directed by it sitting as a court of equity tried at the Bar of the Court of Exchequer sitting as a court of common law.

In reflecting on the issues which I directed it appears to me that they were very distinct. The first issue was to try whether the indenture of lease was granted by Edward Webb to Edmund Rorke freely and voluntarily for the purpose of making the utmost advantage of the lands comprised in it, or whether it was obtained by means of the influence which Rorke had over Webb by means of the debt due by Webb to Rorke. The second issue was whether the rent reserved was the full and fair rent which might be obtained from a solvent tenant upon a demise of said land for 999 years. Upon the trial, however, it seems to have been considered that the second issue was the only issue to be tried, and that the verdict on that was to decide the other. Certainly that was not my view in directing the issues, and in that view it was absurd to direct the first issue. The first issue, therefore, was never in fact tried, though it was the issue on which, if found for the plaintiff, I meant to ground my decree, even if the second had been found for the defendant. But unless the jury could have been put in possession of the principle on which courts of equity decide in the case of trustees, and have adopted all the reasoning which courts of equity apply to such cases, it would have been impossible for the jury to have formed a right judgment upon the subject. I feel, therefore, that I did wrong in directing the issues, and, in truth, I sent to a jury to try a question properly triable only in a court of equity, viz., whether the relation in which these parties stood of mortgagor and mortgagee did not put them in such a condition that except under extraordinary circumstances a transaction of this sort must be deemed prima facie an advantage taken by the mortgagee of the situation in which he stood with respect to the subject-matter of the contract and contrary to the policy on which the Statutes of Usury are founded. That the defendant did stand in such a situation cannot for a moment be doubted. Suppose the land, instead of being worth only £50, the rent at which it was let, was worth £60, and £60 was offered for it, provided the mortgagee would concur, the lease could not be made without his concurrence, and the mortgagee may say: "I will give but £50." Thus, by the power which his situation gives him he prevails without using a single word of threat, like the beggar in Gil Blas, who with his gun at his shoulder extorted money from the traveller without uttering a word.

The situation of a mortgagee necessarily produces this effect on the mind of the mortgagor. He is compelled to reason thus. "It is more beneficial for me to let to him at £50 than to another at £60, because, if I refuse him the lease at £50 and let to another at £60, he may bring an ejectment against the tenant, and turn both him and me out of possession, and the tenant will have an action against me on my covenant; or, the mortgagee may file a bill to foreclose, and put me to great expense." This impression may be made on the mind of the mortgagor, without a single word being used by the mortgagee, and, therefore, it is impossible to say that these two persons deal on equal terms, when they deal for a lease of the lands in mortgage. The mortgagor is under the control of the mortgagee in the very subject-matter of the contract, and, if the mortgagee had distinctly said to the mortgagor: "You must let to me a lease for 99 years at the rent which I think fit to give, and if you will not, I will harass you by all the means by which a mortgagee can harass his debtor," it is plain a lease so obtained could not stand. If the same thing can be done without a word spoken, the same consequence ought to follow. Ought evidence of such a conversation to be required? Is it not better to hold, as in the case of a trustee, "because this may be done it shall be taken as done, and the act, if disputed, shall be invalid." This was not, therefore, a question to be tried by a jury. The only question of fact in the case on the part of the plaintiff, in my judgment, was whether the parties stood in the relation of mortgagor and mortgagee, for, if they did, the policy of public justice seems

to me to require that a dealing of this kind should not stand, if disputed by the mortgagor, unless supported by such evidence on the part of the mortgagee as would put the relation between the parties out of the transaction.

On this ground other cases have been determined. If in *Fox* v. *Mackreth* (1) a question had been put to a jury in the language of these issues, it would have been scarcely possible for them to have found for the plaintiff. It would not have been within the province of a jury to have entered into all the circumstances which a court of equity takes into consideration in deciding upon the relation between cestui que trust and trustee, and the consequences of that relation. It was pressed on Lord Thurlow to grant issues. What he said (and what I ought to have said in this case) was that it would be sending to a jury to try, not matters of fact, but what ought to be the rules and principles of courts of equity. I, therefore, think the issues were improperly directed by me, and that I ought, in this respect, to alter the decree.

The real question is this. A bill is filed by a mortgagor stating that the mortgagee had obtained a lease of part of the lands in mortgage bringing a great encumbrance on the estate, such an encumbrance that, unless there was some collateral benefit to the inheritance derived from it, it must be a great advantage to the mortgagee and disadvantage to the mortgagor, for the result must be that upon a bill for redemption or foreclosure the estate must be sold, subject to a lease for 999 years, that is, not capable of any improvement. When I recollect the manner in which the property was taken from the plaintiff in *Watt* v. *Grove* (2) by getting successive leases, first for short terms, then for longer, till at length (the property being finally represented to the plaintiff as worth almost nothing on account of these very encumbrances) the fee simple was obtained at a price greatly below what would have been its value if none of the leases had been obtained, it is manifest that a lease of this kind obtained by a mortgagee from a mortgagor, must, as a prelude to a sale, be of the most mischievous consequence, perhaps particularly so in this country where the habit is to decree a sale upon a bill of foreclosure. When a bill is filed for a redemption, the party seeking the redemption is to have the estate conveyed free from any encumbrances made by the mortgagee: now this is an encumbrance, not made, indeed, by the mortgagee, but made by procurement of the mortgagee, the effect of which is to leave to him an advantage to himself after he has been paid his principal interest and costs.

Is this a subject on which a court ought to decide upon its own principles or ought it to be sent to be tried by a jury? The only question of fact that could be tried by a jury was whether the lease was at a fair value, and that is not, in my opinion, the true question in the cause. The lease might be in such terms that, if the parties had in dealing for it been on equal terms, there could be no pretence for impeaching it, but the question here is whether the parties were in a situation in which they could fairly discuss the value on equal terms. If they were not, it is clearly a case in which a court of equity should relieve. In trying a question of this kind before a jury, the trial must take place exactly as if the relation between the parties had not existed. This might have been a very fair value at the time of a lease of twenty-one years, or for a term merely in the nature of an occupation lease, but that is very different from the case of a lease for 999 years which is in effect a departure with the inheritance. The only difference between it and a fee farm is that the latter is more convenient to the grantee, and, therefore, he would pay more rent for it, but the former is not more beneficial to the grantor.

The rights of these parties, therefore, in discussion in this cause, are rights to be controlled only by a court of equity, acting upon the relation in which they stand, of mortgagor and mortgagee—the one having the legal estate; the other having an equitable interest which gives him a right to say: "You are entitled to hold these lands only to secure your principal, interest, and costs, and, those being paid, you have not a right to any further benefit out of the lands." If I were to suffer such a lease as this to stand, it would produce even greater mischief than

if a trustee were suffered to become a purchaser of the trust estate, a case in which equity always interferes. It is certainly liable to a more general objection, for, if it were once understood that a court of equity would not impeach a lease of this kind, on the ground of the relation between the parties, the consequence would be that every mortgagee desirous to make the most of his money would endeavour to gain a valuable interest in the mortgaged property by means of a lease. Thus the Statutes of Usury would be defeated in proportion to the conscience or prudence of the mortgagee, and of the caution and care with which the transaction was managed. With due caution and with moderation in his desire of gain, he would be sure of obtaining considerable profit beyond the interest of his money.

It is objected here that the plaintiff has lain by, and *Campbell* v. *Walker* (3) has been referred to where the Master of the Rolls, following what was said by the Lord Chancellor, in *Whichcote* v. *Lawrence* (4), discussed the question of laches by a cestui que trust, in impeaching a purchase by a trustee, as well as the general rule of a court of equity on the subject of such purchases.

If a man has a right to impeach any transaction and lies by a considerable length of time making no claim to and having no connection with the property, as where a trustee has bought the trust estate and remains in possession a length of time as absolute owner without impeachment of his purchase, the laches of the cestui que trust may materially affect his title to relief. The laches may be in itself unjust and contrary to equity and good conscience. But here the question between the parties is of a different description. The relation between them continued and was acted upon, for the defendant did not pay the rent because he was mortgagee, acting thus, not as lessee but as mortgagee. The situations of the parties are so totally different that it is impossible to compare them together. It is impossible to say that the mortgagor under such circumstances, has been guilty of laches because he has not filed his bill to impeach the lease for a period of eleven years without saying that he has also by laches forfeited his equity of redemption which entitled him to a re-conveyance of the mortgaged estate, on payment of principal and interest, free from any encumbrance by the mortgagee. Nay, the title of the mortgagee to the lease, if not impeached, is incomplete, and would be wholly defeated at law by the common decree for a re-conveyance so that a special provision must be made to preserve the lease.

Another objection was that this decision may tend to impeach dealings between mortgagor and mortgagee, for a sale of the equity of redemption. But to this a good answer was given at the Bar. The cases are totally different, the parties stand in a different relation. If there be two persons ready to purchase, the mortgagee and another, the mortgagor stands equally between them, and if the mortgagee should refuse to convey to another purchaser, the mortgagor can compel him by applying the purchase-money to pay off the mortgage. It can, therefore, only be for want of a better purchaser that the mortgagor can be compelled to sell to the mortgagee, but courts view transactions even of that sort between mortgagor and mortgagee with considerable jealousy and will set aside sales of the equity of redemption where by the influence of his encumbrance the mortgagee has purchased for less than others would have given and there were circumstances of misconduct in his obtaining the purchase. In the present case it seems to me that the true and only question is whether the relation of mortgagor and mortgagee is not such that, upon leases of such description as the present (a lease for 999 years, which must materially affect the value of the estate upon a sale, and consequently diminish the value of the equity of redemption), the court is not bound to say: "We will not look into the circumstances of the transaction so as to compel the mortgagor to prove direct misconduct in the mortgagee, but will take the inequality of their situations as evidence that the dealing was produced by the influence derived from the mortgage. In this case what inducement but the influence derived from the mortgage could the mortgagor have for granting a lease for 999 years

to the mortgagee at certainly no higher rent than the land would have been let for to another, upon a common occupation lease?

I am of opinion that the court is bound to say "None," and on this ground I think the lease ought to be set aside. With respect to the enjoyment by the defendant previous to filing the bill, I think it would be unfair to put him into the situation of a mere trespasser and make him account for the value of the lands in the way a mere trespasser ought. I, therefore, think the account of rent until filing the bill ought to be taken on the footing of the lease, for certainly the rent reserved by the lease has not such a character of inadequacy as to mark it as clearly fraudulent.

Order accordingly.

ATTORNEY-GENERAL *v.* EARL OF CLARENDON

[ROLLS COURT (Sir William Grant, M.R.), August 17, 1810]

[Reported 17 Ves. 491; 34 E.R. 190]

Trustee—Charitable trust—Corporation—Breach of trust—Removal from office.

Corporations constituted trustees have sometimes been by decrees of the court divested of their trust for the abuse of it, as any other trustees would have been.

Charity—Eleemosynary corporation—Visitor—Subjection of corporation to jurisdiction—Crown as visitor—Administration of jurisdiction by Lord Chancellor.

Eleemosynary corporations are the subject of visitatorial jurisdiction, and where, for want of an heir of the founder, the Crown becomes the visitor, it is by petition to the Great Seal, and not by bill or information filed in the court, that the removal of a governor from the corporate character is to be sought.

Charity—Eleemosynary corporation—Governor—Tenant of property of corporation—Surrender of premises—Inquiry into adequacy of rent paid.

Although no question of moral turpitude arose, yet, according to the general rule which the court adopted for the purpose of guarding against fraud, it was **held** that the governor of an eleemosynary corporation could not become the tenant of lands belonging to the corporation which it was his duty to let to the greatest possible advantage. If the premises were still in his possession he must deliver them up, and he must be charged with the full value if on inquiry it should appear that the rent he had paid fell short of that value.

Notes. Considered: *A.-G.* v. *Stamford* (1842), 1 Ph. 747. Applied: *Re Whitworth Art Gallery Trusts, Manchester Whitworth Institute* v. *Victoria University of Manchester*, [1958] 1 All E.R. 176. Referred to: *A.-G.* v. *Smythies* (1836), 2 My. & Cr. 135.

As to corporations as charity trustees and visitatorial jurisdiction, see 4 HALSBURY'S LAWS (3rd Edn.) 363–367, 408–414. For cases see 8 DIGEST (Repl.) 488, 489, 504–508.

Cases referred to:

(1) *A.-G.* v. *Grantham* (prior to 1807), cited in 13 Ves. at pp. 527–529.

(2) *Richmond School Case* (prior to 1807), cited in 13 Ves. at p. 527.

(3) *A.-G.* v. *Dixie, Ex parte Bosworth School* (1805), 13 Ves. 519; 33 E.R. 388, L.C.; 8 Digest (Repl.) 494, *2092*.

(4) *A.-G.* v. *Foundling Hospital* (1793), 4 Bro. C.C. 165; 2 Ves. 42; 29 E.R. 833; 8 Digest (Repl.) 505, *2261.*

(5) *Coventry Corpn.* v. *A.-G.* (1720), 7 Bro. Parl. Cas. 235; 3 E.R. 153, H.L.; 8 Digest (Repl.) 494, *2093.*

(6) *Rugby School Case* (circa 1808), unreported.

Information filed at the relation of several inhabitants of the parish of Harrow on behalf of themselves and the other inhabitants against the governors and the Head Master of Harrow School, stated letters patent in the fourteenth year of Queen Elizabeth I establishing a foundation by John Lion of a grammar school with one schoolmaster and usher at Harrow for the perpetual education of children and youth of the parish, and two scholarships at the University of Cambridge, and two at Oxford, and for the repair of certain roads.

The statutes, made by the founder, among various regulations directed that when any one or more of the governors appointed by the letters patent should die, the others should appoint one or more fit and discreet persons within the parish of Harrow; that the governors should appoint a Master at £20 per annum and an usher at £10; or, if so much cannot be made of the rents the surplus beyond the £20; that £20 per annum should be paid to the four poor scholars at Oxford and Cambridge; and all the places as well of scholars in the school as of the poor scholars to have the said exhibitions in the universities to be indifferently appointed and bestowed by the keepers and governors upon such as are most meet for towardness, poverty and painfulness, without any partiality, and a meet and competent number of scholars, as well of poor to be taught freely for the stipends aforesaid as of others to be received for the further profit and commodity of the schoolmaster, should be set down and appointed by the discretion of the governors.

The information stated, among various alleged breaches of the statutes, that five of the six governors were not resident within the parish; that they were not duly appointed; that large sums had been improvidently laid out for repairs; that a sum of £2,000 had been allowed to the Head Master towards repairing and ornamenting his house, part of the possessions of the school which had been greatly enlarged for the reception of boarders, taken in by him as "foreigners" to be educated at the school, instead, and to the prejudice, of the children of the poor inhabitants, which house was decorated with every elegance and convenience and was occupied at no rent, or a very trifling one, and he was permitted to reside at that house, at a considerable distance, instead of the old school-house where he was directed to reside; and which, if not sufficiently capacious, it was directed, and ought, to be made so. It was said that few or none of the children of the inhabitants of the parish or town of Harrow, for whose benefit the free grammar school was originally instituted, had been educated there, nor could they be safely or properly sent there, for, though the Master and governors do not actually refuse to admit such children when offered, yet by taking into the school so many "foreigners," to the amount of 250 or more (which he is permitted to do by the connivance of, and without any restriction and limitation from the governors), who are chiefly the sons of the nobility and gentry of this kingdom, they render it impossible for such poor children to remain in the school, being constantly scoffed at and ill-treated by the other boys, and their lives not only rendered uncomfortable, but often in great danger, insomuch that parents of such children have been obliged to take them away from the school. Many instances of this had happened, whereas by the rules and orders of the charity the Master was permitted to take into the school so many "foreigners" only as could or might be taught without prejudice or neglect of the children of the poor inhabitants of the parish for whose direct and more immediate benefit the school was founded.

The information further stated that the habits and manners of the youths who were admitted as "foreigners" and the expensive establishments they were under, rendered it impossible for the inhabitants to keep their children on the same

footing and very dangerous to their future plans and prospects in life, especially as they were too apt to imbibe the extravagant and expensive ideas, as well as the pernicious habits, of the young men of fortune so admitted into the school. All the governors, except the vicar, were resident at a distance, and a receiver was appointed by them at a large salary. The Master had received a great number of "foreigners" without the judgment of the governors expressed. The information prayed an account of the revenues, the removal of governors not duly appointed and the appointment of others, a reference to the Master for that purpose, and to approve a plan for the better regulation of the school and the admission of the children of the inhabitants, and generally for the establishment of the charity.

The defendants, by their answer, stated their belief, that for many years past persons had been chosen governors, who were not inhabitants, but no injury had arisen from it, and they were fit persons. They believed that but few of the children of inhabitants of the parish were educated or brought up at the school, though there always have been several and then were six such. None had ever been refused to be admitted, and the present Master and the late Master had encouraged the inhabitants to send their children, but this was a school for classical learning which it was the intention of the founder it should be, and classical learning was there cultivated with much diligence and it was the opinion of those best capable of judging not well adapted, generally, for persons of low condition, but better suited to those of a higher class intended for learned professions. That opinion had been, the defendants believed, the chief reason why a greater number of poor children of the inhabitants had not attended the school. Some parents had alleged as a reason for not sending their children that they lived far remote from the school and were not able to bear the expense of boarding their children in the town, and others have objected to the expense of purchasing classical books.

The answer further stated that, the school having been for many years conducted with exemplary diligence and attention, its credit stood very high, and "foreigners," as they were called in the rules of the founder, i.e., sons of persons not inhabitants of the parish, to the amount of 200 or more, had been taken into the school with the approbation of the governors. Many of them were the sons of nobility and gentry of the kingdom whom the high reputation of the school for learning and good conduct had brought thither. Instances might have occurred where the children of the inhabitants had been scoffed at and ill-treated by their schoolfellows, as might have been the case with other boys in so large an establishment, but it had been the constant and invariable rule of the masters to repress such conduct by all means in their power. They were not aware of any such instances, and, if any, believed they would be found to have originated from other causes. By reason of the resort of "foreigners" they had been enabled to procure masters of much greater learning and better qualified for the office than they could otherwise. The inhabitants were not by the non-residence of some of the governors deprived of the opportunity of making complaints, one of the defendants being always resident and the other governors not far distant and well known to most of the inhabitants. The Head Master admitted that he had, with the privity and general consent of the governors, though without any express leave, received many "foreigners," but not more than former masters. The present number was 230. No inconvenience or disadvantage to the children of the inhabitants arose from that.

Aug. 17, 1810. **SIR WILLIAM GRANT, M.R.** This information has three objects—first, the removal of such of the governors of Harrow School as have not been duly elected, secondly, the better administration of the revenues of the charity, thirdly, an alteration in the present constitution of the school.

The first of these objects is prayed upon the ground of those governors not having been inhabitants of the parish at the time of their election. By the letters patent of Queen Elizabeth the governors are constituted a body corporate. This

court, I apprehend, has no jurisdiction with regard either to the election or the amotion of corporators of any description. Eleemosynary corporations are the subject of visitatorial jurisdiction, and where, for want of an heir of the founder, the Crown becomes the visitor, it is by petition to the Great Seal, and not by bill or information, that the removal of a governor from the corporate character, which he de facto holds, is to be sought. This was the course pursued in the cases of Grantham School (*A.-G.* v. *Grantham* (1)) and Richmond School (*Richmond School Case* (2)), and even in *A.-G.* v. *Dixie* (3), where the election of governors might be said to be a fraud upon the court, the Lord Chancellor declined proceeding to their removal until a petition was presented to him in his visitatorial capacity. Corporations constituted trustees have indeed sometimes been by decrees of the court divested of their trust for an abuse of it; as any other trustees would have been: *A.-G.* v. *Foundling Hospital* (4). Such was the case of the corporation of Coventry (*Coventry Corpn.* v. *A.-G.* (5)), in the time of Lord Harcourt, but that is very different from divesting a person of his corporate character and capacity. Whether any court, or visitor, would be disposed to inquire into the original eligibility of corporators after such a length of time as the defendants have held their offices of governors is a point on which it is not necessary for me to give any opinion. The information, so far as it seeks their removal, must be dismissed.

With regard to the revenues, the information complains partly of the management of the estates, and partly of the application of the incomes. In the management of the estates, it is said, there are deviations from the rules of the founder to the injury of the charity; that the governors do not appoint from among themselves surveyors of the estates; that the tenants are not made to covenant to do all repairs; that the rents are not received at the school-house, but a receiver paid for collecting them. As management, generally improper, independent of the founder's rules it is charged that a part of the school estate is let to Mr. Williams, one of the governors, at an undervalue, and it is said to appear by the evidence, that several parts of the estate are let below their estimated value. The governors say that the deviations from the strict letter of the founder's rules have not been introduced in their time, and that those deviations are beneficial, rather than injurious, to the estate. As to the few acres of land and a barn let to Williams, they say that they reserved the full rent, and a higher rent than was offered by any other person. On this branch of the cause I think the relators are entitled to have inquiries directed to ascertain whether the estates are properly and advantageously managed with a view to prospective regulation if any shall appear to be necessary. As to the lease to Williams, though nothing wrong with regard to it is in a moral point of view imputable either to him or the other governors, yet according to the general rule which this court adopts for the purpose of guarding against possible fraud, he could not become a lessee of the lands which, as governor, it was his duty to let to the greatest possible advantage. Therefore, if the premises are still in his possession, he must deliver them up, and he must be charged with the full value if it should appear that the rent he has paid fell short of that full value.

With regard to the application of the income, it is alleged that some of the purposes to which it ought to be applied are neglected and that part of it is applied to purposes not within the scope of the charity. The purposes to which, after providing for the sustentation of the school, the surplus income is to be applied are partly specified by the founder's rules and partly left to the discretion of the governors. As it appears that the application of the income is not in all respects agreeable to the directions of the founder, I think it is fit that it should for the future be fixed and ascertained by a scheme, having due regard on the one hand to the founder's directions, and on the other to the alteration of circumstances that may have taken place since his time, which may be such as to render a literal adherence to his rules adverse to their general object and spirit.

I did not understand that the relators sought to charge the governors personally

and retrospectively for misapplication as for an abusive application of the funds, and I am persuaded that they have administered the revenues of the charity to the best of their judgment and have been actuated by no improper motives in anything they have done or omitted to do. There is one article of expenditure, however, to which I shall presently more particularly advert—that which regards the Master's house. It is in some degree incidental to the third, and most material, object of the suit, the constitution of the school.

In the conception of the relators the school no longer answers the purpose of its foundation, and in that view the whole expenditure may be said to be misapplied. Considering, say they, the very small proportion which the parish boys taught at Harrow School bear to the other scholars who resort thither, the income of the founder's estate is employed rather in providing for the more commodious education of the rich than in supplying a gratuitous education to the poor, and it is contended that some measure ought to be adopted by the court for securing to the inhabitants of the parish the full benefit intended for them by this institution.

We must see in what sense it is asserted or is true that the inhabitants have not the full benefit of the institution before we can judge whether any remedy is necessary or practicable. It is not alleged that there is not a commodious school, that there are not competent teachers, or that any of the children of the parish are refused admittance into the school, or, when admitted, are not carefully taught. At first sight then it seems that the benefit of the institution is within the reach of the inhabitants so far as they may choose to avail themselves of it, but it is said that so many "foreigners," that is, boys not entitled as parishioners to be gratuitously educated, resort to this school that the parishioners are deterred from sending their children to it, partly from the ill-treatment they receive from such "foreigners" and partly from the apprehension of their acquiring expensive habits by an association with persons of rank and fortune superior to their own. From this statement of the evil it is difficult to conceive what remedy it is in the power of the court to apply. The most obvious, and the only complete one, would be the entire exclusion of "foreigners." This, however, in the first place would be incompatible with the intention of the founder who did not mean to erect a mere parochial school, but has declared that the Master may receive over and above the youth of the inhabitants within the parish so many "foreigners" as the whole may be well taught and the place can conveniently contain.

No attempt has been made to show that this number has been exceeded. In the second place, would the parish itself gain by the conversion of this distinguished seminary of learning into a mere parish school? It cannot be supposed that for the present salary a man of talents would be found to fill the place of Master, and to give him a large salary is the last method that prudence would devise for securing diligence and exertion in the obscure sphere to which he would be confined. As to a mere diminution and limitation of the number of "foreigners" to be admitted, it would not meet the evil, of which these relators complain. I do not know what the number is from which bad habits may not be contracted or ill-treatment suffered, but is it really true that it is to the alleged causes that the paucity of parish scholars is to be ascribed? Why should Harrow be so unfortunately distinguished from the great number of schools in which the admission of other scholars does not in any way prevent those who choose it from taking the benefit of the foundation?

Upon the whole of the evidence the existence of the alleged conspiracy against the parish boys is by no means satisfactorily made out. The number of instances of ill-treatment is no greater than might in the course of years, from which they are produced, very possibly happen from personal and accidental circumstances, while the proved existence of cases in which no such treatment was experienced negatives that uniform and systematic hostility to parishioners merely as such which is alleged to prevail in this school. Several witnesses, among them parishioners, say that the reason there are so few parish scholars is that few of the inhabitants wish

to give their children a classical education. Giving credit to all who say they had any disposition to send their children to Harrow School, the number of parishioners that would have been there at one time would be very small. I should be unwilling to take any step that might impair the general utility of the school for the mere chance of adding a few more to the number of scholars on the foundation. In some schools the Master has an allowance of so much per annum for every scholar on the foundation. To that mode of encouraging attention to parish scholars I can see no objection, but any restriction on the number of other scholars, excepting that which the founder himself has prescribed, would be neither proper, nor efficacious, and I cannot agree to make a reference to the Master to frame a scheme with a view to any such object.

It was said that, if the parishioners either do not wish to send their children to the school in greater numbers or are prevented from doing so by causes which the court cannot control, the fund ought not to be applied to expenses attending the school, but the parish should have the benefit of it in some other way. The parishioners must, I apprehend, be contented to take the benefit in the way in which the founder thought fit to give it. The school is not to be let down because in a given period there have been few, or even no, parish scholars sent to it. The founder has determined that there shall be for ever kept up at Harrow a grammar school, and he has provided funds for its perpetual sustentation. In this grammar school parish children are to be taught gratuitously if they choose to receive that sort of education, but the founder intended to encourage other scholars to resort to his school and to impart to them every benefit of his foundation except gratuitous teaching. The school must have been built of larger dimensions and at greater expense with a view to their accommodation. The playground must be calculated for the whole number. The exhibitions are directed not to fail because there are no parishioners qualified to be sent to the university. In that case other scholars are by the express provision of the founder to have them. I can by no means admit that the propriety of any expenditure is to be measured by the number of parish boys who are to be immediately benefited by it, provided it is an expenditure fairly referable to the purposes of the school.

This brings me to notice the expenditure in the repairs of the Master's house. It is clear, that the Master was to be provided with a habitation at the expense of the trust. The founder states his intention to build meet and convenient rooms for the Master and usher. Whether any such rooms were ever built does not appear. In one article it is directed that the account book shall be kept in a chest in the house, that shall be appointed for the Master. It appears that as far back as the year 1670 an allowance was made to the Master for a house. In 1671 some assistance was given him towards fitting up his house for the better accommodation of himself and his boarders. In 1702 he had a house, belonging to the trust, given free from rent, and there are entries at different periods since that time of sums expended in repairs of the Master's house. When the present Master was appointed, the house being much out of repair, the governors agreed to contribute £1,200, payable by instalments of £200 per annum towards the repairs. That sum was not found sufficient even for those that were strictly necessary; and the Master has himself laid out upwards of £5,000 in enlarging and improving the house. Thus it appears that the governors, instead of increasing the Master's salary out of the augmented revenues, have given him in another shape a benefit, the amount of which upon the whole does not appear to be extravagant.

In the case of Rugby School (*Rugby School Case* (6)), which was before the Lord Chancellor about two years ago, the expenditure for the benefit of the Master was much larger, yet the objections, made upon the same grounds that have been relied on in the present case, were not allowed to prevail. Rugby School was founded in Queen Elizabeth's time, and was to be a free grammar school, at first for the children of Rugby and Brownsover, and other places within a certain distance of Rugby. It became in process of time, as this has, a great public school,

and the scholars who paid for their education greatly out-numbered those on the foundation, sometimes in the proportion of ten to one. An Act of Parliament, 17 Geo. 3, was passed relative to the charity estates, among other things directing the trustees to lay before the Court of Chancery plans for the appropriation of the surplus rents. Under an order of reference for that purpose a scheme was laid before the Master by which it was proposed to add £2 a year to £3 before allowed to the Master for every boy educated on the foundation, to add to the number of exhibitioners, and to lay out several thousand pounds in re-building the Master's house with proper accommodation for his boarders and £500 in repairing the other buildings. The Master reported that he approved the scheme except as to re-building the Master's house, and the repairs, and increasing the number of exhibitioners, stating, that he did not approve of such an application, as, though he was of opinion that it was proper and necessary as to both objects, yet, having regard to the size and extent of the buildings proposed for such house and offices and to the number and description of the masters, among whom were a French master and a drawing master, and to the number of boys educated, not more than an average of a fourth of which belonged to the charity and of the exhibitioners a third only was taken from such boys, it appeared to him that such house and buildings were calculated for receiving boys of a different description and for a different education than were intended either by the founder or the Act, and to be to the prejudice of the boys properly entitled to the benefit of the charity. He did not approve the plan as no consideration was had for the almsmen and almshouses, and the trustees, though required, did not lay before him any other plan.

The trustees presented a petition to the Lord Chancellor praying that notwithstanding the report they might be permitted to carry their plan into execution. His Lordship ordered that the petitioners should be at liberty to carry into effect the plan or scheme for the disposition of the surplus income of the charity, so carried in before the Master, and to pay the £2 and to raise £14,000 for the purposes in the said plan mentioned and to enlarge the number of exhibitioners, etc., pursuant to the scheme proposed. It is obvious that the Lord Chancellor did not conceive an expenditure to be improper which tended to the general advantage of the school merely because it was not calculated for the direct and immediate benefit of the boys on the foundation.

The only part of the information remaining to be noticed is that which represents the course of education and internal discipline of the school as not entirely agreeable to the rules laid down by the founder, but the governors are expressly authorised to alter these rules and such alterations as have been long known and acquiesced in will be presumed to have been made by their authority, though the precise order for it does not appear. Whether this or that book is to be read in a particular form, whether the boys are to go to school at this or that hour, and the like, may surely be left to the governors and masters to determine. If there should be any substantial deviation from the principle and purpose of the institution, the visitatorial authority may with propriety be called upon to interpose.

Order accordingly.

SHEPARD *v.* DE BERNALES

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Le Blanc and Bayley, JJ.), May 27, 1811]

[Reported 13 East, 565; 104 E.R. 490]

Shipping—Freight—Payment—Right to claim against charterer—Clause in bill of lading that master deliver goods to consignee or his assigns, he or they paying for them—Goods delivered without receiving freight.

A clause in a bill of lading engaging the master of a ship to deliver goods to a consignee or his assigns, he or they paying freight for the goods, is introduced for the benefit of the master only and not for the benefit of the consignor. Accordingly, the master is not bound to the consignor to withhold the delivery of the goods unless the consignee or his assigns pays the freight, but he can claim the freight from the consignor.

Notes. Applied: *Domett* v. *Beckford* (1833), 5 B. & Ad. 521. Referred to: *Muller (London)* v. *Lethem, Same* v. *I.R. Comrs.*, [1927] 1 K.B. 780.

As to payment of freight, see 35 Halsbury's Laws (3rd Edn.) 479 et seq.; and for cases see 41 Digest (Repl.) 541 et seq.

Cases referred to:

(1) *Penrose* v. *Wilkes* (1790), cited in 13 East, at p. 570; 104 E.R. 492; 41 Digest (Repl.) 541, *3187*.

(2) *Tapley* v. *Martens* (1800), 8 Term Rep. 451; 101 E.R. 1483; 41 Digest (Repl.) 542, *3199*.

(3) *Christy* v. *Row* (1808), 1 Taunt. 300; 127 E.R. 849; 41 Digest (Repl.) 541, *3185*.

Demurrer to an action of covenant on a charterparty.

The charterparty was made Mar. 26, 1808, between the plaintiff, therein described to be master of the American ship *Hopewell* then lying in the port of London, and the defendant, a merchant of London. The charterparty witnessed that the plaintiff let the *Hopewell* to freight to the defendant for the voyage and on the following terms and conditions. The plaintiff covenanted that the vessel should be made tight and be sufficiently manned, victualled, apparelled and provided, etc., for the intended voyage; that he would receive on board not exceeding 160 hogsheads of tobacco from the defendant, his agents or assigns, and being despatched therewith would sail from the port of London and proceed directly to Tangiers, where he would apply to the correspondents, factors or agents of the defendant for orders, and wait for the same fifteen days, whether he was to deliver the cargo at that port, or proceed therewith to St. Lucar or Cadiz; and that having received such orders, the plaintiff would pursuant thereto make a right and true delivery to the correspondents, factors or agents of the defendant of the whole of the cargo of tobacco agreeably to bills of lading; and on such delivery and discharge to end the voyage (the act of God, etc., and all other unavoidable casualties excepted). In consideration whereof the defendant covenanted for himself and his assigns, etc., not only to ship on board the vessel in the port of London a complete cargo of tobacco in hogsheads, and receive the same out of her at Tangiers, St. Lucar or Cadiz (giving notice to the plaintiff at what port the cargo was to be discharged within fifteen days after the vessel's arrival at Tangiers) within the time limited, and days of demurrage, etc.; but, also, that he would pay to the plaintiff or his assigns immediately on a right and true delivery of the cargo in full for the freight of the ship for the voyage at the rate of £3 13s. 6d. British sterling per hogshead received out of her, together with £10 per cent. on the amount of the freight for primage, and 30 guineas as a gratification to the plaintiff.

The plaintiff averred that the ship was made tight and sufficiently manned, etc., for the voyage; and that, on May 2, 1808, after making the charterparty, he received

on board of her at London from the defendant 135 hogsheads of tobacco and that he signed bills of lading for the same. By the bill of lading dated London, May 2, 1808, it appeared that the ship was "bound for Tangiers and from thence to St. Lucar," and that the 135 hogsheads shipped were

> "to be delivered at the aforesaid port of Tangiers and St. Lucar . . . to Mr. John de la Piedra, or in his absence to his Catholic Majesty's consul-general at Tangiers, or to their assigns, he or they paying freight for the said goods, 3 guineas and a half for each cask, £10 per cent. primage, and 30 guineas gratification; the whole at the current exchange at Cadiz on London, with primage and average accustomed."

It was signed by the plaintiff. He further averred that those were the bills of lading referred to in the charterparty, and that no others were signed for the delivery of the cargo; that, having received the cargo of tobacco on board and being despatched, he sailed with the vessel directly from London to Tangiers and, being arrived there on June 6, 1808, applied to John de la Piedra, the correspondent and agent of the defendant in that behalf, for orders whether he should deliver the cargo at that port, or proceed therewith to St. Lucar or Cadiz; that he was then and there ordered by John de la Piedra to proceed with the cargo to Cadiz, and that by means of the several premises aforesaid, the plaintiff was prevented from making a right and true delivery of the same to any of the correspondents, factors or agents of the defendant at Tangiers or St. Lucar, agreeably to the bills of lading in that behalf, but that, having received such orders aforesaid, pursuant thereto he proceeded with the ship and cargo to Cadiz, and afterwards, on July 13, 1808, did there make a right and true delivery of the whole of the cargo, agreeably to the orders and directions of one Benito de la Piedra, the agent of the defendant in that behalf, according to the form and effect of the charterparty, and thereupon ended the voyage; and that the defendant afterwards had notice. The plaintiff alleged a breach of the defendant's covenant in the charterparty by non-payment of the stipulated freight to his damage of £700.

To this the defendant pleaded, inter alia, that the plaintiff ought not to maintain his action because the plaintiff, not regarding the bill of lading and the charterparty, delivered the tobacco without receiving the freight, and gratification, primage and average, according to the bill of lading, or having the same secured to him in any manner whatsoever, as he ought to have done; by reason whereof and by and through the default of the plaintiff, the freight, primage, average and gratification to be paid according to the bill of lading had been wholly lost. To this there was a general demurrer.

Puller for the plaintiff.
Scarlett for the defendant.

LORD ELLENBOROUGH, C.J., delivered the following judgment of the court.—This was an action of covenant on a charterparty, whereby the plaintiff agreed to carry a cargo of tobacco and deliver the same to the correspondents, factors or agents of the defendant agreeably to bills of lading; and the defendant covenanted to ship the tobacco, to receive it either at Tangiers, St. Lucar or Cadiz, giving notice within fifteen days after the ship's arrival at Tangiers at which of those places the cargo was to be delivered, and on right and true delivery, agreeably to bills of lading, to pay or cause to be paid certain stipulated freight. The cargo was loaded and bills of lading signed for delivery at Tangiers and St. Lucar to John de la Piedra, or in his absence to his Catholic Majesty's consul at Tangiers, or their assigns, he or they paying certain specified freight (being the same as that mentioned in the charterparty) at the current exchange at Cadiz on London. The ship arrived at Tangiers, application was made to John de la Piedra to know whether the delivery was to be there or at St. Lucar or Cadiz, orders were received from him to deliver at Cadiz and the cargo was accordingly delivered at Cadiz to the

defendant's agent there but the freight was not paid. The questions which have been made on the part of the defendant are three: first, whether the plaintiff was warranted in delivering the cargo to the defendant's agent without first obtaining from him the freight. Secondly, whether he was warranted in going to Cadiz at all (Tangiers and St. Lucar being alone mentioned in the bills of lading) and in making a delivery there. And thirdly, whether he had any right to deliver to the defendant there, he being, as was contended, a stranger to the bill of lading.

The first is the chief and most material question, and it depends on the effect of this clause in the bill of lading, "he or they paying freight for the said goods." If this clause were introduced with a view to the defendant's security and made it incumbent on the plaintiff, at his peril, to look to the consignee under the bill of lading for payment of the freight, the plaintiff had no right to deliver to the defendant's agent without first receiving such payment; and his delivery without payment was in that case not "a right and true delivery." But if this clause were introduced for the plaintiff's (the master's) benefit only and merely to give him the option, if he thought fit, to insist on his receiving freight abroad before he should make delivery of the goods, he had a right to waive the benefit of that provision in his favour and to deliver without first receiving payment, and is not precluded by such delivery from afterwards maintaining this action. The latter seems to us the true construction of this contract.

Penrose v. *Wilkes* (1), ABBOTT'S LAW OF MERCHANT SHIPS (3rd Edn.) 276, is, according to the account of it there given, nearly in point. According to that account, there was a charterparty and bills of lading, as here, and the bills of lading imported that the goods were to be delivered to a third person on his payment of the freight. They were in fact delivered to him without such payment. LORD KENYON, at nisi prius, at first held that he could not sue the charterer for the freight on the ground that he ought not to have delivered the goods without having the freight paid and, accordingly, nonsuited the plaintiff; but the court afterwards, on a motion for a new trial, thought his opinion wrong and a new trial was ordered, in which the plaintiff succeeded. MR. HOLROYD has furnished the court with the briefs in that case, and they nearly agreed with MR. ABBOTT'S statement. The bills of lading were to the defendant Wilkes or his assigns, he or they paying freight; and the defendant endorsed them specially to Richard Kymer & Co., on condition only that they would accept, or in writing promise to accept, certain bills and would also promise in like manner to account with Rowlett, Corp & Co. to whom half the cargo of tobacco belonged for one moiety of the proceeds of the tobacco; and on refusal by Kymer & Co. so to accept or to promise to accept and so to account to Rowlett, Corp & Co. for one moiety of the proceeds, then to deliver the tobacco to Dewhurst & Co., first obtaining from them similar promise in writing to accept the bills and to account to the defendant for a moiety of the proceeds. Kymer & Co. refused the consignment, and the goods were delivered to Dewhurst & Co., but no promise in writing was obtained from them. They did, however, in fact pay the bills and account for the defendant's moiety, and gave him credit for all the freight; notwithstanding which he continued greatly in their debt. LORD KENYON thought, on the first trial, that the bill of lading imposed on the captain the obligation at his peril to get the freight on delivering the cargo; but the court thought otherwise, and granted a new trial. On the second trial, LORD KENYON told the jury that he conceived at the first trial that the charterparty was controlled by the bills of lading and imposed on the plaintiff the duty of receiving the freight, but that the Court of King's Bench thought the bills of lading imposed no such duty on him, and that whatever his (LORD KENYON'S) private opinion was, he was bound to say that he was at first mistaken. The plaintiff thereupon had a verdict for £967 16s.

This was in 1790, and ten years afterwards came *Tapley* v. *Martens* (2). The plaintiff sued for freight on a charterparty, wherein the defendant stipulated to pay the freight on delivery of the cargo according to the bill of lading. The bill of lading is not set out, but it was probably in the usual form. It was certainly intended that

the freight should be paid by the consignee, he being indebted to the defendant in more than that amount. Part of the freight was paid abroad, but for part of it, viz., £500, the captain took a bill and, that bill being dishonoured, the captain sued on the charterparty for this part of the freight. Had it been his duty to receive payment of the freight before he parted with his cargo, he would have taken this bill at his peril and he could never afterwards have resorted to the defendant on the charterparty: but, on a Case reserved, the court thought it very clear that he was warranted in delivering the cargo as he did and that the defendant was liable to the action.

Lastly, in *Christy* v. *Rowe* (3), where there was a charterparty and a bill of lading in the same form as this, the Court of Common Pleas held that the captain was not bound at his peril to insist on his freight at the time of delivering the goods but that, if he delivered the goods and could not afterwards get the freight from the consignee, he might sue the charterer for it on the charterparty.

These cases, therefore, prove that such a clause as this does not in general cast the duty on the captain at his peril of his obtaining his freight from the consignee, but that, if he cannot get it from him, he may insist on having it from the charterer. Nor is there anything particular in this case to warrant us in saying that the contrary was intended by the parties to these stipulations. The charterparty imports that the delivery was to be to the correspondents, factors or agents of the defendant, and there is nothing in the bill of lading which implies that the consignees were not to be understood as comprehended within this description of "correspondents, factors or agents of the defendant." The assign or appointee of John de la Piedra (if there had been any person properly answering this description) would have been derivatively the agent of the defendant himself.

In the circumstances of this case, the observations that the defendant's covenant in the charterparty is to pay immediately on delivery and that the bills of lading look to a payment abroad by fixing the rate of exchange, do not appear to us to vary the case. The charterparty gives him a right to demand payment on delivery if he think fit, and the bills of lading only fix the rate of exchange if he demand it; but they do not imply that he must necessarily make the demand abroad, or that he may not wait for payment till his return.

The other objections that the plaintiff had no right to go to Cadiz or to deliver to the defendant's agent there are easily answered. The charterparty stipulated for delivery at Tangiers, St. Lucar or Cadiz, and the omission of Cadiz in the bills of lading was in effect for the benefit of the captain, to relieve him from the necessity of going thither if he should wish to decline it; but it did not take from him the power of going there if he should be willing so to do and the defendant's correspondents should desire it. If they chose to accept at Cadiz instead of either of the other places, why were they not at liberty to do so? Then as to the delivery to the defendant's agent at Cadiz, who is considered as a stranger to the bill of lading, he may be looked on either as virtually the appointee of John de la Piedra, and in that way he takes under the bill of lading as his assign; or if not, John de la Piedra must be considered as refusing to accept or to make an appointment under the bill of lading, and, then, in default of his having appointed any assign, the plaintiff could not do otherwise than deliver to the agent of the defendant himself, the original proprietor. For these reasons we think the defence is not made out, and that the plaintiff is entitled to judgment.

Judgment for plaintiff.

WILTSHIRE *v.* SIMS

[Court of King's Bench (Lord Ellenborough, C.J.), March 1, 1808]

[Reported 1 Camp. 258; 170 E.R. 949]

Agent—Authority—Sale of stock in unusual manner—Credit for price of stock—Need of express authority.

The defendant employed a broker to sell stock in the usual manner. The broker agreed to sell it to the plaintiff, but, as the transfer could not be made for a fortnight when there was to be a meeting of the trustees of the stock, the plaintiff paid the broker by a promissory note at fourteen days. The broker paid the note to his own bankers where it was attached for a debt of his. At the end of the fortnight the defendant refused to make the transfer as he had received no part of the purchase-money.

Held: the broker had sold the stock in an unusual manner, and, as he was not authorised to do so by the defendant, the defendant was not bound by his acts.

Notes. As to implied authority of an agent, see 1 Halsbury's Laws (3rd Edn.) 164 et seq.; and for cases see 1 Digest (Repl.) 357 et seq.

Action for not transferring stock.

The only witness was Watkins, the broker in this transaction, who stated that the defendant gave him orders to sell out £500 of the stock of the trustees of the Commercial Road; that, on Aug. 27, he agreed to sell it to the plaintiff; that, as the transfer could not be made till the expiration of a fortnight when there was to be a meeting of the trustees, the plaintiff paid him for the stock by a promissory note at fourteen days; that, in taking the note, he acted with a view to his employer's advantage, thinking the stock might fall before the transfer could be made; that he paid in the note to his bankers, where it was attached for a debt of his own; and that at the end of the fortnight, the defendant refused to make the transfer as he had received no part of the purchase-money.

Garrow, *Park* and *Lawes* for the plaintiff.

Sir Vicary Gibbs and *Reader* for the defendant.

LORD ELLENBOROUGH, C.J.—When the defendant employed the broker to sell the stock, he employed him to sell it in the usual manner. He made him his agent for common purposes in a transaction of this sort. But did anyone ever hear of stock being absolutely exchanged for a bill at fourteen days? Has a broker in common cases power to give credit for the price of the stock which he agrees to sell? The broker here sold the stock in an unusual manner and, unless he was expressly authorised to do so, his principal is not bound by his acts.

Plaintiff nonsuited.

THE OCEAN

[Admiralty Court (Sir William Scott), January 27, 1804]

[Reported 5 Ch. Rob. 90]

Domicil—Commercial or trade domicil—British-born subject resident abroad—Dissolution of partnership before outbreak of war—Detention abroad—Restitution as British subject.

F., a British-born subject, had been settled as a merchant in Flushing, but on the approach of hostilities he took measures to return to England and made arrangements for the dissolution of his business partnership. He was only prevented from removing personally by the detention of all British subjects who were within the territory of the enemy at the outbreak of war.

Held: subject to proof being made of the property, F. was entitled to restitution as a British subject.

Notes. As to commercial domicil, see 7 Halsbury's Laws (3rd Edn.) 25–27; and for cases see 11 Digest (Repl.) 360 et seq.

Claim given on behalf of Mr. F——, a British-born subject who had been settled as a merchant in Flushing, but who, on the appearance of approaching hostilities, had taken means to remove himself and return to England.

The affidavit of the claimant stated that, in July, 1803, he actually effected his escape and returned to England; that he had actually dissolved his partnership; and that he had continued to reside in Holland after the war only under the detention unwarrantably applied to all Englishmen resident in the country of the enemy at the breaking out of hostilities.

SIR WILLIAM SCOTT.—This claim relates to the situation of British subjects settled in foreign states in time of amity and taking early measures to withdraw themselves on the breaking out of war. The affidavit of claim states that the claimant had been settled as a partner in a house of trade in Holland, but that he had made arrangements for the dissolution of the partnership and was only prevented from removing personally by the violent detention of all British subjects who happened to be within the territories of the enemy at the breaking out of the war. It would, I think, in these circumstances, be going further than the principle of law requires to conclude this person, by his former occupation and by his present constrained residence in France, so as not to admit him to have taken himself out of the effect of supervening hostilities by the means which he had used for his removal. On sufficient proof being made of the property, I shall be disposed to hold him entitled to restitution.

JONES *v.* EDNEY

[Court of King's Bench (Lord Ellenborough, C.J.), December 4, 1812]

[Reported 3 Camp. 285; 170 E.R. 1384]

Auction—Sale of land—Lease of public-house—Verbal warranty by auctioneer at time of sale that public-house "a free public-house"—Covenant in lease that lessee should take beer from a particular brewer—Right of purchaser to recover deposit.

The lease of a public-house was sold to the plaintiff at a public auction and he paid a deposit. The conditions of sale described the public-house as a "free public-house", but the lease contained a covenant that the lessee and his assigns should take their beer from a particular brewer. At the time of the sale the lease was read over by the auctioneer who mistakenly said that it was a free public-house and that the covenant about the beer had been decided to be bad, there having been a trial upon it. He said: "I warrant it as a free public-house and sell it as such." The plaintiff, finding that the covenant might still be enforced, refused to complete the purchase and claimed the return of his deposit,

Held: as the auctioneer at the time of the sale had expressly warranted and sold the public-house as a free public-house, the bidder was not bound to attend to the clauses of the lease or consider their legal operation; the plaintiff was, therefore, entitled to rescind the contract and be paid back his deposit.

Notes. Considered: *Flight* v. *Booth*, [1824–34] All E.R. Rep. 43; *Brumfit* v. *Morton* (1857), 30 L.T.O.S. 98. Referred to: *Grosvenor* v. *Green* (1858), 28 L.J.Ch. 173; *Re Davis and Carey* (1888), 40 Ch.D. 601; *Re Fawcett and Holmes' Contract* (1889), 42 Ch.D. 150; *Watson* v. *Burton*, [1956] 3 All E.R. 929.

As to verbal statements by auctioneers, see 2 Halsbury's Laws (3rd Edn.) 80, 81; and for cases see 3 Digest (Repl.) 18, 19.

Case referred to:

(1) *Cooper* v. *Twibill* (1808), 3 Camp. 286, n.; 31 Digest (Repl.) 117, *2582*.

Action for money had and received, to recover back the sum of £105, paid as a deposit upon the purchase of the lease of a public-house called the General Abercrombie.

In the conditions of sale this was described as "a free public-house," that is to say, that the tenant was not bound by the terms of the lease to take his beer from any particular brewer. The lease in fact contained a proviso that the lease and his assigns should take all their beer from the brewery of Elliott & Co. or pay a very high advanced rent. At the sale the auctioneer read over the whole lease in the hearing of the bidders. When he came to the clause about taking the beer, he was asked how the house could be called "a free public house." He answered:

"That clause has been done away with. There has been a trial upon it before Lord Ellenborough [i.e., *Cooper* v. *Twibill* (1)], who has decided it to be bad. I warrant it as a free public-house, and sell it as such."

The plaintiff was the highest bidder, and paid 100 guineas deposit; but finding that the clause might still be enforced, he refused to complete the purchase, and insisted on being paid back the deposit.

Park, *Topping* and *E. Lawes* for the plaintiff.

Garrow (with him *Lawes*) for the defendant, contended that the action could not be maintained as the plaintiff heard the whole lease read over, and could neither complain of concealment nor deception. He had an opportunity of judging for himself respecting the operation of the objectionable clause, or of taking the opinion of his professional adviser. The auctioneer was certainly mistaken as to the effect of Lord Ellenborough's decision in *Cooper* v. *Twibill* (1), but in

giving an opinion upon that subject he could not be considered as acting in his capacity of auctioneer, and his mistake could not vitiate the sale.

LORD ELLENBOROUGH, C.J.—In the conditions of sale this is stated to be "a free public-house." Had the auctioneer afterwards verbally contradicted this, I should have paid very little attention to what he said from his pulpit. Men cannot tell what contracts they enter into if the written conditions of sale are to be controlled by the babble of the auction room. But here the auctioneer at the time of the sale declared that he warranted and sold this as a free public-house. In these circumstances a bidder was not bound to attend to the clauses of the lease or to consider their legal operation.

Verdict for plaintiff.

DU BOST *v.* BERESFORD

[Court of King's Bench (Lord Ellenborough, C.J.), December 6, 1810]

[Reported 2 Camp. 511]

Damages — Measure — Chattel — Destruction — Value of chattel destroyed — Libellous picture.

In assessing the damages payable by the defendant for wilfully destroying a painting belonging to the plaintiff which was proved to be a libel on persons portrayed in it, **held** that the jury must not consider it as a work of value, but must award the plaintiff merely the value of the canvas and paint which formed its component parts.

Libel—Evidence connecting plaintiff with libel—Libellous picture—Declarations of spectators—Identification of persons portrayed.

Where a libel does not expressly refer to the plaintiff extrinsic evidence may be given to connect it with the plaintiff. Accordingly, per Lord Ellenborough, C.J. (arguendo): declarations of spectators while they looked at a libellous picture were admissible in evidence to prove the identity of the figures portrayed.

Notes. Applied: *Jozwiak* v. *Sadek*, [1954] 1 All E.R. 3. Referred to: *Dobree* v. *Napier* (1836), 3 Scott, 201; *Emperor of Austria* v. *Day and Kossuth* (1861), 3 De G.F. & J. 217; *Mulkern* v. *Ward* (1872), L.R. 13 Eq. 619; *Prudential Life Assurance Association* v. *Knott* (1875), 23 W.R. 249.

As to measure of damages for trespass to chattels, see 11 Halsbury's Laws (3rd Edn.) 261 et seq.; as to admissibility of extrinsic evidence to identify subject of alleged libel, see ibid. vol. 24, pp. 17, 18, and cases there cited.

Action for trespass by cutting and destroying a picture of great value, which the plaintiff had publicly exhibited; per quod he had not only lost the picture, but the profits he would have derived from the exhibition. The defendant pleaded not guilty.

It appeared that the plaintiff was an artist of considerable eminence, but that the picture in question, entitled "La Belle et la Bête," or "Beauty and the Beast," was a scandalous libel upon a gentleman of fashion and his lady, who was the sister of the defendant. It was exhibited in a house in Pall Mall for money, and great crowds went daily to see it, till the defendant one morning cut it in pieces. Some of the witnesses estimated it at several hundred pounds.

Jekyll, *Marryat* and *Gaselee* for the plaintiff, insisted that the plaintiff was entitled to the full value of the picture, together with a compensation for the loss of the exhibition.

Gibbs, *Park* and *Brougham* for the defendant, contended that the exhibition was a public nuisance, which everyone had a right to abate by destroying the picture.

LORD ELLENBOROUGH, C.J.—The only plea upon the record being the general issue of not guilty, it is unnecessary to consider whether the destruction of this picture might or might not have been justified. The material question is the value to be set upon the article destroyed. If it was a libel upon the persons introduced into it, the law cannot consider it valuable as a picture. Upon an application to the Lord Chancellor, he would have granted an injunction against its exhibition, and the plaintiff was both civilly and criminally liable for having exhibited it. The jury, therefore, in assessing the damages, must not consider this as a work of art, but must award the plaintiff merely the value of the canvas and paint which formed its component parts.

Verdict for plaintiff. Damages £5.

In the course of the trial, LORD ELLENBOROUGH, C.J., held upon argument that the declarations of the spectators while they looked at the picture in the exhibition room were evidence to show that the figures portrayed were meant to represent the defendant's sister and brother-in-law.

ELLIOTT AND ANOTHER *v.* GURR

[PREROGATIVE COURT OF CANTERBURY (Sir John Nicholl), June 13, 1812]

[Reported 2 Phillim. 16; 161 E.R. 1064]

Marriage—Avoidance—Voidable marriage—Avoidance after death of either party.

A voidable marriage cannot be rendered void after the death of either of the parties.

Notes. The Marriage Act, 1949, s. 1 (1) (28 HALSBURY'S STATUTES (2nd Edn.) 653), re-enacting the Marriage Act, 1835, s. 2, renders void a marriage within the prohibited degrees. The Marriage (Enabling) Act, 1960, s. 1 (1) (40 HALSBURY'S STATUTES (2nd Edn.) 393), validates, inter alia, a marriage between a man and a woman who was formerly the wife of his uncle (whether deceased or not).

Considered: *Ross Smith* v. *Ross Smith*, [1962] 1 All E.R. 344. Referred to: *Dodworth* v. *Dale*, [1936] 2 All E.R. 440.

As to capacity to marry, see 19 HALSBURY'S LAWS (3rd Edn.) 779 et seq.; and for cases see 27 DIGEST (Repl.) 340.

Cases referred to:

(1) *Hemming* v. *Price* (1700), 12 Mod. 432; Holt, K.B. 457.

(2) *Haydon* v. *Gould* (1710), 1 Salk. 119; 91 E.R. 113; 23 Digest (Repl.) 149, *1578*.

Decree issued at the suit of the plaintiffs praying that administration of the will of Sarah Lester (otherwise Gurr), who died intestate, might be granted to them.

The following statement of facts is taken from the judgment of SIR JOHN NICHOLL.

Sarah Lester, otherwise Gurr, died intestate in July, 1796. A marriage was

A solemnised in 1787 between the deceased, then a widow, and William Gurr, then a bachelor, in the regular form. William Gurr survived his wife, but did not take out an administration to her effects. In 1812 a decree was taken out against him to show cause why administration should not be granted to John Elliott, and Elizabeth Sugden, the brother and sister of the deceased, the suggestion being that the marriage was incestuous and void to all intents and purposes, and, there-
B fore, that the deceased did not die the wife of William Gurr, but the widow of her former husband, Abraham Lester. The question was whether Sarah Lester was to be considered as dying the wife of William Gurr, or as dying a widow.

SIR JOHN NICHOLL stated the facts, and continued: The question appears rather a strange one to be brought before the court and it is brought in a strange
C manner. The decree issued at the suit of John Elliott and Elizabeth Sugden is in these terms:

> "Whereas Sarah Lester, otherwise Gurr, late of Chatham, in the county of Kent, deceased, departed this life in the month of July, 1796, intestate, without having made any will, having at the time of her death goods, chattels, and credits in divers dioceses, or jurisdictions sufficient to form the jurisdiction
D of our said Prerogative Court of Canterbury; and that in the month of November, 1771, the said Sarah Lester, being then a spinster, married Abraham Lester, who afterwards died in her lifetime, whereby she became his lawful widow and relict. Some time after, to wit, in June, 1787, a marriage, or rather a profanation of a marriage, was had between the said Sarah Lester, and William Gurr, the lawful sister's son of the said Abraham Lester, deceased,
E while living the legal husband of the said Sarah Lester, by reason whereof, the marriage so had between her and the said William Gurr was and is incestuous, illegal, and null and void to all intents and purposes in law whatsoever; and, therefore, it was alleged, that the said Sarah Lester, otherwise Gurr, died a widow, without child, or parent, leaving behind her the said John Elliott, and Elizabeth Sugden, her natural and lawful brother and sister,
F and only surviving next of kin."

I wish to know whether there is any precedent for such a decree. I have asked the counsel, who supported the decree, whether they could show any authority for a next of kin obtaining an administration in exclusion of a husband or a wife so married: no authority has been cited. If consulted, the court would not have allowed such a decree to have issued; for, on the face of it, it asserts that which,
G for reasons which I will presently assign, is not law. I desire in future that no decree of a novel kind may issue without either being consulted in camera, or moved in court by counsel. It is of consequence because the instruments of the court are generally presumed to be declaratory of the law of the court. The proceedings on the part of the husband are equally strange. He appears, and instead of asserting his right to the administration as husband and praying to
H be heard on petition—in form of a protest, or otherwise—he gives an allegation pleading the fact of marriage. The fact of marriage is admitted in the decree, so that it was unnecessary to plead it: but it is pleaded simply, omitting indeed the words "free from impediment," but still not so as to raise the question, for that clause is not absolutely necessary. It is to be presumed all the essentials are pleaded; no person could infer from that clause being omitted that there existed
I a previous impediment by reason of affinity. The court will not withhold its opinion, as it is the object of the parties to obtain it, and I am unwilling to throw upon them any unnecessary expense. At the same time I must express some surprise that such a question should be made at this time of day; for anyone might as well question the most established rules of the court.

The marriage was within the prohibited degrees, for the husband was the sister's son of the woman's former husband, that is, her nephew by affinity; but the marriage was not declared void in the lifetime of the parties. The difference

between void and voidable is so clear that no person who ever looked into any elementary book on the subject is ignorant of it. The canonical disabilities, such as consanguinity, affinity and certain corporal infirmities, only make the marriage voidable, and not ipso facto void, until sentence of nullity be obtained: and such marriages are esteemed valid unto all civil purposes, unless such sentence of nullity is actually declared during the lifetime of the parties.

Civil disabilities, such as a prior marriage, want of age, idiocy and the like, make the contract void ab initio, not merely voidable. These do not dissolve a contract already made, but they render the parties incapable of contracting at all: they do not put asunder those who are joined together, but they previously hinder the junction. If any persons under these legal incapacities come together, it is a meretricious, and not a matrimonial union, and, therefore, no sentence of avoidance is necessary.

The present is not a void, but a voidable marriage, and, therefore, not having been declared void in the lifetime of the parties, is valid to all civil purposes, and to all such purposes, the deceased died the wife of William Gurr, and he was her husband and their issue are legitimate. One of the civil rights of the husband is that of administration to his wife, which is held to be within the Statute of Distribution, and is expressly confirmed by the Statute of Frauds, 1677, s. 25. Both the administration and the property belong exclusively to the husband; it is not an ecclesiastical but a civil right, though it is a right administered in this court.

In a matter so clear of doubt it is almost waste of time to quote authorities. Modern cases would hardly be found, because such a point has hardly been questioned in modern times. But it is so laid down by Bracton and Holt, C.J., and it is thus stated by Coke (Co. Litt. 33 a):

> "If a marriage de facto be voidable by divorce, in respect of consanguinity, affinity, pre-contract, or such like, whereby the marriage would have been dissolved, and the parties freed ex vinculo matrimonii, yet if the husband die before any divorce, then, for that it cannot now be avoided, the wife de facto shall be endowed; for this is legitimum matrimonium quoad dotem; and so in a writ of dower, the bishop ought to certify that they were legitimo matrimonio copulati, according to the words of the writ;—but if they were divorced à vinculo matrimonii in the lifetime of the husband, then she loseth her dower."

Here, then, it is clearly laid down, that unless it is avoided in the lifetime, it is legitimum matrimonium quoad dotem.

The distinction of a void marriage may be seen in *Hemming* v. *Price* (1). Hemming was libelled ex officio for adultery with a person dead. She pleaded that they were married and had issue; it was replied that she had a former husband then living. A prohibition was prayed alleging that the suit would have the effect of bastardising the issue. Holt, C.J., after stating that the issue were bastardised without any proceedings if the parents were never married, said (12 Mod. at p. 432):

> "The [ecclesiastical] court shall not proceed to dissolve a marriage de facto, after the death of either party, as in the case of consanguinity, pre-contract, and the like; but in this case, if the replication be true, the marriage was, ipso facto, void. Per Curiam. No prohibition."

In this case, therefore, the marriage was ipso facto void, because there was a former husband living, and, therefore, it required no sentence.

The case cited, of *Haydon* v. *Gould* (2), was a marriage between Sabbatarians, not celebrated by a priest; this was held to be no marriage, a void marriage, a mere nullity. The court said (1 Salk. at p. 120):

> "Haydon demanding a right by the ecclesiastical law, must prove himself a husband according to that law, to entitle himself to the administration."

A In that case the ecclesiastical law held that they were never married; in the case now before me, the ecclesiastical law as established in these realms, notwithstanding the canonical disabilities (and the bishop is bound so to certify), holds that the parties were legitimo matrimonio copulati at the time of the death, the marriage being only voidable, but not having been voided by sentence of divorce during the lifetime of the parties. In the present case, then, the parties having been B de facto married, and that marriage, though voidable, not having been declared void in the lifetime of the parties, the husband remained husband to all civil purposes and is clearly entitled to the administration. The constant course of practice is in entire conformity with this: both the husband and the wife uniformly take such administrations: no person can be found to question it, for no case can be produced, and no similar decree is brought forward. If parties will try experi- C ments, and call in question rules clearly established by an uniform course of practice, they, and not the parties proceeded against, ought to be liable to the expenses. It is the duty of the court to check such novelties in practice by costs.

Judgment for defendant with costs.

D

GIBBS *v.* RUMSEY

E [Rolls Court (Sir William Grant, M.R.), December 3, 6, 1813]

[Reported 2 Ves. & B. 294; 35 E.R. 331]

Trustee—Powers—General power of appointment given virtute officii—Trust or power—Uncertainty.

The testatrix, after specific legacies, gave her freehold, copyhold and personal F estate to her executors on trust for sale, and directed payment out of the proceeds of sale and her ready money of several pecuniary legacies, including £100 to each of her executors for their trouble in administering the estate. She gave the residue of such money and personal estate, after payment of debts, legacies and funeral and testamentary expenses, "unto my trustees and executors [naming them] to be disposed of unto such person or persons and G in such manner and form and in such sum and sums of money as they in their discretion shall think proper and expedient. The personal estate being insufficient to pay the debts, the executors sold real estate and a surplus of £1,095 remained. On the question whether this sum belonged to the heir or next of kin or passed to the executors by the terms of the residuary bequest,

Held: the money was validly subjected to a general power of appointment H by the executors and not a trust, which would have failed from the uncertainty of the objects.

Per Curiam: There is a distinction between an express trust for an indefinite purpose and those cases where the court concludes from the indefinite nature of the purpose that no trust was intended, notwithstanding words which would have been apt to create an implied trust had the objects been definite.

I *Morice* v. *Bishop of Durham* (1) (1805), ante p. 451, distinguished.

Notes. Explained: *Ellis* v. *Selby* (1836), 1 My. & Cr. 286. Distinguished: *Buckle* v. *Bristow* (1864), 5 New Rep. 7; *Yeap Chea Nev* v. *Ong Cheng Nev* (1875), L.R. 6 P.C. 381; *Re Sinclair, Young* v. *Sinclair*, [1903] W.N. 113. Distinguished and Doubted: *Re Howell, Re Buckingham, Liggins* v. *Buckingham*, [1914] 2 Ch. 173 (see [1914–15] All E.R. Rep. 211). Referred to: *Cooke* v. *Stationers' Co.* (1831), 3 My. & K. 262; *Amphlett* v. *Parke* (1831), 2 Russ & M. 221; *Whitaker* v. *Tatham* (1831), 7 Bing. 628; *Briggs* v. *Penny* (1849), 3 De G. &

Sm. 525; *Pocock* v. *A.-G.* (1876), 3 Ch.D. 342; *Re Gott, Glazebrook* v. *Leeds University*, [1944] 1 All E.R. 293; *Re Edward's Will Trusts, Dalgleish* v. *Leighton*, [1947] 2 All E.R. 521. A

As to designation of objects of trust, see 38 HALSBURY'S LAWS (3rd Edn.) 835; and for cases see 47 DIGEST (Repl.) 58 et seq.

Case referred to : B

(1) *Morice* v. *Bishop of Durham* (1804), 9 Ves. 399; affirmed (1805), ante p. 451; 10 Ves. 522; 32 E.R. 947, L.C.; 47 Digest (Repl.) 47, *308*.

Bill raising questions as to the will of Ann Clarke, deceased.

By her will dated Dec. 12, 1809, Ann Clarke, having given to her executors her household goods, watches, trinkets, plate and wearing apparel, to be disposed of to such persons and in such proportions as they, or the survivor of them, should in their or his discretion think proper, devised and bequeathed her freehold, copyhold and personal estate to Henry and James Rumsey, their heirs, executors, administrators and assigns, on trust for sale; and out of the money arising, together with all her ready money and her other estate and effects, she bequeathed several legacies, including £100 to each of her trustees for their care and trouble, and all her books to Henry Rumsey to be retained by him and divided among such of her friends as he should think proper. The will proceeded thus : C D

"I give and bequeath all the rest and residue of the moneys arising from the sale of my said estates and all the residue of my personal estate after payment of my debts, legacies, and funeral expenses and the expenses of proving this my will, to my said trustees and executors (the said Henry Rumsey and James Rumsey), to be disposed of unto such person and persons and in such manner and form and in such sum and sums of money as they in their discretion shall think proper and expedient. And I do hereby declare my will and mind to be, that in case my said freehold copyhold and leasehold and personal estates hereinbefore mentioned shall fall short or not be sufficient for payment of all the said several legacies and bequests sum and sums of money by me hereby given and bequeathed that what shall fall short shall be proportionably abated out of each legacy or sum of money hereby given and bequeathed." E F

The personal estate being insufficient to pay the debts, the real estate had been sold. The questions were: first, whether the executors, or the heir-at-law, or the next of kin of the testatrix were entitled to a sum of £1,095 8s. 4d., the surplus arising from the sale of the real estate; secondly, who was entitled to the sum of £530, the amount of the charitable legacies admitted to be void by the Charitable Uses Act, 1735 [repealed]. G

Leach and *Cullen* for the heir-at-law.
Roupell for the next of kin.
Richards and *Stephen* for the executors.

SIR WILLIAM GRANT, M.R.—It is clear that such part of the real estate as is given to charitable purposes belongs to the heir-at-law, and does not go either to the next of kin or the residuary legatee. The question then is as to what is not otherwise disposed of than by the residuary clause; which turns on the point whether there is any trust imposed by that clause : if there is, they cannot take beneficially, though the trust may be of so indefinite a nature that the court cannot carry it into execution. This testatrix, having created a trust to sell, gives many particular legacies, among them £100 to each of her two trustees for their care and trouble in the execution of the trusts of the will. That is undoubtedly sufficient to exclude any claim as executors [this was before the Executors Act, 1830, when executors were entitled to undisposed of residue unless a contrary intention appeared in will], but they claim not in that character, but under a direct disposition to them as residuary legatees. The first words of the residuary clause amount clearly to an absolute gift to them, as the mere circumstance of giving H I

them the description of trustees and executors cannot make them trustees as to that part of her property expressly bequeathed to them. Then do the subsequent words import trust? The testatrix has very frequently in the course of her will used the words "in trust," but those words are not introduced here: "to be disposed of unto such person and persons and in such manner and form and in such sum and sums of money as they in their discretion shall think proper and expedient."

I see nothing here but a purely arbitrary power of disposition according to a discretion, which no court can either direct or control. It is not to be contended that if the words were "to be disposed of according to their discretion," that would have qualified the preceding gift; then the effect must be produced, if at all, by the interposed words: "to such person or persons and in such manner and form and in such sum and sums of money:" but those are words perpetually occurring in general powers of appointment; and it was never conceived that such words, instead of conferring a power, raised a trust. If that were so, there would be no such thing as good general powers of appointment. They would be all void trusts; for, if trusts at all, they must be void from the uncertainty of the objects.

In *Morice* v. *Bishop of Durham* (1) there was an express trust to pay debts and legacies, and dispose of the residue as therein mentioned; and that was treated by the Lord Chancellor [Lord Eldon], as it had been here, as a case of express trust; and the Lord Chancellor very clearly states the distinction between express trust for an indefinite purpose and those cases where from the indefinite nature of the purpose, the court concludes that a proper trust could not be intended: though words may have been used which, had the objects been definite, would by construction import a trust. His Lordship observes (10 Ves. at p. 537) that the principle of cases of the latter description has never been held in this court applicable to a case where the testator himself has expressly said he gives his property upon trust.

Supposing this testatrix after this gift to the executors had requested them to give the residue to such persons and in such manner as they may think proper and expedient, there would have been no trust, notwithstanding the words, on account of the uncertainty of the object. It is said the testatrix meant the executors to give this property to somebody and not to enjoy it themselves: but that might be said in every case of a bequest to give to objects not distinctly specified, and in every case of a general power of appointment. It would be necessary to show that these executors not only cannot enjoy it themselves, but have no right to appoint it to others, as, whether they have the absolute property or only a power to appoint the residue, still the claim of the heir or next of kin is premature, until it shall be seen whether any appointment will be made. It was insinuated in the argument that this was probably a secret trust for charity. If that were so it would be void: but there is nothing in the case entitling me to form such a conclusion. Therefore, neither the heir nor the next of kin have a right to call upon the executors to account for this residue.

Order accordingly.

HARNETT *v.* YIELDING

[Lord Chancellor's Court in Ireland (Lord Redesdale, L.C.), June 27, November 12, 1805]

[Reported 2 Sch. & Lef. 549]

Specific Performance—Refusal of decree—Contract uncertain as to extent—Defendant not lawfully competent to execute contract.

Equity will not order specific performance of a contract the terms of which are uncertain as to its extent. Nor will equity order specific performance against a party not lawfully competent to execute the contract.

Notes. As to contracts outside the scope of the remedy of specific performance, see 36 Halsbury's Laws (3rd Edn.) 267 et seq.; and for cases see 44 Digest (Repl.) 23 et seq.

Cases referred to:

(1) *Errington* v. *Aynsly* (1788), 2 Dick. 692; 21 E.R. 440; sub nom. *Errington* v. *Aynesly*, 2 Bro. C.C. 341; 44 Digest (Repl.) 37, *259*.

(2) *Flint* v. *Brandon* (1803), 8 Ves. 159; 32 E.R. 314; 44 Digest (Repl.) 23, *130*.

(3) *Lord Bolingbroke's Case* (circa 1787), 1 Sch. & Lef. 19, n.; 44 Digest (Repl.) 104, *832*.

(4) *Cooke* v. *Booth* (1778), 2 Cowp. 819; 98 E.R. 1380; 31 Digest (Repl.) 80, *2335*.

(5) *Baynham* v. *Guy's Hospital* (1796), 3 Ves. 295; 30 E.R. 1019; 31 Digest (Repl.) 80, *2328*.

(6) *Iggulden* v. *May* (1804), 9 Ves. 325; 32 E.R. 628, L.C.; 31 Digest (Repl.) 132, *2707*.

(7) *Brodie* v. *St. Paul* (1791), 1 Ves. 326; 30 E.R. 368; 30 Digest (Repl.) 440, *821*.

Also referred to in argument:

Allen v. *Harding* (1708), 2 Eq. Cas. Abr. 17; 22 E.R. 14, L.C.; 44 Digest (Repl.) 38, *264*.

Mosely v. *Virgin* (1796), 3 Ves. 184; 30 E.R. 959, L.C.; 40 Digest (Repl.) 390, *3114*.

Lord Walpole v. *Lord Orford* (1797), 3 Ves. 402; 30 E.R. 1076; 44 Digest (Repl.) 33, *231*.

Bill for specific performance of an agreement to renew a lease.

On Mar. 9, 1779, the defendant demised to the father of the plaintiff, certain lands for a term of twenty-one years from Mar. 25 then instant, at a rent of £85 per annum, and thereby covenanted

"for and during the term of his life to renew said lease for the said D. Harnett, his executors, administrators, and assigns, by giving unto him or them a lease for twenty-one years of said demised premises, when applied to by him or them so to do."

By the lease the tenant had a power of surrendering on giving six months' notice. Pursuant to that, conceiving the rent too high, on Sept. 29, 1779, he gave notice that he would surrender on Mar. 25 following.

The defendant then entered into a treaty with Power, and made him a lease to commence on Mar. 25, 1780; and it being agreed that Power should attend on the lands on that day to obtain possession, the defendant went there to accept Harnett's surrender, and to give possession to Power. Power did not appear and the defendant, conceiving that he had abandoned the agreement, entered into a contract with Harnett, in consequence of which the following endorsement on the back of the original lease was made and signed by the defendant:

"I promise and agree to perfect a fresh lease to Mr. Daniel Harnett, at any

time he shall demand the same, at £5 a year than the within mentioned rent; as Mr. Patrick Power, who took the within ground from me, to commence from this day, has not, according to agreement, either sent or come to take the possession, as by his agreement he was bound to do this day. Given under my hand this 25th day of March, 1780. Richard Yielding."

The original lease, with this memorandum, was registered on April 17, 1780. Harnett continued in possession for seventeen years, paying the reduced rent, but without making any application for the purpose of having a new lease executed; and in August, 1797, he assigned his interest to his son the plaintiff. In 1799, the term in the original lease being near expiring, the plaintiff applied to the defendant for a renewal which he refused, insisting by his answer, first, that the endorsement or memorandum did not import an agreement for any more than one term of twenty-one years; and secondly, that he was tenant for life with a power to demise for twenty-one years only, in possession, at the best improved rent. The bill insisted that the agreement, referring to the original lease, sufficiently imported an agreement for a renewal during his life, and offered to accept a lease for twenty-one years, from the expiration of the subsisting lease, if the defendant should so long live.

Saurin, *Burton* and *T. Lloyd* for the plaintiff.
Ponsonby and *Curran* for the defendant.

LORD REDESDALE, L.C.– I have bestowed a good deal of consideration on this case, and particularly with reference to the jurisdiction exercised by courts of equity in decreeing specific performance of agreements. Whether courts of equity, in their determinations on this subject, have always considered what was the original foundation of decrees of this nature, I doubt. I believe that from something of habit, decrees of this kind have been carried to an extent which has tended to injustice.

Unquestionably the original foundation of these decrees was simply this: that damages at law would not give the party the compensation to which he was entitled, that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed. On this ground the court, in a variety of cases, has refused to interfere where, from the nature of the case, the damages must necessarily be commensurate to the injury sustained: *Errington* v. *Aynesly* (1); *Flint* v. *Brandon* (2). For instance, in agreements for the purchase of stock, it is the same thing to the party where or from whom the stock is purchased, provided he receives the money that will purchase it. These cases show what were the grounds on which courts of equity first interfered, but they have constantly held that the party who comes into equity for a specific performance must come with perfect propriety of conduct, otherwise they will leave him to his remedy at law. He must also show that in seeking the performance, he does not call on the other party to do an act which he is not lawfully competent to do, for if he does, a consequence is produced that quite passes by the object of the court, in exercising the jurisdiction which is to do more complete justice.

If a party be compelled to do an act which he is not lawfully authorised to do, he is exposed to a new action for damages at the suit of the person injured by such act. Therefore, if a bill be filed for a specific performance of an agreement made by a man who appears to have a bad title, he is not compellable to execute it, unless the party seeking performance is willing to accept such a title as he can give, and that only in cases where an injury would be sustained by the plaintiff in case he were not to get such an execution of the agreement as the defendant can give: see *Lord Bolingbroke's Case* (3). I take the reason to be this, among others, not only that it is laying the foundation of an action at law, in which damages may be recovered against the party, but also that it is by possibility injuring a third person, by creating a title with which he may have to contend.

There is also another ground on which courts of equity refuse to enforce specific

execution of agreements, that is, when, from the circumstances, it is doubtful whether the party meant to contract to the extent that he is sought to be charged. All these are held sufficient grounds to induce the court to forbear decreeing specific performance, that being a remedy intended by courts of equity to supply what are supposed to be the defects in the remedy given by the courts of law. In these circumstances, therefore, considerable caution is to be used in decreeing specific performance of agreements; and the court is bound to see that it really does that complete justice which it aims at, and which is the ground of its jurisdiction.

There are several objections to enforcing this contract. I agree with counsel for the plaintiff that, if a contract be so completely uncertain as to be void here, it must also be void at law; and if it is certain to a degree, but doubtful as to the extent, equity would, I think, act infinitely more wisely in leaving the party to the old remedy by action for damages, than to run the hazard of doing injustice, in doing what is said to be more complete justice, by decreeing a specific performance. If the contract, therefore, in this case be perfectly uncertain, the ground on which the court would act would be that it is a contract on which no action could be sustained, and no equity could be sustained, unless there were particular circumstances binding the conscience of the party, which, in some cases, has induced the court to decree specific performance where no damages could be recovered at law.

As to directing an action, it is putting the parties to great expense and is not to be done without great consideration, and for the sake of quieting a question which may arise frequently, as in *Cooke* v. *Booth* (4). That was decided on a Case Stated. Had it been on an action, it might be said that it was for the purpose of ascertaining, in one instance, what was the tenure, for the question being whether it was a covenant for perpetual renewal, the effect of it would be to bind the title for ever.

In later cases (see *Baynham* v. *Guy's Hospital* (5); *Iggulden* v. *May* (6)) on covenants of this kind (where, for instance, there was a lease for lives with a covenant to execute a further lease with like covenants) it has been held that the words "with like covenants," do not, of themselves, imply a covenant for renewal; and that there must be some additional words to show that it was the intention of the parties that there should be such in the new lease. I think these cases go a great way to give a construction to this instrument. It is very difficult to say that this endorsement is not to be taken as referring to the instrument on which it is endorsed. It refers to it with respect to the rent and with respect to the ground. It must be taken as having such reference, within the intent and meaning of the parties. Then I must look to that instrument to see what the endorsement clearly contracts to give.

The agreement is: "I promise and agree to perfect a fresh lease to Mr. Daniel Harnett." Looking into the instrument on which this is endorsed, I find it to be a lease for twenty-one years. Prima facie, therefore, this is to be taken, as to the term, to be an agreement to give a like term as that in the instrument on which it is endorsed; but there is nothing importing that it was to be a fresh lease with all the covenants contained in the former. In general if a lease is to be executed, it is to be a lease with all covenants in their nature incidental to the enjoyment, what are called usual and proper covenants. That I take to be the construction generally put on words importing a general agreement to grant a lease. There is nothing here which imports that this was a contract for a lease with a covenant for a further lease; that may or may not have been in the contemplation of the parties. The instrument, therefore, is certain to a certain extent, that is, as a contract to grant a like term as that in the instrument on which it is endorsed, but there is nothing from whence it is to be inferred to be a contract to give a future, as well as a fresh lease.

Then if it be uncertain whether the contract extended to a future lease, there can be no ground for coming into equity to enforce it. The uncertainty in itself may form a ground of objection. The defendant says that he only intended to grant

A a term for twenty-one years, and as the plaintiff has referred to his answer and is entitled to the benefit of it, so, to a certain extent, he must submit to the prejudice. The consequence is, unless the conscience of the court be sufficiently satisfied by such evidence as it can allow that there is a contract for a future lease, it cannot interfere.

B It might be different if the instrument would be merely nugatory if it were held not to give what was contended for. It might be well argued, in that case, that the party must have intended to enter into some contract and that it must have been a fraud so to express his agreement that it contained no contract. However, it is different where the agreement may have a certain effect, though not to the extent contended for. In *Brodie* v. *St. Paul* (7), because part of the contract was that the lease should contain such of the covenants referred to as had been read, and as it

C was impossible to ascertain what they were but by parol, the court could not execute the agreement. Yet the party who signed that agreement meant to make some agreement. Both parties might be said to be in a certain degree in fault by leaving the agreement so far uncertain.

Here, however, the construction is clear and effectual to a certain extent, and I

D think the construction which ought to be put on it is, that the contract did not extend to a covenant for a new lease. *Iggulden* v. *May* (6), and the late cases on covenants for new leases, hold that unless there are words clearly importing that a perpetual interest is intended, it shall not be inferred against the party who enters into the covenant. Here, there being no words which import that this new lease was to be a lease with all the covenants contained in the former lease, I must hold

E that the party has not so bound himself by this contract to make a lease with all the covenants in the other, as to make him chargeable on it. It is too uncertain whether he has done so, to admit of its being the foundation of any proceeding either at law or in equity.

I think it is important that this should so be considered, because the true foundation on which a party is to be charged specially on the contract, is, that he has

F knowingly entered into the engagement which is sought to be enforced; and if the terms are ambiguous, it is impossible for the court to say that he has done so. The court cannot be certain of doing justice when it acts on such contracts; and it is better, even for avoiding fraud, to suffer the party to escape out of a contract which he may have intended to make, where it is so ambiguously expressed, than to attempt to enforce it on a conjecture that such was the intent of the parties.

G Nothing gives so great an opening to fraud as ambiguous words in an instrument. Persons executing instruments are frequently not acquainted with the meaning of the words, even when they are clear; but if words, in themselves ambiguous, were permitted to operate to create a contract which it may not have been the intention of the party to enter into, and where the consequence would be to charge the party beyond the clear effect of the words, the courts would run the risk of doing greater

H mischief. They may do injustice in a particular case, by refusing to act on such ambiguous words, but on the other hand, they may induce persons who intend fraud, to use ambiguous words for the purpose of fraud. It is said that this agreement was in the defendant's own handwriting, but that I think makes very little difference.

Then there is another consideration in this case which appears to be a ground

I for refusing performance of this agreement. That is, that on the face of the instrument this is a contract by a person having a limited interest, with a leasing power, to act in fraud of that power. It is a contract to execute a lease for twenty-one years and a further lease for twenty-one years at any time during his life; consequently to execute a lease for twenty-one years whatever may be the increased value of the property at the time of the lease granted. It is said that it does not appear that he is tenant for life; but according to the constant habit of courts of equity, where a party says he has no power to do what he is called on to do, the court refers it to the Master to inquire whether he has title. He is not required

to prove that he has no title in the first instance, nor unless the plaintiff persists in requiring a reference. Here, I presume from what has passed, there is no doubt if such a reference were made that the Master would report the defendant tenant for life only. A

Courts of equity should never enforce such contracts, whether with a view to the party himself or to the person entitled in remainder. In the first place, it is unconscionable in the tenant for life to execute such a lease because it brings an encumbrance on the estate of the remainderman, and puts him to litigation to get rid of it. As to the tenant for life himself, it is compelling him to do what is to be the foundation of a future action for damages if he die before the twenty-one years. The court will never do this but will leave the party at once to bring his action for damages. I also conceive that this sort of contract, obtained by a person who knew at the time the nature of the title, is unconscionable in him because he makes himself a party knowingly to that which is a fraud on the remainderman. In such circumstances, he has no claim to the assistance of a court of equity. To obviate this objection, the plaintiff has offered to take a lease for twenty-one years, etc., if the defendant shall so long live. I think this is one of those cases where the plaintiff has no right thus to qualify the contract he insists on. There is nothing in the case to show that satisfaction in the form of damages is not an adequate remedy for him. If he had been put into a situation from which he could not extricate himself, the defendant might be called on to make the best title in his power; but nothing can be more mischievous than to permit a person who knows that another has only a limited power, to enter into a contract with that other person which, if executed, would be a fraud on the power, and when that is objected to, to say: "I will take the best you can give me." A court of equity ought to say to persons coming before it in such a way: "Make the best of your case with a jury." B C D E

On the whole I think (though I have had considerable doubts) that this bill ought to be dismissed.

Bill dismissed.

GRAY *v.* COOKSON AND ANOTHER

[Court of King's Bench (Lord Ellenborough, C.J., Grose and Bayley, JJ.), June 1, 1812.]

[Reported 16 East, 13; 104 E.R. 994]

Master and Servant—Apprentice—Indenture—Avoidance—Act of delinquency by apprentice.

Magistrates—Protection—Action for trespass for wrongful committal—Conviction of plaintiff—Proof of date.

By an agreement to cancel an indenture of apprenticeship it was provided that the cancellation should be subject to the condition that the apprentice "makes no engagement or enters into any person's service in the town of N." The apprentice set up in trade in N.

Held: on the construction of the condition the stipulation against making an engagement coupled with the context of entering into any person's service imported an engagement of trade or business and was a stipulation that the apprentice should neither engage in any business himself nor be employed in any as servant to another within the town of N.; there was, therefore, a breach of the condition, but the indenture of apprenticeship could not be avoided by an act of delinquency on the part of the apprentice, and justices were justified in committing the apprentice to prison for breach of the indenture.

In an action by the apprentice against the justices for trespass for wrongfully committing him **held** by Lord Ellenborough, C.J., that the date shown on the conviction was proof of the fact of that date.

Notes. Applied: *Grant* v. *Welchman* (1812), 16 East, 207. Followed: *Brittain* v. *Kinnaird*, [1814–23] All E.R. Rep. 593. Distinguished: *Rogers* v. *Jones* (1824), 3 B. & C. 409; *Wickes* v. *Clutterbuck* (1825), 2 Bing. 483. Distinguished: *R.* v. *Barmston* (1838), 7 Ad. & El. 858. Referred to: *R.* v. *Ickham* (1843), 7 J.P. 529; *Fuller* v. *Brown* (1849), 3 New Mag. Cas. 172; *O'Connor* v. *Isaacs*, [1956] 1 All E.R. 513.

As to apprenticeship, see 25 Halsbury's Laws (3rd Edn.) 491–497; and for cases see 34 Digest (Repl.) 313 et seq.

Cases referred to:

(1) *Strickland* v. *Ward* (1767), 7 Term Rep. 633, n.; 12 East, 74, n.

(2) *Massey* v. *Johnson* (1809), 12 East, 67; 104 E.R. 27; 38 Digest (Repl.) 91, *653*.

(3) *R.* v. *Eaton* (1787), 2 Term Rep. 285; 100 E.R. 155; 33 Digest (Repl.) 246, *763*.

(4) *R.* v. *Barker* (1801), 1 East, 186; 102 E.R. 73; 33 Digest (Repl.) 167, *181*.

(5) *Crepps* v. *Durden* (1777), 2 Cowp. 640; 98 E.R. 1283; 38 Digest (Repl.) 95, *685*.

(6) *St. Nicolas, Ipswich (Inhabitants)* v. *St. Peter's, Ipswich* (1736), Lee temp. Hard. 323; 2 Stra. 1066; 95 E.R. 210; sub nom. *R.* v. *St. Nicholas, Ipswich (Inhabitants)*, Burr, S.C. 91; 2 Sess. Cas. K.B. 231.

(7) *R.* v. *Evered* (1777), Cald. Mag. Cas. 26; 34 Digest (Repl.) 319, *2378*.

Rule Nisi to set aside a verdict for the plaintiff in an action of trespass, in which the first count of the declaration charged that the defendants assaulted the plaintiff, and without reasonable or probable cause committed him to the house of correction and kept him there until he sued out a writ of habeas corpus, by which he was removed thence to and before the Court of King's Bench and was afterwards by that court discharged from the imprisonment, by means of which he was injured in his business of a woollen draper, put to expense, etc. There were other counts, stating the assault and imprisonment more generally. The defendants (who were justices of the peace, acting as such in this transaction) pleaded the general issue.

At the trial before Chambre, J., at Newcastle, the plaintiff, a woollen draper at Newcastle, after proving the regular notice to the defendants of the process, and the service of it within the time limited by law, proved the habeas corpus writ

directed to the keeper of the house of correction by virtue of which he was brought up before this court, with the original warrant of his commitment for one calendar month as an apprentice having absented himself without his master's consent. This warrant had been issued by the defendants, whose signatures to it were admitted, and on the production of it this court had before discharged the plaintiff. It also appeared that after the first warrant of commitment had been delivered with the plaintiff to the keeper of the house of correction on Jan. 17, 1810, he had received another warrant of commitment on Jan. 20, and that he had both those warrants at the time of his bringing the plaintiff before the court in obedience to the habeas corpus, but that in consequence of advice by the plaintiff's attorney he had only produced to the court the first warrant. It was also proved that when the parties were before the magistrates on Jan. 17, previous to the commitment, Spencer, the master of the apprentice Gray, insisted upon his return into his service for the remainder of his term, and that on the plaintiff's part it was argued that the indenture which had been laid before the defendants was at an end. Mr. Cookson, the mayor of Newcastle, asked the plaintiff if he would return into Spencer's service, and, he refusing, the first warrant of commitment was filled up and executed, and the plaintiff was sent away in custody.

At the close of this evidence, it was objected, on the part of the defendants, that an action of trespass was not maintainable since the Justices Protection Act, 1803 [repealed by Justices Protection Act, 1848], which protected magistrates from actions in that form for mistakes committed by them in the execution of their duty, but the learned judge, doubting whether the statute extended to this case where there had been no conviction quashed, but the party had been discharged on the ground of the illegality of the warrant of commitment issued without any information on oath in the presence of the party so committed, directed the cause to proceed, with liberty to the defendants to move the court to enter a nonsuit. Thereupon the defendants called a witness, who produced the conviction, which he also proved to have been drawn up and signed on Aug. 10, 1810, after the commencement of this action, which was on July 16 preceding. It was also proved that Spencer, the master, was sworn to the truth of his information upon his application to the magistrates before the plaintiff was apprehended upon the warrant then granted. When the plaintiff was brought before the magistrates, he was informed of the nature of the charge made by Spencer against him, of absenting himself from his master's service, but neither of the witnesses would swear that any oath was administered to Spencer in the presence of the plaintiff, though one of them believed that it had, and spoke with certainty to the fact that the former information was read over to the plaintiff, and the indenture was then produced by Spencer, and the endorsement on it was pointed out. It was also in proof that the plaintiff, at the time of the complaint made, had a shop in Newcastle, where he was carrying on the business of a woollen draper.

The indenture of apprenticeship, which was dated June 16, 1808, was made between the plaintiff, a minor, and his father, of the one part, and William Spencer, of the town and county of Newcastle-upon-Tyne, woollen draper, of the other part. By it, the plaintiff, with the consent of his father, bound himself an apprentice to Spencer in his trade for three years and nine months from the day of the date, to become void on the death of the father before the end of that period. On April 17, 1809, the following endorsement was put upon the indenture:

> "I agree to cancel this indenture as against John Gray and William Gray his son, provided the said William Gray makes no engagement or enters into any person's service in the town of Newcastle-upon-Tyne. In such case this indenture to remain valid, and the present agreement to be void. As witness my hand, this 17th of April, 1809. William Spencer."

At the trial the jury returned a verdict for the plaintiff. The defendants obtained a rule nisi to set aside the verdict and enter a nonsuit.

Serjeant Richardson, *Topping*, *Clayton* and *Cookson*, for the defendants, supporting the rule, contended that the production of a subsisting conviction was conclusive in an action of trespass, particularly since the Justices Protection Act, 1803 [repealed by Justices Protection Act, 1848], which, assuming that a subsisting conviction would protect the convicting magistrates in a collateral action, provided that, even in the case of a conviction quashed, they would only be liable to damages in an action on the case: *Strickland* v. *Ward* (1); *Massey* v. *Johnson* (2). To make convicting magistrates trespassers, it must be shown that they had no jurisdiction as to the subject-matter of the conviction, for if they had, their judgment was decisive on the fact. With respect to the period when the conviction was formally drawn up after it had been in fact made, it was not considered in *Massey* v. *Johnson* (2), as material, but that it was sufficient to draw it up at any time before it was given in evidence in defence of the magistrates in any collateral proceeding. The conviction, shown to have been drawn up in its present form so long after the time when it purported to have been made, and after proceedings had upon the commitment in execution of it before the court, was too late and could not be resorted to as evidence to defend the magistrates against this action. Though there was no time limited by statute for drawing it up, it ought to be done within a reasonable time. [**LORD ELLENBOROUGH, C.J.**: The formal conviction, when issued, would properly bear date at the time when in fact it took place. Will not the court give credit to it as to a conviction made at that time when produced in a collateral proceeding, such as an action of trespass, however they might inquire of the time upon any other occasion when the conviction is directly impeached.] The fact of the conviction itself is traversable, and, therefore, it is not strictly a record.

Hullock, for the plaintiff, showed cause against the rule.

LORD ELLENBOROUGH, C.J.—When the conviction is produced at the trial as of the date when it took place, it would so appear, and it still comes to the same question whether the court in a collateral inquiry will look out of the record of conviction for the time when it took place, but I think that we ought to give credit to it. As to the objection upon the Justices Protection Act, 1803, to the form of the action, that Act applies only to the case of a conviction quashed. Magistrates were before protected in an action of trespass by a subsisting conviction good upon the face of it, and the Act meant to protect them still further to a certain extent in a case where before they were left unprotected by the quashing of the conviction. Even before this statute I had always considered that, if a conviction were produced at the trial which would justify the imprisonment, that was sufficient: *R.* v. *Eaton* (3); *R.* v. *Barker* (4).

It was next contended on the part of the plaintiff, that the justices in this case had no jurisdiction, and, therefore, that the conviction was a nullity. *Crepps* v. *Durden* (5) was referred to, where trespass was maintained against a magistrate who had convicted a baker by four several convictions, each in the penalty of 5s. for exercising his business on a Sunday, when the Act which gave the penalty had only made the exercising of any such calling on the Lord's day one entire offence, whether done in one or more instances on the same day.

But **LORD ELLENBOROUGH, C.J.**, and **BAYLEY, J.**, observed that the objection in that case had appeared upon the face of the four convictions given in evidence which showed that the plaintiff had been convicted of four several offences in exercising his calling of a baker on the same Sunday, when by law he could only be convicted of one such offence on the same day. By collating and bringing together the four convictions it appeared that the justice of peace had exercised a jurisdiction in respect of three of the convictions, which was not given to him by any law, for after the first conviction he was functus officio. The court, therefore, desired *Hullock* to confine his objections to such as appeared upon the face of the present conviction.

Hullock made certain objections which were answered by the court. He was then asked to point out the particular act of avoidance on which he meant to rely. To this he answered at first that when the apprentice was before Mr. Cookson, the magistrate, he was asked whether he would return into his master's service, which he refused to do. This, *Hullock* contended, was an election by the apprentice to avoid the indenture, which avoidance he might originate before the magistrates independently of the prior act of leaving his master, and which he insisted upon his right to do by virtue of the agreement between him and his master endorsed upon the indenture.

Cur. adv. vult.

LORD ELLENBOROUGH, C.J.—This was a motion for a new trial which was argued on the part of the defendants in support of a rule for the new trial. The defence made below to the action of trespass and false imprisonment, in which the plaintiff had recovered a verdict against the defendants for £120, was founded on a conviction of the plaintiff by the defendants, who, in their character of aldermen, are justices of peace for the town and county of Newcastle-upon-Tyne. This conviction was given in evidence by them on the general issue. The conviction was founded upon the statute 20 Geo. 2, c. 19, s. 4 [regulation of servants and apprentices, repealed by Conspiracy and Protection of Property Act, 1875], empowering two or more justices, upon application or complaint upon oath, by any master or mistress against any "such apprentice" (i.e., by reference to s. 3, such apprentice upon whose binding out no larger a sum than £5 of lawful British money was paid, which was the case here as nothing was taken with the apprentice) touching or concerning any misdemeanour, miscarriage, or ill behaviour in such his or her service (which oath such justices are thereby empowered to administer), to hear, examine and determine the same, and to punish the offender by commitment to the house of correction, for a time not exceeding one calendar month.

It was contended that the conviction was bad for want of any jurisdiction in the defendants, the convicting justices, on the ground that the indenture of apprenticeship was not warranted by the statute 5 Eliz., c. 4 [artificers and apprentices, repealed by Conspiracy and Protection of Property Act, 1875], under which the binding took place, not being for a term of seven years, as required by s. 26 of that statute. All indentures made otherwise than by the statute are declared by s. 41 of that statute to be "void in law to all intents and purposes." Perhaps, in order to raise this objection it should properly have appeared on the face of the conviction that the indenture was in fact made for a less term than seven years, which nowhere appeared. It may, however, be inferred from the conduct of the parties, the one of whom insisted upon an avoidance of the indenture by the act of the parties while the other resisted such avoidance, thereby by their mutual consent admitting that the indenture was in its original frame a voidable instrument. It was admitted by the plaintiff's counsel, on the authority of *R.* v. *St. Nicholas, Ipswich* (*Inhabitants*) (6), that the indenture was voidable only on this account, and not void. It was further said by the plaintiff's counsel that the indenture, so in its nature voidable, had been avoided by the plaintiff, the apprentice, before the conviction took place. The fact of avoidance relied upon was an unstamped endorsement, signed by the plaintiff's master, but not sealed with his seal, made on the indenture of apprenticeship in these words:

> "I agree to cancel this indenture as against John Gray and William Gray, his son [i.e. the plaintiff] provided the said W. Gray makes no engagement or enters into any person's service in the town of Newcastle-upon-Tyne: in such case this indenture to remain valid, and the present agreement to be void. As witness my hand, this 17th of April, 1809. William Spencer [i.e. the master.]"

It appears by the evidence stated on the face of the conviction, that W. Gray,

A the apprentice, had made an engagement in the town of Newcastle-upon-Tyne by setting up the trade there of a woollen draper. The question is whether the fact last stated amounts to a breach of that agreement on the part of the apprentice which is contained in the proviso, on the breach of which the indenture was to remain valid and the agreement for vacating the same was to become void—in other words, whether the making an engagement in the town of Newcastle-upon-
B Tyne by setting up the trade there of a woollen draper (it not appearing on the face of the conviction to have been the trade carried on by Spencer the master) be a making an engagement in the town of Newcastle-upon-Tyne, within the meaning of this proviso. The stipulation against making an engagement coupled with the context of entering into any person's service in the town of Newcastle-
C upon-Tyne, in plain sense imports an engagement of trade or business, and seems to be equivalent to a stipulation that he should neither engage in any business himself nor be employed in any as servant to another within the town of Newcastle-upon-Tyne.

If that be, as we think it is, the true meaning of the stipulation contained in the proviso, then was the indenture unavoided at the time when the absence commenced which is the subject of the conviction? According to *R.* v. *Evered* (7)
D with a manuscript note of which I have been favoured, indentures, though voidable, cannot be avoided by merely doing that which is forbidden by, and in violation of them, as long as they continue at all in force. In that case two justices had committed one Robert Collehall, an apprentice, to Shepton Mallett bridewell for running away from his master. Among other objections to the commitment was that the binding, being only for six years, was contrary to the statute 5 Eliz., c. 4,
E s. 26, which required it to be for seven years at least, and that by s. 41, all indentures otherwise made are void. It was argued that in *R.* v. *St. Nicholas, Ipswich* (*Inhabitants*) (6) LORD HARDWICKE had expressly adjudged that such an indenture was voidable by the parties. The apprentice had in this case done everything in his power to avoid the indenture, having left his master and said he would live no longer with him under his control and that it would be extremely hard that
F he should be subjected to punishment only for using that liberty and exercising those rights which the law gave him. In *R.* v. *Evered* (7) LORD MANSFIELD, C.J., said:

> "It has been adjudged that an infant may bind himself for his own benefit, and it is settled that a binding for four years gives a settlement."

G ASTON, J., said:

> "Supposing the indentures voidable, I cannot conceive that the apprentice's running away can avoid them. Had he served regularly, and during such services declared his intention to depart, it might have been different. Here he would make use of his offence in order to avoid the punishment that attends it: but it is too late to do it before a justice when charged with a crime."

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WILLES and ASHURST, JJ., being of the same opinion on this ground, the rule for the apprentice's discharge would have been discharged, but for an objection to the frame of the commitment which is collateral to the present question.

Upon the authority of these cases, we are of opinion that the indenture of apprenticeship in this case was voidable only and not void, and that it was not
I avoided by any act other than the act of delinquency on the part of the apprentice, which was the subject of the punishment in question and which on the authority of the last-mentioned case, as well as the reason of the thing, is not available for the purpose of avoiding an indenture of apprenticeship. On these grounds, therefore, we are of opinion that the defendants, the justices, had by law the authority which they exercised by a commitment under this conviction, and that they were entitled to have been acquitted under the general issue pleaded by them.

Rule absolute.

Ex parte BERKHAMPSTEAD FREE SCHOOL

[Lord Chancellor's Court (Lord Eldon, L.C.), July 29, 1813, April 28, 1814]

[Reported 2 Ves. & B. 134; 35 E.R. 270]

Charity — Visitor — Charitable corporation — School — Visitatorial powers over internal management—Trust as to application of revenues—Jurisdiction of court.

The internal management of a charity school founded by Act of Parliament (2 & 3 Edw. 6, c. xx) was exclusively the subject of visitatorial jurisdiction, but, **held,** that, as a charitable corporation, there was a trust in respect of its revenues, and, therefore, that the application of those moneys was subject to the jurisdiction of the court.

Notes. Considered: *A.-G.* v. *Browne's Hospital* (1849), 17 Sim. 137. Referred to: *A.-G.* v. *Smythies* (1836), 2 My. & Cr. 135; *A.-G.* v. *St. Cross Hospital* (1853), 17 Beav. 435; *Re Chelmsford Grammar School* (1855), 3 Eq. Rep. 517.

As to jurisdiction over charities generally, see 4 Halsbury's Laws (3rd Edn.) 407 et seq.; and for cases see 28 Digest (Repl.) 849.

Cases referred to:

(1) *A.-G.* v. *Governors of the Foundling Hospital* (1793), 2 Ves. 42; 4 Bro. C.C. 165; 29 E.R. 833; 28 Digest (Repl.) 849, *824.*

(2) *A.-G.* v. *Dixie* (1805), post p. 735; 13 Ves. 519; 33 E.R. 388, L.C.; 8 Digest (Repl.) 500, *2197.*

Petition presented under the Charities Procedure Act, 1812 [repealed by Charities Act, 1960], authorising a summary application in cases of breach of trust created by charitable purposes, to have a charity properly regulated. The petition stated that prior to 1744 an information was filed, setting forth the foundation of the free-school of Berkhampstead under an Act of Parliament, 2 & 3 Edw. 6, c. xx, reciting letters patent, 33 Henry 8, incorporating the master and usher, and enacting that they should hold the said manors, etc., receiving certain stipends; the King to appoint the master, and the master to appoint the usher whenever vacancies occurred; and the Warden of All Souls' College, Oxford, to have the visitatorial power and to remove the master if necessary; with a proviso for the master and usher to make leases for thirty-one years or three lives, subject to waste, reserving the usual rent or more.

The information alleged great abuses by the defendants, the master and usher, particularly in letting on fines and converting the fines to their own use, and prayed an account of the rents, etc., and all fines arising by letting any leases, with proper directions for the application of the funds according to the Act of Parliament.

By a decretal order, dated July 13, 1744, declaring that the Warden of All Souls was visitor of the school but that the revenues were subject to the jurisdiction of this court, an account was directed of the rents and profits of the manors, etc., and of all fines received by the master and usher, allowing their stipends, the repairs, etc.; the balance to be paid in, with directions that the lands then out of lease, should be let with the approbation of the Master; and in case any fines were taken they were to be applied first, to repairs, reserving the consideration as to the residue as to which any of the parties were to be at liberty to lay a scheme before the Master, and also as to the improved income.

By another order dated May 3, 1753, it was declared that the court, under the letters patent and Act of Parliament had power to augment the salaries of the master and usher, and a reference was directed to the Master to consider the augmentations, etc.

The Master's report dated July 23, 1754, and afterwards confirmed, approved the scheme laid before him by the master of the school, that two-thirds of what the lands then produced, or the future increased value, should be allotted to the

A master and usher and the remaining third for the repairs, taxes, and poor. That the balance due from the late master, and the fines lately paid into the bank, should follow the same course. And as to the augmentation for the time to come, the defendant proposed that all the rents, issues, fines and profits arising from the estate, after deducting quit-rents, should be divided into three equal parts to be disposed of in the same manner.

B By another order dated May 5, 1790, the Master was directed to consider a proper plan for letting the charity estates in future which, by his report dated June 30, 1792, and afterwards confirmed, he considered to be by public auction for thirty-one years or lives determinable at that period, partly on fines, partly on rents, conformably to the plan mentioned in the report of July 23, 1754; the estates, as they should fall in, to be let from time to time with the approbation of C the Master.

In pursuance of that order in February, 1813, certain parts were let before the Master at annual rents amounting to £267 12s., and on fines amounting to £4,300. The other parts of the estates were let on leases having eight or nine years to run, at yearly rents amounting to £150 11s.

D The taxes, repairs, etc., having greatly increased so as to exhaust the one-third of the rents, leaving no part applicable to the poor, the petition insisted that the decree of July 13, 1744, did not extend to future fines; that the order of May 3, 1753, applied only to the augmentation of the salaries of the master and usher; that it was not the intent of the scheme, so approved by the court, that fines payable on renewing or granting leases of the charity estate, should be divided as annual E profits; and that the master and usher were not entitled to the two-thirds of the £4,300 now to be received for fines, etc. It prayed directions for the application of the sum of £4,300, and of all future fines and the future management of the estates and income and that the Master might approve a scheme for that purpose, and if necessary, review the former scheme.

Sir Samuel Romilly, *Bell* and *Barber*, in support of the petition.

F *Richards* and *Leach* opposed it.

LORD ELDON, L.C.—This petition is presented under Charities Procedure Act, 1812, giving liberty to apply by petition in a summary way to have the charity properly regulated.

The declaration of the decree pronounced in 1744, that the Warden of All Souls G is the visitor but that the revenues were subject to the jurisdiction of this court, is perfectly agreeable to law, and calls on me to lay out of the case all circumstances relative to the regulation of the school which fall under the cognisance of the visitor. The master of the school at that time stated that it was not his fault that there were no scholars; that another school established for teaching arithmetic had been found more beneficial to the views of the inhabitants of this place. The H Lord Chancellor, however, said that the Warden of All Souls, as the visitor, had exclusive jurisdiction on that subject.

Concurring in that opinion, I have nothing to do with so much of this petition as complains of the circumstances which, if they afford ground for complaint, that complaint must be addressed to the visitor. The circumstances with which I have nothing to do are a fund arising from fines amounting to near £5,000, to be dis- I tributed as to two-thirds to the master and usher and the remaining third to the poor of the parish; that the master is resident with one scholar and that the usher is living in Hampshire. All that is for the consideration of the visitor if made the subject of complaint.

As to the revenue, it has been decided by the court, and is quite clear, that where there is a local visitor as to the conduct and management of the school, if in the original instrument a trust is expressed as to the application of the revenue, this court has jurisdiction to compel a due application. The court has, in fact

and practice, acted on the ground of such jurisdiction of which there is no doubt: *A.-G.* v. *Governors of the Foundling Hospital* (1); *A.-G.* v. *Dixie* (2).

The construction that has been given to the Act of Parliament (2 & 3 Edw. 6, c. xx) and letters patent, as to the application of the revenues of this foundation, is this. Confining myself to the actual application of the rents prior to the reference directed by Lord Thurlow to the Master to consider a scheme as to the future application, but without adverting to the several orders, it may be represented in a general way that the court had approved this sort of distribution of the revenues of an estate let in the way I shall mention. The court has expressed an opinion that it has authority to control the power in the master and usher of leasing for three lives or thirty-one years, if it should appear for the benefit of the charity not to act on that power. Under the express terms of the power they are to lease not for their own benefit only, but also in a given proportion for the benefit of the poor of the parish. Some leases were made for lives and some not for lives. Until the Master's report under the reference directed by Lord Thurlow, it was never considered as a plan to be generally acted on, that all the estates should be let on leases for thirty-one years or lives determinable on that period, taking large fines.

The court had, however, great difficulty to determine what was to be done with the fines that had been taken, but the final distribution of the revenue has been of this sort. The distribution contemplated by the Act of Parliament and the letters patent, being in proportions which altogether exhausted the whole, the court thought that the distribution of the revenues, when augmented, must be in the same proportions making an addition to the quota of each. Accordingly, where there were leases on fines or rents, the distribution actually made was two-thirds, without deducting taxes and other outgoings, to the master and usher. The other third was applied to the charges and outgoings of all the three shares, and what remained was distributed to the poor of the parish.

On an application to Lord Thurlow as to the distribution of some of the funds, this seems to have struck him as a singular management of a charity estate. There is one material petition and order bringing to the view of the court something which seems to have been forgotten in the scheme that had been approved, namely, that in consequence of this species of letting applied generally but not universally, when leases were renewed on fines, there was something material coming to the parish. On the other hand, that after giving the portion of the annual rents to the master and usher free of all deductions, the remaining third for the poor after leaving all outgoings on the whole estate, left nothing to be given to the poor in those years. The annual charges ate one-third of the surplus, so that the receiver was obliged to apply to the court to authorise him to deduct from the other two-thirds the deficiency of that third to answer those charges. The application aimed at, though did not distinctly pray, a declaration authorising some arrangement that would give something to the poor of the parish, forming one of the objects to receive something annually.

Lord Thurlow made an order directing a reference to the Master to consider a better scheme for letting the estate. It probably occurred to his Lordship that this mode of letting operated directly to disappoint one object of the charity. Further, that if it were fit, these fines should be taken, as they would probably largely increase and it should be considered whether the profit arising in that shape, should not be made a permanent fund, yielding a permanent revenue for the master and usher and their successors, and, as to one-third, for the poor. He probably also thought this not at all a proper mode of letting a charity estate.

The report made in 1792, and approved afterwards by the lords commissioners, states the ground on which the Master went, not only as to the farms out of lease, but as to all the estates in future. The leases were not less than thirty-eight in number, and the reasoning would apply equally to the estate of any tenant in fee; so that by letting without fines, needy persons might become tenants and

the tenants were to covenant to repair and leave in repair. The report proceeds, therefore, to state that, as the leases should expire, all the lands should be let on fines at small rents.

As a general application, if there were no particular circumstances, this reasoning would, in the case of an infant, call on the court to take the same course, as there might be bad tenants who would not do justice to the farms. The answer to that would be that good tenants might be procured who would do them justice. Giving credit, however, to the argument that in the covenant to build on the estate, the landlord may receive a consideration for a long lease, if the same lease contains on the tenant's part a covenant to sustain and leave all those buildings in sufficient repair, and taking that to have been the condition of all these farms, on what ground am I to infer that, though such a lease was necessary in that instance, it was equally necessary afterwards when that very lease provided that those circumstances, in consideration of which such peculiar leases were to be made, should not exist? And why, if that was proper as to one farm which required expensive buildings, was every farm, though not in the same circumstances, to be let in the same way?

In 1794, this report was confirmed. The leases were directing to be so made, not only then but at all future time. Afterwards an application was made to Lord Loughborough, L.C., about the taxes. He would only go the length of giving to the receiver what the whole annual income of the parish would not pay of those outgoings which the receiver was not authorised to take out of the proportions of the master and usher.

The present application arises out of what passed in 1804. The first difficulty is as to persons who, under the authority of the court, have actually contracted for leases. It would be difficult to dispossess those who have become tenants or continued occupation, relying on the faith of biddings before the Master that they were to have leases. I wish, therefore, to know the nature of their contracts, the particular state of each tenant as to his lease and his money. The proceedings in this charity require me to say that if the present scheme and management are not for the benefit of all the objects of the charity, it must no longer go on so. That is very different from the consideration as to the time past, having regard to the expectations of persons who have been dealing on the authority of the court, much as I conceive the court was mistaken in what was done in 1792.

I desire, therefore, to have a statement of the respective names of the bidders, the times of bidding, of confirming the report and what was done with the money, whether fines or purchase-money, at the times of confirming those biddings or since. Refer it to the Master to consider a proposal, with liberty to any party to lay proposals before the Master, for the future management of the estate, with power to review all the plans, previously adopted. If the Master shall be of opinion that it is for the benefit of the charity that all or any of the lands should hereafter be let on fines, or partly on fines, to be at liberty to receive proposals and to state his opinion on them as to the application of those fines, either as divisible at the time they are paid, or being considered as a permanent fund for the future interest of the respective objects of the charity. Further, to state his opinion on all these matters, having due regard to the letters patent, the Act of Parliament, and all the subsequent proceedings of this court.

April 28, 1814. The master and usher presented a petition stating that several of the charity estates had lately been let with the approbation of the Master at increased rents and fines, that the fines amounted to £4,303, and insisting, that the petitioners were entitled, as their predecessors, to two-thirds of the money arising from such fines in the proportions, as between themselves, of two-thirds to the master and one-third to the usher. The petition stated further that the master had expended considerable sums in substantial repairs and improvements and prayed an account of the money so laid out and an application of the fund

in the bank on account of the fines, namely, two-thirds to the petitioners in the proportions before stated, the costs and improvement to be paid out of the remaining third and the surplus to go according to the Act of Edw. 6.

LORD ELDON, L.C.—I am satisfied that the question how these fines for the time past are to be disposed of, has devolved on me as a consequence of the change of the Great Seal from LORD THURLOW to the lords commissioners in 1792. LORD THURLOW's order was calculated to set right the mode of dealing with the estate which had prevailed, and the lords commissioners did not sufficiently attend to the principle on which LORD THURLOW ordered a review of the application directed by LORD HARDWICKE.

The only difficulty I have is on the point whether I have anything more to do with the fines for the time past than to distribute them according to the existing trusts actually attaching to them. Were I the visitor I might state an opinion, but I am out of my place in observing that, as visitor, I should admonish the master or usher of this school in Hertfordshire, residing in Somersetshire, however usefully employed. The master might as well reside elsewhere as the usher, but both ought to be where they will be ready to do the duty and can do it. It is impossible to say that they can be as properly employed elsewhere, with reference to the objects of this foundation, as if they were resident in the place where that duty is to be performed. This is a royal foundation under which the master and usher are corporators. As long as they remain so, and the visitor does not think proper to remove them, they must in a court of justice have the enjoyment of all the revenues which belong to them by the same instrument that gives them the corporate character. The question now before me is not as to their conduct but how the rents and profits have been actually given to the persons holding these situations, and, unless I am to conclude that from 1792, an improper mode of letting these estates has prevailed in the Master's office, I do not see my way to refuse two-thirds of the profits for the time past, having no right to withhold that to which they have a present title.

COUPLAND *v.* HARDINGHAM

[Court of King's Bench (Lord Ellenborough, C.J.), June 5, 1813]

[Reported 3 Camp. 398]

Highway—Nuisance—Nuisance on premises adjoining highway—Existence for as long as could be remembered and long before occupier's possession began—Duty of occupier to fence land.

It is the common law duty of the occupier of a house having an area fronting a public street so to fence it as to make it safe for persons using the street, and it is no defence to an action against him for neglecting to do so, whereby the plaintiff fell into the unfenced area and was hurt, that as far back as could be remembered and long before his possession began the area was in the same state as when the accident happened, for he is bound to guard against the danger to which the public were exposed and is liable for the consequences of having neglected to do so in the same manner as if he had originated the nuisance.

Notes. In general, there is no obligation to fence land adjoining the highway; but by s. 144 of the Highways Act, 1959 (39 Halsbury's Statutes (2nd Edn.) 566), the local authority may require the owner or occupier to fence land adjoining a street which is dangerous to persons using the street.

Considered: *Barnes* v. *Ward* (1850), 9 C.B. 392. Explained: *Cornwell* v. *Metropolitan Sewers Comrs.* (1855), 10 Exch. 771; *Fisher* v. *Prowse*, *Cooper* v. *Walker*, [1861–73] All E.R. Rep. 907. Referred to: *A.-G.* v. *Roe*, [1914–15] All E.R. Rep. 1190; *Jacobs* v. *L.C.C.*, [1950] 1 All E.R. 737.

As to duty of occupier to fence land adjoining highway, see 19 Halsbury's Laws (3rd Edn.) 119, 120, 278; and for cases see 7 Digest (Repl.) 288 et seq.

Action on the case for negligence in not railing in or guarding an area before the defendant's house in Wood Street, Westminster, whereby the plaintiff fell down into the area, and was severely hurt.

It appeared that before the defendant's house there was an area, which was descended to by three steps from the street, and from which there was a door leading into the basement story of the house: there was no railing or fence to guard the area from the street. The plaintiff passing by on a dark night, fell into it, and had his arm broken. The defence set up was that the premises had been exactly in the same situation as far back as could be remembered, and many years before the defendant was in possession of them.

Garrow and *Marryatt* for the plaintiff.

Park and *Reader* for the defendant.

LORD ELLENBOROUGH, C.J., held that however long the premises might have been in this situation, as soon as the defendant took possession of them, he was bound to guard against the danger to which the public had been before exposed, and that he was liable for the consequences of having neglected to do so, in the same manner as if he himself had originated the nuisance. His Lordship said: The area belongs to the house, and it is a duty which the law casts upon the occupier of the house to render it secure.

Verdict for plaintiff.

LE BRET *v.* PAPILLON

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), February 6, 1804]

[Reported 4 East, 502; 102 E.R. 923]

Alien—Enemy—Right to sue in English courts—Action brought before enemy status acquired.

An alien friend brought an action in this country, but before plea pleaded he became an alien enemy.

Held: (i) a plea in bar of the action generally was wrong, since it should have been in bar of the further maintenance of the action; (ii) as the court ought, ex officio, to give such judgment as appeared on the whole record to be proper without regard to the issues found or conferred, or to any imperfection in the prayer of judgment on either side, and as it appeared that the plaintiff was an alien enemy, and, therefore, incapable of maintaining further his suit, judgment must be given that he be barred from further having and maintaining his action.

Notes. Considered: *Allen* v. *Hopkins* (1844), 13 M. & W. 94; *Rodriquez* v. *Speyer Bros.*, [1918–19] All E.R. Rep. 884; *V/O Sovracht* v. *Gebr. Van Udens Scheepvaart en Agentuur Maatschappij*, [1943] 1 All E.R. 76. Referred to: *R.* v. *Mitchel* (1848), 3 Cox, C.C. 93; *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1900–3] All E.R. Rep. 426.

As to legal status of alien enemy, see 39 Halsbury's Laws (3rd Edn.) 32 et seq.; and for cases see 2 Digest (Repl.) 241 et seq.

Cases referred to:

(1) *Campion* v. *Baker* (1684), 2 Lut. 1139.
(2) *Rainbow* v. *Worrall* (1690), 2 Lut. 1174.
(3) *Moor* v. *Green* (1694), 1 Salk. 178.
(4) *Price* v. *Kenrick* (1710), Fortes. Rep. 338.
(5) *Sullivan* v. *Montague* (1779), 1 Doug. 106.
(6) *Reynolds* v. *Beering* (1784), 4 Doug. K.B. 181; 3 Term Rep. 189, n.; 99 E.R. 829; 40 Digest (Repl.) 411, *62*.
(7) *Evans* v. *Prosser* (1789), 3 Term Rep. 186; 100 E.R. 524; 40 Digest (Repl.) 411, *58*.
(8) *Dive* v. *Maningham* (1550), 1 Plowd. 60; 75 E.R. 96; 15 Digest (Repl.) 806, *7656*.
(9) *Fraunces's Case* (1609), 8 Co. Rep. 89 b; 77 E.R. 609; 31 Digest (Repl.) 516, *6388*.
(10) *Westlie* v. *King* (1624), Winch, 75; 124 E.R. 63.
(11) *Kirk* v. *Nowill* (1786), 1 Term Rep. 118; 99 E.R. 1006; 13 Digest (Repl.) 248, *754*.
(12) *Street* v. *Hopkinson* (1736), Cas. temp. Hard. 345; 2 Stra. 1055; 95 E.R. 223.

Demurrer to an action of assumpsit brought by the plaintiff against the defendant on a foreign judgment recovered by the plaintiff against the defendant in the court at Rouen in France, and on the common money counts.

The defendant pleaded, first, non-assumpsit; and, secondly, that the plaintiff ought not to have or maintain his action because the plaintiff was an alien born in foreign parts, viz., at Rouen in France, out of the allegiance of the King of England, and within the allegiance of a foreign sovereign, to wit, the French king, and that the plaintiff, before and at the time of exhibiting his bill in this behalf, was inhabiting and commorant in France, viz., at Rouen, under the government of the persons exercising the powers of government in France between whom and the King of England a public war had been commenced and was now carried on; and that the plaintiff was an enemy of the King, and adhering to the King's enemies.

A The defendant, therefore, prayed judgment if the plaintiff ought to have or maintain his action against him. The plaintiff, by his replication, said that he ought not, by reason of anything in that plea alleged, to be barred from having and maintaining his action against the defendant, because he exhibited his bill against the defendant long before Wednesday next after five weeks from the day of Easter in Easter Term, 1803, viz., on Wednesday next after fifteen days from the day of Easter B in Easter Term, 1803, and that at the time of the exhibiting of his bill against the defendant and afterwards, he, the plaintiff, as well as the persons then exercising the powers of government in France, were at peace and in amity with the King and his subjects. The plaintiff, therefore, prayed judgment and damages. To this the defendant demurred.

C *Espinasse* for the defendant, in support of the demurrer.
Lambe for the plaintiff.

LORD ELLENBOROUGH, C.J., delivered the following judgment of the court: —This is an action of assumpsit brought on a foreign judgment recovered by the plaintiff against the defendant in a court at Rouen in Normandy. The defendant pleads first, the general issue; and secondly, that the plaintiff is an alien enemy D born in foreign parts and under the allegiance of a foreign sovereign, viz., the King of France, and is now inhabiting and commorant in France under the government of the persons exercising the powers of government in France, between whom and our King a war is commenced and now carried on; and that the plaintiff is an enemy of the King. To this the plaintiff replies stating the time when he exhibited his bill, that as well he as the persons exercising the powers of government in France E were then at peace and in amity with our King and his subjects. To this replication there is a demurrer with special causes assigned. It appears on the whole of this record that though the plaintiff be now an alien enemy yet that he was not such at the time of exhibiting his bill; and the question is whether the plea of the defendant, pleaded as it is generally in bar of the action, be good, or whether, inasmuch as a right to sue was well vested in the plaintiff at the time of action brought, it ought F not to have been pleaded in the form in which pleas after the last continuance are generally pleaded, viz., that the plaintiff ought not further to have or maintain his action. Indeed, according to what is said in *Campion* v. *Baker* (1) (in which RASTELL, APPELS EN MORT. 4, and DETT EN RELEASE 7, are referred to) (2 Lut. at p. 1143):

G > "This seems to be the proper way of pleading a collateral thing, which happens after the action brought; for by this it admits that the action was well brought, but that the plaintiff by reason of the new matter, ought not to proceed further in it."

This report refers to a subsequent case, *Rainbow* v. *Worrall* (2) (2 Lut. at p. 1177), in which case it does not, however, appear whether any judgment was ultimately H given.

It is urged that outlawry pending the writ may, on the authority of *Moor* v. *Green* (3), and a release on the authority of *Price* v. *Kenrick* (4), be pleaded generally in bar of the action. *Sullivan* v. *Montague* (5) was cited, where it was held that matter of defence arising after action brought may be given in evidence on the general issue if it happen before plea pleaded; to which might be added I *Reynolds* v. *Beering* (6), where it was held on the authority of *Sullivan* v. *Montague* (5), that a judgment recovered by the defendant against the plaintiff, after action brought and before plea pleaded, might be pleaded in bar of such action. However, in the subsequent case of *Evans* v. *Prosser* (7) it was held that a plea of set-off, in which it was pleaded that the plaintiff, before and at the time of the plea pleaded, was indebted, was bad on general demurrer; and the point determined in *Reynolds* v. *Beering* (6) in favour of a set-off, the matter of which arose after action brought, was considered as not capable of being supported. Since that time, therefore, it

may be considered as a settled rule of pleading that no matter of defence arising after action brought can properly be pleaded in bar of the action generally.

It has been suggested that pleas of judgment recovered, pleaded by executors, where judgments have been confessed after action brought, are pleaded generally in bar of the action, and not with an ulterius manutenere non debet plea, after the last continuance pleaded; but that is an action of a peculiar nature. The action is there brought against the executor, not only on the foundation of a debt due from the testator to the plaintiff, but in respect also of assets supposed to be in his, the executor's, hands liable to its satisfaction; and the executor has by law a power of confessing a judgment to another creditor in preference to the plaintiff in the suit first brought, and thereby to the extent of the assets then in hand to create a perpetual bar to the plaintiff's suit, the same being pleaded in the usual way, viz., that he has not assets except so much, which are not sufficient to satisfy that judgment. But the plaintiff may, and constantly does, avoid the effect of the plea as an absolute bar and protect himself from costs at the same time on the ground of his original right of suit, by praying judgment of such assets as should come to the executor's hands after satisfying the judgment so confessed. So that the plea of judgment recovered against the defendant as executor pending the writ enures in point of effect, if the judgment itself be not questioned by the replication, as only a plea in bar of the further maintenance of the suit against the executor in respect of his present assets.

It is also urged on the part of the defendant, that, even if the plea be bad as pleaded in bar generally, yet that the replication is bad in praying a judgment for damages which cannot be given in favour of the plaintiff, inasmuch as he appears by the record to be now an alien enemy, and of course incapable of recovering damages. On this account it is contended that, inasmuch as the plaintiff cannot recover the judgment he prays, he must be barred from maintaining his action generally, according to the prayer of the defendant's plea. But this by no means follows: for the court may, and ought ex officio, to give such judgment on the whole record as ought to be given, without regard to the issues found or to any imperfection in the prayer of judgment made on either side.

In *Dive* v. *Maningham* (8), MONTAGUE, C.J., speaking of the plea of the defendant in that case, says (Plowd. at p. 66):

> "He ought to have concluded non est factum, and not judgment si actio, as he has done; for which reason the conclusion is bad. Further, inasmuch as the conclusion in this point is bad, it is to be seen what shall be done if it appear to us judges, that upon the matter in law the deed is void; and it seems to me that we, by our office, ought to give judgment against the plaintiff; for although the defendant may not take the advantage, yet, inasmuch as it appears to us that the plaintiff has no cause of action, we ought to give judgment against him."

And later (ibid. at p. 69):

> "he shall have benefit by the office of the judge, notwithstanding the bad conclusion to the action, as I have said before."

So, also, *Fraunces's Case* (9) (8 Co. Rep. at p. 93a) and *Westlie* v. *King* (10) to the same effect. Indeed, if it were necessary to cite authorities on such a subject, in *Kirk* v. *Nowill* (11) (1 Term Rep. at p. 125), and in many other cases judgment has been entered up according to the right appearing in favour of the plaintiff on the whole record, notwithstanding an issue on a bad plea in bar found against him. In *Street* v. *Hopkinson* (12) the court held expressly that they were not bound by the prayer of an improper judgment and, therefore, pronounced the rule that the plaintiff in error in that case should be barred, contrary to the terms of the defendant's prayer, which was that judgment might be affirmed.

There is no difference between the office of the court in this particular in a court

of error and in the court of original jurisdiction, which gives the judgment in the first instance. If, therefore, we have power, as on these and other authorities we have, to give the proper judgment in this case, and that judgment be, as it appears to us it will be, that the plaintiff be barred from further having and maintaining his action, we shall feel it our duty to give that judgment, and we do pronounce the same accordingly.

ATTORNEY-GENERAL *v.* WANSAY

[Lord Chancellor's Court (Lord Eldon, L.C.), July 29, 1808]

[Reported 15 Ves. 231; 33 E.R. 742]

Charity—Cy-près doctrine—Surplus after satisfying prescribed purposes.

By his will, dated in 1699, a testator bequeathed money to the congregation of Presbyterians to which he belonged "for placing out and putting apprentices two poor boys of such as were members of the said congregation and living in the parish of M." The fund being considerably more than sufficient for the purpose, an application was made for a scheme.

Held: the surplus should be applied on the principle of cy-près, first, to the sons of members of the congregation within that same parish; secondly, such boys in other parishes; thirdly, daughters of members of the congregation in the same parish; and fourthly, sons of Presbyterians generally: sons of persons of other religious denominations in the same parish were not within the testator's intention and should receive no benefit under the charity.

Notes. Section 13 of the Charities Act, 1960 (40 Halsbury's Statutes (2nd Edn.) 137), codifies the law as to the circumstances in which the original purposes of a charitable gift may be altered to allow application cy-près, and at the same time widens the scope of that doctrine by specifying additional circumstances in which the purposes of a charity can be altered.

As to where a surplus remains after satisfying the prescribed objects, see 4 Halsbury's Laws (3rd Edn.) 323 et seq.; and for cases see 8 Digest (Repl.) 467.

Cases referred to:

(1) *A.-G.* v. *Baxter* (1684), 1 Vern. 248; reversed sub nom. *A.-G.* v. *Hughes* (1689), 2 Vern. 105; 23 E.R. 677; 8 Digest (Repl.) 335, *166.*

(2) *Moggridge* v. *Thackwell* (1803), post p. 754; 7 Ves. 36; 32 E.R. 15, L.C.; affirmed (1807), 13 Ves. 416, H.L.; 8 Digest (Repl.) 503, *2229.*

Exception to the Master's report.

The report approved a scheme for the application of a charity under a will, dated in 1699, bequeathing £200 to the congregation of Presbyterians to which the testator belonged. Under the will the members of the congregation were to give bond to his wife for payment of £12 a year to her for her life, with directions that after her decease, the members should lay out the £200 in land and yearly raise two several sums out of the profits thereof for placing out and putting apprentices two poor boys of such as were members of the congregation, and that lived in the parish of St. Martin in New Sarum.

The fund being considerably more than adequate to the object specified by the testator, the Master rejected a proposal for extending that object to other parishes and for the foundation of a school. He approved a plan for extending the charity to children of persons in the same parish of whatsoever religion.

Sir Samuel Romilly and *Wingfield*, in support of the exception: As there is not a sufficient number of boys answering both parts of the description, that is, children of persons attending this congregation and inhabitants of this particular parish, the principle of cy-près must be applied by extending the charity to female children and to children of Presbyterians in other parishes. The object approved by the Master is quite foreign, and must be contrary to the intention. Why may not this charity be extended to female children, as being nearer the intention?

Martin and *Johnson* supported the Master's report: This bounty is expressly confined to boys. The Master did not think that he should properly execute this charity by going into other parishes to find children of dissenters, there being a great number of poor families in this parish who professed the principles of the Church of England.

There is no instance, where the words were not imperative, of an application to an establishment dissenting from that of the country which would operate as an encouragement to educate children in a different persuasion. That consideration had weight in *A.-G.* v. *Baxter* (1). The latter part of the proposed scheme, the foundation of a school, is perfectly inconsistent with the intention that these boys should be put out as apprentices.

Sir Samuel Romilly replied: The decree in *A.-G.* v. *Baxter* (1) was reversed, and there is no authority against an application in favour of persuasion that is tolerated in this country. The principle, certainly very much misapplied in that instance, is that where religion was uppermost in the mind of the founder, his object shall be executed cy-près.

There can be no doubt that this testator would have preferred daughters of those who professed his mode of worship, to children of persons of a different religious persuasion. His object in specifying this parish was only that the persons should be neighbours of this place, as members of this congregation must be, probably residing in some adjoining parish.

As to the latter part of this proposal giving education to these children, apprenticeship was, in his view, only a mode of doing them benefit. If they could not be placed out as apprentices, he would probably have done them good in some other way.

LORD ELDON, L.C.—The description of the objects of this charity "boys of such as are members of this congregation," must be taken to mean sons of such persons. This testator has strongly marked that he did not place his confidence in the management of this trust in any persons but Presbyterians. He states himself to belong to them and he mentions the man who was Presbyter. He entrusts the duty to the members of the congregation and his primary view, undoubtedly, was to take such individuals, being members of that congregation, as lived in that parish. I am satisfied, however, that as between the two objects of residence in that parish, and being sons of members of the congregation, he intended to give the benefit to the latter.

This is a body known to and tolerated by the law. It is the duty of the court and of the Crown, where the distribution is in the Crown, by sign manual (*Moggridge* v. *Thackwell* (2)), to distribute an unexpected surplus, cy-près, the object to which the fund was originally given. If there are no legal objections, or objections arising out of considerations of policy, the surplus must be applied as near as can be to that object which the testator meant to prefer. It would be inconsistent with his intention to hold that it might be applied in placing out, as objects of his bounty, children of persons of different religious persuasions, the Roman Catholic, the Jewish or even the Church of England, his object being children of persons professing the same religious worship that he professed.

It has happened that the profits of the land purchased with the fund which he destined to this purpose, amount to much more than sufficient to place out two boys. As the property is not to go to the heir but is to go as near as can be to the first

A object, namely, sons of members of this congregation within this particular parish, if such boys cannot be found in that parish, his next object, applying the doctrine of cy-près, is sons of members of that congregation whether living in that parish or not. If both those objects shall not be sufficient to exhaust the whole fund, the question then will be, which member of the description is to be preferred; that which speaks of boys in that parish or that which points out sons of members of that B congregation. One must recollect that he describes it as a congregation of Presbyterians, and, if according to the policy of the law as it has been acted on, charitable institutions will be enforced in favour of persons of this description, I cannot see why the principle is not to be followed throughout in the application of the cy-près doctrine.

The consequence is, that if boys, sons of members of this congregation, cannot C be found living in this parish or not, the application must be for boys answering that material object in the view of the testator, namely, sons of Presbyterians. The specification of this parish denotes a local preference. It will, therefore, be more proper to take boys living in the city of Sarum, but I see nothing to confine it.

If the fund should prove so considerable that the court cannot abide by the description taken altogether, that will not justify going to the greatest distance in D the first instance; but there is nothing confining the application if it be necessary to the execution of the object. I think the court would not disapprove, as an execution cy-près, a provision for putting out apprentices girls who are the children of members of this congregation, rather than go out of it, if boys cannot be found answering both descriptions, either in that parish or in any other. After the application to daughters of members of this congregation, and before you can go to E building a school and other purposes in the scheme, you must go to boys, sons of Presbyterians out of Sarum.

The scheme was directed to be reformed accordingly, without another reference to the Master, by taking, first, boys, sons of members of the congregation within the parish; secondly, sons of such members in other parishes; thirdly, daughters of members of the congregation, in the same way; fourthly, sons of Presbyterians F generally.

R. *v.* LUFFE

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), January 31, 1807]

[Reported 8 East, 193; 103 E.R. 316]

Bastardy—Married woman—Child conceived and born during marriage—Evidence of non-access by husband.

Per Lord Ellenborough, C.J.: The conclusion to be drawn from the authorities is that circumstances which show a natural impossibility that a husband can be the father of a child of which his wife is delivered are grounds on which the illegitimacy of the child may be founded whether those circumstances arise from the husband's being under the age of puberty, or from his labouring under disability occasioned by natural infirmity, or from the length of time elapsed since his death. Other causes equally potent as these natural causes and conducive to show the absolute physical impossibility of the husband's being the father may be adopted, as in the present case the fact that the husband was beyond the seas from a date more than two years before the birth of a child to his wife until fourteen days before the birth.

Legitimacy—Presumption of legitimacy—Child born after marriage—Conception before marriage—Knowledge by mother's husband—Presumption of acknowledgment.

If a man marries a woman whom he knows to be with child he may be considered as acknowledging by a most solemn act that the child is his.

Notes. With regard to the question raised in the case regarding the admissibility of the wife's evidence of non-access by the husband see now s. 43 of the Matrimonial Causes Act, 1965 [45 Halsbury's Statutes (2nd Edn.) 503] which provides that the evidence of a husband or wife shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period.

Applied: *R.* v. *Collingwood*, [1843–60] All E.R. Rep. 551; *R.* v. *Pilkington* (1853), 2 E. & B. 546. Referred to: *Morris* v. *Davies*, [1835–42] All E.R. Rep. 270; *Turncock* v. *Turncock and Turncock* (1867), 36 L.J.P. & M. 85; *Re Parson's Trust* (1868), 18 L.T. 704; *Jones* v. *Davies*, [1900–3] All E.R. Rep. 243; *Brown* v. *Leech* (1924), 88 J.P. 208; *Jones* v. *Evans*, [1945] 1 All E.R. 19; *Taylor* v. *Parry*, [1951] 1 All E.R. 355.

As to evidence admissible to rebut the presumption of the legitimacy of a child born to a married woman, see 3 Halsbury's Laws (3rd Edn.) 89–92; and for cases see 3 Digest (Repl.) 402–406.

Cases referred to:

(1) *R.* v. *Bedell* (*Inhabitants*) (1737), Andr. 8; Lee temp. Hard. 379; 2 Stra. 1076; Bull. N.P. 112 a; 95 E.R. 273; 22 Digest (Repl.) 292, *2975*.
(2) *R.* v. *Reading* (1734), Cunn. 140; Sess. Cas. K.B. 206; Lee temp. Hard. 79; 94 E.R. 1113; 3 Digest (Repl.) 410, *96*.
(3) *Foxcroft's Case* (1282), 1 Roll. Abr. 259; cited in 8 East, at p. 200, n.
(4) *R.* v. *Murray* (1704), 1 Salk. 122; 91 E.R. 115; 3 Digest (Repl.) 403, *43*.
(5) *R.* v. *Albertson* (1698), 2 Salk. 483; 1 Ld. Raym. 395; 91 E.R. 416; sub nom. *R.* v. *Alverston*, Carth. 469; Holt, K.B. 508; sub nom. *Alinson* v. *Spence*, 5 Mod. Rep. 419; 3 Digest (Repl.) 402, *42*.
(6) *R.* v. *Rook* (1752), 1 Wils. 340; Say. 61; 95 E.R. 651; 3 Digest (Repl.) 410, *97*.
(7) *Goodright d. Tompson* v. *Saul* (1791), 4 Term Rep. 356; 100 E.R. 1062; 3 Digest (Repl.) 405, *67*.

Rule Nisi for an order of certiorari to bring into court to be quashed a bastardy order made by justices for the county of Suffolk.

By the order it was recited that it appeared to the justices "upon the oath of Mary Taylor as otherwise" that her husband, Jonathan Taylor, had been beyond the seas; that she did not see him or have access to him from April 9, 1804, until June 29, 1806; and that on July 13, 1806, she was delivered of a male child of whom one Luffe was the father. The justices adjudged that Luffe was the father of the child and ordered him to pay to the churchwardens of the parish £2 3s. 6d. towards the expenses of Mary Taylor's confinement and 3s. a week for the maintenance of the child.

Three objections were taken to the order: (i) that evidence of the wife was admitted to prove the non-access of her husband; (ii) that, this being the child of a married woman, the justices had no jurisdiction to make an order of filiation, unless the child appeared to have been actually chargeable, and not merely likely to become so; (iii) that the non-access of the husband was not proved during the whole time of the wife's pregnancy, which was necessary to bastardise the child.

Storks showed cause against the rule.

Wilson, *Alderson* and *King*, supported the rule.

LORD ELLENBOROUGH, C.J.—Three exceptions have been taken to this order —first, that the wife was examined generally, and alone, to the fact of non-access, and that the order is founded on her evidence only, whereas it is laid down in the cases that an order of this sort cannot be made on the evidence of the wife alone, but there must be other proof of the non-access. This objection is grounded upon a principle of public policy which prohibits the wife from being examined against her husband in any matter affecting his interest or character unless in cases of necessity, where, from the nature of the thing, no other witnesses can probably have been present, but exceptions of that sort have been established, and that it is necessary, and on that account allowable, to examine her as to the fact of her criminal intercourse with another has been held by various judges at different periods, for this is a fact which must probably be within her own knowledge and that of the adulterer only. By a parity of reasoning it would seem that, if she be admitted as a witness of necessity to speak to the fact of the adulterous intercourse, it might also be competent for her to prove that the adulterer alone had that sort of intercourse with her by which a child might be produced within the limits of time which nature allows for parturition.

Certainly, however, it is competent for her to prove the fact of her connection with that person whom she charges as being the real father of her child. Here the order is stated to have been made, not on her evidence only, but "upon the oath of the said Mary Taylor, as otherwise." It is true that it is not said, "as otherwise upon oath," but, as no evidence can properly be given otherwise than upon oath, it is not going further in making an intendment to support this order than has been done in other cases to say that such other evidence must also be taken to have been given upon oath. It does not appear to what particular facts the wife deposed or what were proved by the other evidence, and then the rule laid down in *R.* v. *Bedell* (*Inhabitants*) (1) applies that, if there were other witnesses besides the wife and she were competent to prove any part of the case, the court will intend, in support of an order framed like the present, that she was examined only as to those facts which she was competent to prove, and that the rest of the case was proved by the other evidence. This is not more than has been intended in many other cases. We may, therefore, read the adjudicatory part of the order as made "upon examination, etc., of the premises upon oath, as well of the said Mary Taylor, as otherwise."

The second exception, which arose on the wording of the statutes 18 Eliz. 1, c. 3 [relating to the poor] and 6 Geo. 2, c. 31 [bastard children], in effect resolves itself into the third. For when the question is whether this was a child born out of lawful matrimony, that is, out of the limits and rights belonging to that state, it is the same in substance as the question whether it be a bastard. It is so for

the general purposes of the Act. The matrimony does not cover the child if it be in other respects (according to the rule of law applicable to this subject) a bastard. So it seems that a child born by adulterous intercourse is as much within the provision of the Act of Geo. 2 as one which is born of a single woman. *R.* v. *Reading* (2) and *R.* v. *Bedell (Inhabitants)* (1), were both decided after the statute of Geo. 2 and yet no such objection was taken. It is a consequence which follows of course from establishing the bastardy of the child that it was born out of lawful matrimony, in the proper sense of those words as applied to the subject-matter. This brings us to the third and principal exception, that, as it appears that the husband returned within access to the wife about a fortnight before the child was born, he must be presumed to be the father of it, which will throw upon him the burden of its maintenance.

As something has been said concerning the novelty of the doctrine admitting the proof of non-access to the husband living within the kingdom in order to rebut the presumption of legitimacy, let us see how the law was understood to be in early periods. In 1 Roll. Abr. 358, tit. Bastard, letter B., it is said: "By the law of the land no man can be a bastard who is born after marriage, unless for special matter." Therefore, in the very text of the rule an exception is introduced. The first special matter of exception mentioned by Rolle to bastardise the issue where the husband is within reach of access is one of a natural impossibility—where the husband was not of the age of puberty, though that was no obstacle to the marriage. There is a case in the Year Book 1 Henry VI, 3 b. [1422] which goes the length of deciding the issue to be a bastard where the husband was within the age of fourteen. There are several other cases mentioned from the Year Books, less questionable as the age in those cases was much less. All these establish the principle that where the husband in the course of nature could not have been the father of his wife's child, the child was by law a bastard. *Foxcroft's Case* (3) was the case of an infirm bedridden man who, having married in that state twelve weeks before the delivery of his wife, that was held to bastardise the issue though the parties were together. No doubt is thrown on the principle of that case in any subsequent authority, not even in the learned editor's notes on Co. Litt., 244 a., 123 b., etc. This, therefore, is another instance of an exception to the general rule admitted at so early a period as 1282 and founded on natural impossibility arising from bodily infirmity.

There is another case in 1290, also mentioned in 1 Roll. Abr. (p. 356), still stronger to the present purpose, where the child was found to be born eleven days post ultimum tempus legitimum mulieribus pariendi constitutum, and because of that fact, et quia per veredictum juratorum invenitur quod prædictus Robertus [the husband] non habuit accessum ad prædictam Beatricem per unam mensem ante mortem suam, per quod majis presumitur contra praedictum Henricum [the issue], etc., therefore, the brother and heir of Robert had judgment to recover in assize. Even at that time, therefore, it was considered that the fact of access or non-access was a material question to be gone into, and that the period of time which had elapsed between the non-access and the birth, which only goes to establish the natural impossibility of the husband being the father of the child, was proper to be inquired of. And Lord Rolle, C.J., adds a note to that case to the effect that the jury found that the husband languished of a fever long before his death, which shows that the natural impediment to any access, arising from his languishing of a fever some time before his death, was also considered as an ingredient in the question which was submitted to the jury. The rule of law which has prevailed in these cases is (Bracton, p. 6 a):

> "Stabitur huic præsumptioni donec probetur in contrarium. Ut ecce, maritus probatur non concubuisse aliquamdiu cum uxore, infirmitate vel alia causa impeditus, vel erat in ea invalitudine ut generare non possit."

From all these authorities I think the conclusion may be drawn that circumstances which show a natural impossibility that the husband could be the father of the child of which the wife is delivered, whether arising from his being under the age of puberty, or from his labouring under disability occasioned by natural infirmity, or from the length of time elapsed since his death, are grounds on which the illegitimacy of the child may be founded. Therefore, if we may resort at all to such impediments arising from the natural causes adverted to, we may adopt other causes equally potent and conducive to show the absolute physical impossibility of the husband's being the father. I will not say the improbability of his being such, for upon the ground of improbability, however strong, I should not venture to proceed. No person, however, can raise a question whether a fortnight's access of the husband before the birth of a full grown child can constitute in the course of nature the actual relation of father and child. It is said that, if we break through the rule insisted upon that the non-access of the husband must continue the whole period between the possible conception and delivery, we shall be driven to nice questions. That, however, is not so, for the general presumption will prevail unless a case of plain natural impossibility is shown, and to establish as an exception a case of such extreme impossibility as the present cannot do any harm, or produce any uncertainty in the law on this subject.

As to *R.* v. *Murray* (4), relied on for the proposition contended for, on which case alone *R.* v. *Albertson* (5) proceeded, the ground of it was discountenanced by Lee, J., in *R.* v. *Reading* (2). Without weakening, therefore, any established cases or any legal presumption applicable to the subject, we may without hesitation say that a child born under these circumstances is a bastard. With respect to the case where the parents have married so recently before the birth of the child that it could not have been begotten in wedlock, it stands upon its own peculiar ground. The marriage of the parties is the criterion adopted by the law, in cases of ante-nuptial generation, for ascertaining the actual parentage of the child. For this purpose it will not examine when the gestation began, looking only to the recognition of it by the husband in the subsequent act of marriage.

GROSE, J.—As to the first and second objections which have been made, I shall content myself with referring to the answers given to them by my Lord. But in respect of the third objection, as we have been warned not to break in upon the common law without some rule to go by, I shall make a few observations upon it. It is said that, if we break in upon the old rule of the quattuor maria, we must adopt some other line, which will be difficult to be drawn. But that rule has been long exploded on account of its absolute nonsense, and we will adopt another line which has been marked out on account of its good sense. In every case we will take care, before we bastardise the issue of a married woman, that it shall be proved that there was no such access as could enable the husband to be the father of the child. If by reason of imbecility, or on any personal account, or from absence from the place where the wife was, the husband could not be the father of the child, there is no reason why it should not be so declared. Here it is apparent that the husband, who had no access to the wife till two weeks before her delivery, could not be the father. In saying so we go upon the sure ground of natural impossibility and good sense, rejecting a rule founded in nonsense.

LAWRENCE, J.—The objections are reduced to two. The first is that this order is made upon the evidence of a married woman that her husband had no access to her, and *R.* v. *Reading* (2), and *R.* v. *Rook* (6), have been relied on. But those cases are not broken in upon by sustaining the present order, because it was made on other evidence besides that of the wife. It is stated to have been made on examination of the wife on oath "as otherwise," by which I understand on other legal proof besides her evidence. It is said that we can make no intendment in support of this, which is more in the nature of a conviction of an offence than of an order. That, however, is not so, and is contrary to the determination in

R. v. *Bedell* (*Inhabitants*) (1), between which and the present case there is no distinction, except that there the order was stated to be made "upon examination of the wife, and other proof upon oath." The only question, therefore, is whether the words "as otherwise" here used must not be taken to mean other proof upon oath, for, if they can, the cases are parallel, though, if orders can be made in any cases without oath, which I do not know that they can, still this would be good as an order. But suppose it had been stated in express terms that the wife had given evidence of the non-access and that the same fact had been proved by ten other witnesses, we should presume in the case of an order that the magistrates had proceeded upon the evidence of the other witnesses as to that fact. This case comes to us after an appeal to the sessions, and we may presume that, if there had been no other evidence of non-access than that of the wife, the sessions would not have confirmed the order.

The third question is whether, as the husband had no access until about a fortnight before the birth, a child so born can be said by our law to be legitimate. Without going over the whole ground of the argument again, the doctrine of the quattuor maria has been long exploded, and it has been shown by the authorities mentioned by my Lord that imbecility from age and natural infirmity from other causes have always been deemed sufficient to bastardise the issue, all of which evidence proceeds upon the ground of a natural impossibility that the husband should be the father of the child. Then why not give effect to any other matter which proves the same natural impossibility? It is said, however, that in so doing we shall shake a settled rule of law that, if a child be born in wedlock, though but a week after the marriage of its parents, such child is to be deemed legitimate. I do not see that the consequence supposed would follow. By the civil law, if the parents married any time before the birth of the child, it was legitimate, and our law so far adopts the same rule that, if a man marry a woman who is with child, it raises a presumption that it is his own. Lord Rolle gives some such reason for the rule, and it seems to be founded in good sense, for where a man marries a woman whom he knows to be in this situation, he may be considered as acknowledging by a most solemn act that the child is his.

LE BLANC, J.—As to the first objection, I think it must be taken that the wife was examined to prove the fact of the non-access of her husband within the time mentioned as well as the other witnesses, for the particular facts proved by her and other witnesses, or by her alone, are given in detached sentences. Then the question is brought to this, whether an order of filiation, where the wife and other witnesses were examined to prove the non-access of the husband, can be supported? To that *R.* v. *Bedell* (*Inhabitants*) (1) is in point, for there the wife, as well as other witnesses, was examined to prove that fact (which, I think, appears as plainly here from the statement of the Case), and yet the order was held to be good. I consider that case, therefore, as an authority to this point. It is more peculiarly fit to make the intendment that the fact was proved by the other witnesses as well as by the wife in a case like the present where an appeal lies to the sessions from the original order of the justices, where the appeal has been heard, and where the objection might have been taken on the evidence that no other than the wife had proved the non-access, and where notwithstanding it is stated that that fact, among others, was proved by the wife "as otherwise," understanding, as I do, these latter words to mean other competent proof.

The second objection has been properly abandoned because it comes in effect to the question whether a child proved to be a bastard be not the same for the purpose of these Acts of Parliament as a child born out of matrimony or born of a single woman. To be sure they must be considered as the same thing.

As to the third objection, the question will be whether the child of a woman whose husband is proved to have had no access to her till a fortnight before her delivery can in law be considered as illegitimate. Our attention has been called to cases

where a child born within a short time after the marriage of the parents is, by the rule of law, considered to be legitimate. That is a rule of law not to be broken in upon except as in other cases, one of which has been mentioned, by proof of natural imbecility which showed that the husband could not have been the father of the child. In order to make the cases the same it must be supposed that the adultery of the wife in the absence of her husband, who only returns to her just before her delivery, is assimilated in law to the case of a man's marriage with a pregnant woman recently before the birth of the child, where the very act of marriage in such a situation is an acknowledgment by him that he is the father of the child with which the woman is pregnant. There is no analogy between the two cases. It comes, then, to a case of non-access for a year and a half, excepting the last fourteen days before delivery. The rule of law was formerly very strict in favour of the legitimacy of children born of a married woman whose husband was within the four seas, but that has been long broken in upon. Afterwards the rule was brought to this, that where there was an impossibility that the husband could have had access to his wife and have been the father of the child, there it should be deemed illegitimate. In *Goodright d. Tompson* v. *Saul* (7), the court held that there was no necessity to prove the impossibility of access if the other circumstances of the case went strongly to rebut the presumption of access. *R.* v. *Murray* (4) and *R.* v. *Albertson* (5) were cited rather for the sake of expressions thrown out by some of the judges in giving their opinions than for the determination of the court, for the points in judgment did not require the support of the doctrine advanced that there must be non-access during the whole period of the wife's pregnancy in order to bastardise the issue. Where it can be demonstrated to be absolutely impossible in the course of nature that the husband could be the father of the child, it does not break in upon the reason of the current of authorities to say that the issue is illegitimate. If it do not appear but what he might have been the father, the presumption of law still holds in favour of the legitimacy. But if, as in this case, it be proved to be impossible that he should have been the father, then, within the principle of the modern cases, there is nothing to prevent us from coming to that conclusion.

Order confirmed.

R. *v.* SOUTHERTON

[Court of King's Bench (Lord Ellenborough, C.J., Grose and Lawrence, JJ.), February 4, 1805]

[Reported 6 East, 126; 2 Smith, K.B. 305; 102 E.R. 1235]

Criminal Law — Demanding money with menaces — Threat — Proof — Threat attended with duress—Threat calculated to overcome free will of firm and prudent man.

To sustain a charge of demanding money with menaces the threat alleged must be proved to have been attended with duress or to have been such as was calculated to overcome the free will of a firm and prudent man and induce him from fear to part with his money.

Notes. For the statutory offence of demanding money with menaces see now Larceny Act, 1916, s. 29 (1) (5 Halsbury's Statutes (2nd Edn.) 1011), amended as regards punishment by Sched. 10 of the Criminal Justice Act, 1948 (28 Halsbury's Statutes (2nd Edn.) 420).

Distinguished: *Ex parte Warren* (1835), 1 Har. & W. 113. Considered: *R.* v. *Smith* (1850), 14 J.P. 69; *Re Weare*, [1893] 2 Q.B. 439. Referred to: *R.* v. *Crisp* (1818), 1 B. & Ald. 282; *Re Blake* (1860), 3 E. & E. 34; *Re Strong* (1885), 53 L.T. 694; *Myers* v. *Rothfield*, [1938] 3 All E.R. 498; *A.-G. of Gambia* v. *N'Jie*, [1961] 2 All E.R. 504.

As to demanding money with menaces, see 10 Halsbury's Laws (3rd Edn.) 797–801; and for cases see 15 Digest (Repl.) 1121 et seq.

Cases referred to:

(1) *R.* v. *Woodward* (1707), 11 Mod. Rep. 137; 6 East, 133, n.; 88 E.R. 949; 15 Digest (Repl.) 1121, *11,178*.

(2) *Serlested's Case* (1627), Lat. 202; 82 E.R. 346; 15 Digest (Repl.) 1160, *11,694*.

(3) *R.* v. *Mackarty and Fordenbourgh* (1705), 2 Ld. Raym. 1179; 1 Salk. 286; 6 Mod. Rep. 301; 2 East, P.C. 823; 92 E.R. 280; 15 Digest (Repl.) 1179, *11,912*.

(4) *R.* v. *Jones* (1704), 1 Salk. 379; 2 Ld. Raym. 1013; 91 E.R. 330; sub nom. *Anon.*, 6 Mod. Rep. 105; 15 Digest (Repl.) 1161, *11,728*.

(5) *R.* v. *Hannon* (1704), 6 Mod. Rep. 311; 87 E.R. 1050; 15 Digest (Repl.) 840, *8026*.

Information filed by the Attorney-General against the defendant, an attorney of the Court of King's Bench, upon which he was convicted at Somerset Assizes on the fourth and subsequent counts.

The fourth count charged that the defendant, on Aug. 23, 1803, wickedly and corruptly intending to abuse the laws made for the protection of His Majesty's revenue and support of his government, to the oppression of the subject and to his own corrupt gain . . . sent a letter of that date to R. and W. Allen, to the tenor and effect following, viz:

> "Sirs, I am applied to, to prosecute an information against you for selling certain medicines without stamps. I have told the parties that all such informations must now be prosecuted by the public officer, and have advised them to let me write you on the subject, and hear what you have to say. If I can be of any service to you in stopping them, you will write me accordingly, and I will get the best terms I can. (Signed by the defendant.)"

It was alleged that this letter was sent to the Allens with intent to extort and procure money from them for the purpose of preventing the prosecution in the letter alleged to be intended against them from being commenced. The fifth count charged that the defendant, for his own corrupt advantage, unlawfully, wilfully, and corruptly, did attempt to extort and procure from R. and W. Allen £10 by

threatening them that a prosecution would be commenced against them under and by virtue of the statutes in that case made for having sold a certain medicine, viz., Fryar's Balsam, without a stamp, unless they should pay £10 for the purpose of preventing such prosecution from taking place. The sixth count was for threatening the Allens that they should be prosecuted under the statutes in that case made for having sold medicines without stamps, with intent to obtain and extort money from them under pretence of putting a stop to such prosecution. There were similar counts for threatening other persons in the same manner, and with the like intent.

Burrough moved to arrest judgment.

The Attorney-General (*Spencer Perceval*), *Gibbs*, *Serjeant Lens*, and *Dampier*, for the Crown, showed cause against the rule.

LORD ELLENBOROUGH, C.J.—To obtain money under a threat of any kind, or to attempt to do it, is, no doubt, an immoral action, but to make it indictable the threat must be of such a nature as is calculated to overcome a firm and prudent man. The threat used by the defendant at its utmost extent was no more than that he would charge the party with certain penalties for selling medicines without a stamp. That is not such a threat as a firm and prudent man might not and ought not to have resisted. I do not say that, if the last count had concluded against the statute, it would not have brought the case within the statute 18 Eliz. 1, c. 5 [Common Informers Act, 1575: repealed by S.L.R. 1959], and the defendant have been exposed to an ignominious punishment. Had the indictment been so framed, it might have been sustained, but it is laid as an offence at common law. The other counts state no more than an attempt by the defendant to charge the several parties with a statutable offence, for which, if guilty, they would have been liable to certain penalties. What authority is there for considering these as offences at common law? The principal case relied on is *R.* v. *Woodward* (1), where the defendants, having a man in their custody at the time, threatened to carry him to gaol on a charge of perjury, and obtained money from him under that threat in order to permit his release. Was not that an actual duress such as would have avoided a bond given under the same circumstances? But that is very unlike the present case which is that of a mere threat to put process in a penal action in force against the party.

The law distinguishes between threats of actual violence against the person, or such other threats as a man of common firmness cannot stand against, and other sorts of threats. Money obtained in the former cases under the influence of such threats may amount to robbery, but not so in cases of threats of other kinds. In *Serlested's Case* (2) there were circumstances of deception, though it does not exactly appear by what means the imposition was practised. It might have been a case of cozenage and deceit. Such a case was *R.* v. *Mackarty and Fordenbourgh* (3) considered. The wine there given in exchange was an unwholesome commodity not fit for man to drink. But this is a case of threatening, and not of deceit, and it must be a threat of such a kind as will sustain an indictment at common law, according to one case, either attended with duress, or according to others, such as may overcome the ordinary free will of a firm man, and induce him from fear to part with his money. The present case is nothing like any of those; it is a mere threat to bring an action which a man of ordinary firmness might have resisted.

GROSE, J.—*R.* v. *Woodward* (1) was the only case cited that weighed on my mind, and I have had some difficulty to distinguish it from the present in principle. But what has been said of it by my Lord does, I think, sufficiently distinguish it. This is a mere threat of procuring a penal action to be brought against the party without any circumstance of duress accompanying it. Therefore, this is not an indictment for an attempt to commit a misdemeanour, for it does not appear to us on this record that any misdemeanour was intended.

LAWRENCE, J.—The question is whether the offence of which the defendant has been convicted be cognisable by the laws of the country? It was argued to be an offence by insisting that this was an attempt by the defendant to intercept the penalty incurred under the Act of Parliament from coming into the public purse, but, in order to show that, it must have appeared that the Allens were guilty. If that had been shown, I do not say that this would not have been an indictable offence, for I agree that there is no difference in the respect contended for between an attempt to commit an offence at common law and one which is created by statute. They must both be governed by the same considerations.

The question is whether it be an offence at common law to threaten another that he will procure a public officer to prosecute him unless he give him money. It has been decided in many cases that even where money has been fraudulently obtained, yet it is not indictable, as in *R.* v. *Jones* (4), where the defendant obtained money of another by pretending that he was sent by a third person for it. One of the judges in that case said that one man cannot be indicted because another has been a fool. *R.* v. *Hannon* (5) is to the same purpose. It is otherwise where money is obtained by such means as common prudence and firmness cannot guard against. The same distinction was adopted by the old law with respect to such as were deterred by threats from making entries into lands which they claimed. The threats must be such as will deter virum fortem et constantem from entering on the land in order to render it sufficient for him to go as near to it as he safely may for the purpose of asserting his claim. There must be a fear of personal violence: Co. Litt. 253, b. It is there said that

> "it seemeth that fear of imprisonment is also sufficient, for such a fear sufficeth to avoid a bond or a deed."

That shows the ground of the decision in *R.* v. *Woodward* (1): that was not a case of mere threat, but the man was in actual duress at the time, and was threatened to be taken to Newgate. One cannot say that that might not be such a threat as a man of ordinary firmness could not resist. But here, when the defendant threatened to prosecute the party for the penalties, a man of ordinary firmness might have well said to him that he was not guilty of the offence charged, and, therefore, he might prosecute him at his peril if he pleased.

Judgment arrested.

LORD ELLENBOROUGH, C.J., then said that enough appeared to the court to satisfy them that the defendant was a very improper person to remain as an attorney on the rolls of the court. Therefore, he desired the Master to inquire and report whether the defendant were still upon the roll of attorneys of the court. The Master having certified to the court in the affirmative, a rule was made on the defendant to show cause why he should not be struck off, which the defendant yielded to, and his name was accordingly struck off the roll, his counsel admitting that he could not resist it.

ATTORNEY-GENERAL *v.* DIXIE AND ANOTHER

[Lord Chancellor's Court (Lord Eldon, L.C.), November 16, 17, July 21, 1801, February 26, July 6, 1802, August 27, 1805]

[Reported 13 Ves. 519; 33 E.R. 388]

Trustee — Charity — Degree of diligence — Jurisdiction of court — Removal of trustees—Inquiry into grant of leases—Account.

Trustees of a charity are not bound to look with more providence to the affairs of the charity than to their own, but where there has been mismanagement of the property of a charity the court can exercise its general jurisdiction to control trustees.

Where it appeared that the appointment of the governors of a charity and of a schoolmaster to carry out the objects of the charity had been irregular and improper, leases of trust property had been granted at small rents to the relatives of a governor and in one instance to a governor himself, and that rents and profits of the charity had been retained for the benefit of a governor or his family,

Held: the court had jurisdiction to direct an inquiry into the leases which had been granted, to remove governors who had not been properly appointed, and have an account taken.

Notes. Referred to: *A.-G.* v. *Clarendon* (1810), 17 Ves. 491; *A.-G.* v. *Hartley* (1820), 2 Jac. & W. 353; *A.-G.* v. *Newbury Corpn.* (1834), 3 My. & K. 647; *A.-G.* v. *Smythies* (1836), 2 My. & Cr. 135.

As to the powers and duties of charitable trustees and the jurisdiction of the court relating thereto, see 4 Halsbury's Laws (3rd Edn.) 363 et seq.; and for cases see 8 Digest (Repl.) 488 et seq.

Cases referred to in argument:

Sutton Colefield Case (1635), Duke, 68; 8 Digest (Repl.) 513, *2407*.

Eden v. *Foster* (1726), 2 P. Wms. 325; Cas. temp. King, 36; 24 E.R. 750; sub nom. *Birmingham School Case*, Gilb. Ch. 178, L.C.; 8 Digest (Repl.) 506, *2293*.

A.-G. v. *Foundling Hospital* (1793), 4 Bro. C.C. 165; 2 Ves. 42; 29 E.R. 833; 8 Digest (Repl.) 505, *2261*.

Hynshaw v. *Morpeth Corpn.* (1629), Duke, 69; 8 Digest (Repl.) 498, *2163*.

Information praying accounts and directions relating to the management of a charity, and a **Petition** for further relief.

The information stated the foundation of the school of Market Bosworth in the county of Leicester, under the will and codicil of Sir Wolstan Dixie, dated in 1592 and 1593, letters patent of Queen Elizabeth, and a decree in the reign of King Charles II by which it was provided that the rector and churchwardens for the time being, and in default of them, the Bishop of Lincoln, should elect governors (the rector and churchwardens to be of the number), and that Sir Wolstan Dixie, and his heirs, and in default of heirs the Bishop of Lincoln, should appoint the Master and ushers.

The information further stated that after the death of Sir Wolstan Dixie, the nephew and heir of the founder, the succeeding heirs assumed the entire management of the school, being the patrons of the church and owners of most of the houses and lands in the parish. Particularly, no governors had been appointed from 1740 until the death of Sir Wolstan Dixie, the father of the defendants Sir Wolstan Dixie and Willoughby Dixie, in 1767, during which period the rents and profits of the premises belonging to the school were received by Sir Wolstan Dixie, the father, and after his death by the defendant Sir Wolstan Dixie until a commission of lunacy issued against him in 1769. From that period the rents were received by his brother and committee, the defendant Willoughby Dixie. The information

stated various instances of abuse and mismanagement—that leases were made at small rents with declarations of trust for the daughters of Sir Wolstan Dixie; that the estates were underlet; that the surplus rents and profits beyond the salaries of the Master and ushers had not been applied to the purposes of the charity; that Willoughby Dixie had appointed to the office of Head Master Joseph Moxon, a person unfit to be Master of a school, being a waiter in a public-house, whom he afterwards removed, and appointed William Wood; that in 1789, the information having been filed in 1788, the rector and churchwardens, under the influence and control of Willoughby Dixie, elected him and five other persons, also defendants, to be governors, all of whom were unfit for that office, as his tenants, or otherwise under his control, and one a lessee of part of the charity estate at an under-value.

The information prayed an account of the rents and profits received by the several defendants, and by Sir Wolstan Dixie, the father; that proper directions might be given for the application of the surplus rents and profits of the charity estates; and that the persons, appointed governors, might be removed and proper governors appointed.

Sutton, *Alexander*, and *Stratford* for the information.

Spencer Perceval, *Romilly*, *Stanley*, *Richards*, *Hood* and *Lewis* for the defendants.

LORD ELDON, L.C.—It is not advisable to dispose of this cause entirely till a petition shall be presented to bring before me in another shape the question of removing these governors, but I should not do my duty if I did not say that in the administration of this charity abuses have been practised which call for the most marked animadversion of the court.

The authority, according to the will given to this court, is a special authority applying to a particular case. The particular provision in the will having failed by the refusal of the Skinner's Company to act, it naturally and legally devolved upon the heir-at-law. The Crown properly, as it always does, took the heir's recommendation of the governors of the school. In his character of manager of the revenues unquestionably he became amenable to this court, for, in his character of visitor he never could control his own accounts. If the Skinner's Company do not nominate governors, or if their nomination cannot be considered a nomination de jure, by implication the nomination is given to the heir-at-law, and, as to the schoolmaster, to the Bishop of Lincoln. The letters patent unfortunately did not look to the present case of lunacy. The question is whether the bishop has the power of appointing the schoolmaster, or whether the committee has that power—which, I think, can hardly be contended—or whether the appointment of the schoolmaster is not in the Crown. The circumstance of Wood's situation is to be considered. He has been appointed by the committee, and a question occurs that is not brought forward by this information, whether he is de jure schoolmaster, and whether it is not expedient, if he is a proper person to be the Master, to clothe him in a more effectual way with the character of Master.

The letters patent are produced to prove the charge of misapplication, not in the common sense merely by undue expenditure, but in corruptly retaining the rents and profits for the benefit of Sir Wolstan Dixie, or, as the information expresses it, of part of his family. The estates were let in 1656 and at subsequent periods, long prior to 1753. The first letting was undue certainly, the tenant being himself a governor. But there is a great difference between an undue letting and a lease for the purpose of constituting himself tenant that he may have the means of underletting at a great private advantage. The leases were undue also in the respect that the chances of improvement in a lapse of time are to be taken and are not to be prevented by leases enduring half a century. After the filing of the information it would have been more discretion to have thrown under the view of the court the election of governors instead of its being made under such circumstances. From 1748, when an attempt was made to appoint new governors, no regular appointment took place until after this information was filed, a quarrel taking place

between the Dixie family and the rector. In 1753, Sir Wolstan Dixie knowing he was not the legitimate manager of this charity and that the providence of this court ought to have been thrown round it, the following transaction took place with Dudley, his instrument, and some others—a lease to Dudley by these governors (who in truth were not governors, the office not being filled up) for no less than 99 years if the three daughters of Sir Wolstan Dixie should so long live at a rent £3 less than the rent paid before and a fine of £150, with a declaration of trust endorsed upon it by Dudley. Another lease of the same sort was made.

It is said that the account upon an information filed in 1788, for I must consider it as taken then, against the estate of a man who died in 1767, would be not beyond the authority of the court, but it would not be directed with much discretion. It is one thing to say that a general account shall be taken of all sums received and another, that the court may hold it manifestly due to justice that some inquiry shall be made as to the actual application of all advantages acquired under these leases, and I cannot think I carry the authority to an unwholesome length by saying I will search to the bottom the application of everything made under those leases. At this moment I am not disposed to carry the account of the rents and profits received by the late Sir Wolstan Dixie, further than to get at that. There is charge enough for that inquiry, and, instead of charging the estate of Sir Wolstan Dixie, I only direct an inquiry to see what is finally right to be done, but, if the result shall be that any part has been applied in the family that ought to have gone to the sustentation of the school, in any interpretation of that word, upon further directions the court will not feel any difficulty in saying, that must be considered as received by the order of Sir Wolstan Dixie, and, therefore, his estate shall be answerable for the amount.

The next period is that of the lunatic, about a year. The information, filed in 1788, did not produce the account of the rents and profits received by Sir Wolstan Dixie, or the defendant Willoughby Dixie, but the amended and supplemental information does produce an account, namely, the answer put in in 1793. The appointment of the governors was in 1788. After the information filed, when there ought to have been no more payments by Dixie, viz., in November, 1789, a payment was made of eight years' salary to the receiver, the answer stating the account, as concluded. The Loughborough estate was not accounted for from 1768 to 1783. I have no hesitation in directing the account in a larger form with regard to that period than that in which the late Sir Wolstan Dixie was living. It is said that the court cannot do this.

First, as to the jurisdiction. I was very soon satisfied as to the jurisdiction if the corporation had been full and had the management of the rents and profits. I say also that it does not necessarily follow, because a commission of charitable uses would not issue, that, therefore, this court could not act, and if it were made out that the governors were merely nominal and only the agents of Dixie, this court would try to get at it. But here was no visitor in fact capable of acting. A person as committee of the lunatic is acting without authority for him as visitor, and till after the information filed there were not even nominal governors. Then, if the information was well filed, will the election pending the suit take away from the court the jurisdiction, even if they were well elected? I think not, for the governors, if well elected, are trustees, and the visitor not being capable of acting, the jurisdiction of this court must take place.

The jurisdiction being clear, the next consideration is as to the manner of taking the account. Though the account in form must be directed, I do not think that the underletting since 1787 has been carried to that strict degree of proof to make it wise to prosecute the inquiry as to the rents, except as to those corrupt leases, for trustees of a charity are not bound to look with more providence to the affairs of the charity than to their own. A sufficient fair letting appears as to that period to show that an inquiry on the ground of underletting would not be wise. As to King and the other tenants, if the probable result would be that the rents had been

sufficient, I should hesitate whether I should not direct the account for the sake of the principle, for no trustee can be a tenant; and the court will charge him with an occupier's rack-rent, and, therefore, if the difference of King's rent, between six and eight guineas, were not too small to make it worth while, I should expressly declare that the ground. Besides that, King must quit the premises.

As to the other governors, men are not to put themselves in a situation of responsible duty, and expect to be relieved even at the expense of those who bring them into that situation. Therefore, I do not think that it would be unwholesome to serve them with the decree. As to removing the governors, it is very difficult to say they are not to be removed; such an election of governors, compared with the duties, required by the statute! The only answer can be that no other governors could be obtained: but the evidence is all against that.

As to the consequence of removing the governors, the questions upon that require more consideration. Whether there should be a new election or a nomination by the bishop or the Crown, and whether those who have so abused the situation of governors shall be disqualified, I shall reserve till after that petition shall have been presented. The relators must have their costs without doubt. It is too much to say that the charity estate is to be redressed at the expense of those who seek to redress it. The consequence would be that all charities would be for ever liable to abuse without redress. The question then is whether it is to be out of the estate of the charity. Much of it must be at private expense—whether all, or whether there may be exceptions, shall be reserved. As to the application of the surplus rents and profits, it is difficult now to allow Mr. Dixie the surplus rents and profits he has paid over while the information was pending. He had no right to apply them pending the suit. I am not prepared to say that under the large words as to the sustentation of the school, due regard being had to all the objects, of necessity all the surplus must go to the schoolmaster. On that point also I reserve the question until after the petition with regard to the removal of the governors.

A petition was accordingly presented alleging that the appointment of Wood to be Master was not a due appointment, and that he was not properly qualified and that the office of visitor was in either His Majesty or the heir of the founder, and in consequence of the lunacy of the heir was vested in His Majesty to be executed by the Lord Chancellor, and praying a proper appointment of masters, that the persons, chosen as governors might be declared to have been improperly chosen and might be removed, that new governors might be appointed, and that directions might be given for the future regulation of the school and the application of the surplus rents, etc.

July 6, 1802. **LORD ELDON, L.C.**—In this case three distinct periods are to be attended to: first the acts of the elder Sir Wolstan Dixie, particularly with regard to the leases, require a declaration of the principles on which his estate is to be answerable and some particular directions. As to the time of the lunatic himself, there is not much for consideration unless on his permitting certain branches of his family to enjoy beneficially. That enjoyment by sufferance is in a moral view much less an object of censure than the creation of such an interest. As to the defendant, Willoughby Dixie, it is impossible to avoid expressing strong disapprobation of his acts, and with regard to more than one the decree must contain a declaration of the sense the court has of his conduct.

Directions are also necessary as to the account. Perhaps no objection could be maintained against a general account as to the time of the father, but, I think, authority will bear me out in not involving the charity in a general account of the period during which he lived; and that I may confine it to the leases appearing to have been made by him. For the time during which the defendant, Willoughby Dixie, has had in a sense the general management, though the prosecution of such an account may not be useful, I do not know any principle on which I can avoid directing a general account, at least from the time of filing the bill. I believe, great

A mismanagement has taken place, and that might be pressed with great force against the defendant if it should be thought worth while, with reference to the delay, to go through that general account. The pleadings require that account to be directed generally though that direction may be acted upon in a more limited manner.

As to the circumstances, the appointment of Moxon to be Master was invalid; if the defendant had stood in a situation in which he could have made that appoint-
B ment, it would have been an abuse of his powers. The appointment of Wood must also be declared invalid, but with liberty to make any application for a due appointment to those persons who can make it. The prohibition from appointing any beneficed clergyman is express and strong in the statutes, and the reason is explained—that the Master shall not be called from the exercise of his duty attending the scholars in his Parish Church, the statutes directing him to require them
C to furnish him with notes of the sermons.

As to the governors, the founder originally intended to reserve to his family a considerable influence, and that purpose was very proper in a moral view. But the conduct of the defendant has been such that I do not know how to preserve that influence in his person, and, if not, I do [not] know how it can be preserved in any degree. The election of governors, the subject of the supplemental bill, was a
D wrong and undue proceeding as under the circumstances that election ought not to have been made, pending the cause, without leave of the court. The situation in which some of the persons electing stood calls for strong animadversion. Those governors cannot remain, and I think the court under all the circumstances has power to remove them. Are they to go to a new election? The objection is that then the rector and churchwardens are to choose the new governors, and a doubt
E may be suggested whether it is not to be considered as a default of those who were to elect, which would authorise the Bishop of Lincoln under the charter to appoint, or whether any other course is to be taken. Another consideration is whether the interest of this charity will not admit of particular individuals being appointed governors in futuro.

I have long been perfectly satisfied that this court has jurisdiction. This is not
F the mere case of a corporation having visitors, but the visitor himself has generally been one of the governors and the governors are acting as trustees in the receipt of the rents and profits of the estate. That is a sufficient ground. But there is another ground—that the interest which this family have had with the rector has not induced him so far to accede to their purposes as to keep the corporation alive. From the period of the dispute about the management it does not appear to have
G existed as a corporation until the governors were filled up under those circumstances. It is the case of persons acting as to what does not belong to them within that corporate character that would be necessary to lay the foundation of an objection to the jurisdiction. The corporation revived, therefore, could not possibly compel a due account for the time past, or a due application for that period, without the assistance of a court of equity, which, therefore, must have jurisdiction as to
H those persons, who acted in the intermediate period, not having vested in them that character, which alone could form the ground for an objection to the jurisdiction.

I shall direct inquiries as to those leases, which Sir Wolstan Dixie, the elder, procured for the benefit of some of his family, and I shall make his assets liable, at least to the extent of what the charity has lost by the benefit they received. On the evidence that was done by his express direction and appointment, leases made
I and declarations of trust for the benefit of his issue who possessed under those acts. In the result of any suit in equity his estate ought first to refund to the charity that loss. I am not called on to direct a general account. That account would be difficult and expensive. It is not clear that the expense of it would fall upon his estate, and, therefore, it is doubtful whether it would be beneficial to the charity if the expense of an account to so remote a period should be defrayed by the charity funds. The period of the lunatic's management is very short. As to the committee not saying whether it would be right to disturb the payments to the schoolmasters

and others without a very strong ground, I think it due to principle and authority to declare that the information must carry with it an account at least from the time, when it was filed. The appointment of Moxon I must declare a most culpable abuse of the trust, if vested in the defendant. A division of the profit took place between him and Wood by bargain. Wood also must be declared not to have been duly appointed. The defendant had imposed on him a duty, not only to this school, but also to his brother, to preserve by proper conduct that influence which the founder intended to give to his family. This estate has been treated too much as private property. Manors, fisheries, etc., have been reserved, which might be reserved, but that must be for the benefit of the charity.

Decree accordingly: made Aug. 27, 1805.

CHRISTY *v.* ROW

[Court of Common Pleas (Sir James Mansfield, C.J., Heath, Lawrence and Chambre, JJ.), May 30, 1808]

[Reported 1 Taunt. 300; 127 E.R. 849]

Shipping—Freight—Pro rata freight—Completion of voyage prevented by restraint of princes—Part of cargo accepted by charterer's consignees at intermediate port.

A ship was chartered to carry a cargo to H., but was directed by the charterer's consignees to deliver the cargo at G., which was in the course of the voyage. The ship discharged part of the cargo at G., and the charterer's consignees accepted delivery of it there. The ship was then compelled by restraint of princes to abandon the voyage and return to England.

Held: the shipowner was entitled to recover from the charterer pro rata freight for the carriage of the cargo to G. and its delivery there.

Notes. Considered: *Shepard* v. *De Bernales* (1811), 13 East, 565. Referred to: *Domett* v. *Beckford* (1833), 5 B. & Ad. 521; *Argos* (*Cargo Ex*), *Gaudet* v. *Brown*, *The Hewsons*, *Geipel* v. *Cornforth* (1873), L.R. 5 C.P. 134; *Great Northern Rail. Co.* v. *Swaffield*, [1874–80] All E.R. Rep. 1065; *Brunner* v. *Webster* (1900), 5 Com. Cas. 167.

As to pro rata freight, see 35 Halsbury's Laws (3rd Edn.) 501, 502; and for cases see 41 Digest (Repl.) 563–568.

Cases referred to in argument:

Cook v. *Jennings* (1797), 7 Term Rep. 381; 101 E.R. 1032; 41 Digest (Repl.) 563, *3412*.

Bright v. *Cowper* (1611), 1 Brownl. 21; 123 E.R. 640; 41 Digest (Repl.) 569, *3477*.

Luke v. *Lyde* (*Lloyd*) (1759), 2 Burr. 882; 1 Wm. Bl. 190; 97 E.R. 614; 41 Digest (Repl.) 568, *3472*.

Byrne v. *Pattinson* (1797), cited in Abbott's Merchant Shipping, 14th ed., p. 745; 41 Digest (Repl.) 565, *3429*.

Smith v. *Wilson* (1807), 8 East, 437; 103 E.R. 410; 41 Digest (Repl.) 223, *494*.

Penrose v. *Wilkes* (1790), cited in 13 East, at p. 570; 104 E.R. 492; 41 Digest (Repl.) 541, *3187*.

Newland v. *Horsman* (1681), 2 Cas. in Ch. 74; 22 E.R. 853; 1 Digest (Repl.) 725, *2709*.

Roberts v. *Holt* (1685), 2 Show. 443; 89 E.R. 1031; 41 Digest (Repl.) 543, *3205*.

Mason v. *Lickbarrow* (1790), 1 Hy. Bl. 357, Ex. Ch.; reversed sub nom. *Lickbarrow* v. *Mason* (1793), 4 Bro. Parl. Cas. 57; 6 East, 22, n.; 2 E.R. 39, H.L.; 41 Digest (Repl.) 258, *744*.

Rules Nisi to vary and set aside a verdict for the plaintiff shipowner in an action against the charterer to recover freight, demurrage, and port charges, on a voyage intended to have been made to Hamburg.

The first count of the declaration set forth a charterparty in writing whereby the plaintiff, being owner and master of the *True Briton*, on Oct. 2, 1806, agreed to let her to freight for one voyage from Shields to Hamburg, stipulating that the ship should be kept tight, etc., during the voyage, with an exception of perils of the seas, restraints of princes and rulers, fire, and enemies. The plaintiff agreed to take on board a full cargo of coal on account of the freighter or his assigns, to proceed for Hamburg, and on his arrival to deliver the same to the freighter or his assigns at such convenient place or places where the ship and cargo might safely come. It was also agreed that the ship should for her loading lie until Oct. 9, and for her delivery lie at the rate of one working day per keel, and so to end the voyage.

The freighter agreed not only to put on board a cargo of coal and to receive or cause the same to be received from on board her at Hamburg within the times limited for her loading and delivery, but also to pay the plaintiff in full for the freight of the ship for the voyage after the rate of £20 per keel on the delivery of the cargo, by the master having what money he might require for the ship's use, and the remainder by a good bill on London at two months' date, with £5 demurrage for every day of the ship's detention beyond the days so limited for her loading and delivery, and also two full third parts of all pilotage and port charges which might be incurred during the voyage. The declaration further averred that on Oct. 13, and not before through the default of the defendant in not loading the ship within the stipulated period although the plaintiff was ready within that period, he received on board a full cargo, to wit, seventeen keels of coal, on account of the defendant or his assigns, proceeded towards Hamburg, and on Nov. 8 arrived at Cuxhaven, being a port in the course of the voyage from Shields to Hamburg, and gave notice thereof to Ross and Schleiden, the defendant's consignees at Hamburg. On Nov. 12 the ship arrived at Gluckstadt, another port in the course of the voyage, the master having been forced and compelled by certain officers acting in the service of the king, whose orders he could not resist or control, to remain at Cuxhaven until that day. The plaintiff averred that by the restraint of princes and by reason of the danger of capture to which the ship and cargo would be exposed by reason of certain enemies of His Majesty being then near to and likely to seize and occupy Hamburg, he was prevented from proceeding nearer to Hamburg, whereof the defendant had notice, and in consideration of the premises and that the plaintiff, at the defendant's request, would deliver the cargo at Gluckstadt to the defendant or his assigns, into such craft or lighters as he or his agents or assigns should send, the defendant undertook to pay freight for the cargo from Shields to Gluckstadt, and the same demurrage, and after the same rate was stipulated in the charterparty, together with two third parts of all pilotage and port charges.

The plaintiff averred that he did deliver at Gluckstadt to certain assigns or agents of the defendant, into certain craft or lighters sent by them, seven keels and one chaldron of coal, part of the cargo, and was ready and willing to have delivered the residue in the like or in any other manner which the defendant, his agents, or assigns, should direct, and for that purpose remained at Gluckstadt until Nov. 21, whereof the defendant and his assigns had notice, but they did not receive it; that he was on that day directed by certain officers in His Majesty's service having authority (which directions were occasioned by certain acts of His Majesty's enemies, and it being in consequence of such acts unsafe and exposing the ship and cargo to risk of capture to remain at Gluckstadt), to proceed from Gluckstadt back to Cuxhaven; and that he, accordingly, returned to Cuxhaven, and remained there

until Nov. 25, the will and intent to have delivered the residue of the cargo, but that the defendant and his assigns neither sent any craft nor in any manner received the residue of the cargo. The plaintiff further averred that he was on that day compelled, by and in consequence of the restraints of princes and rulers, the acts of the enemy, and by certain officers acting under the orders of His Majesty ordered to sail from Cuxhaven for this kingdom; that on Dec. 1 he arrived at Shields, and on Feb. 4, 1807, at London, he delivered the residue of the cargo which he was so prevented and hindered from delivering at Gluckstadt or Cuxhaven, or elsewhere, but which might have been delivered or received had the defendant loaded the ship within the time stipulated, as he might and ought to have done; or had he, his agents or assigns, used due diligence.

The plaintiff claimed for seventy-one days' demurrage at the rate in the memorandum specified, £355; for the freight of the cargo, £340; and for two third full parts of the pilotage and port charges, £25 14s. 6d. The second count stated that the residue of the cargo had, since the ship's return, with the defendant's knowledge and assent, been landed in this kingdom. The third count stated a substituted contract entered into by the defendant, to pay reasonable freight for the cargo, or so much thereof as should be delivered, and averred that the plaintiff, after being compelled to return, discharged and delivered the rest of the cargo for the use of the defendant, with notice, and claimed £142 10s. only for freight of the seven keels one chaldron.

On the trial of the action at Guildhall in 1807, before Sir James Mansfield, C.J., the jury found a verdict for the plaintiff, and, in calculating the damages, awarded him,

1.	Freight for seven keels of coals, at £20 per keel	£140	0	0
2.	Compensation for the use of the ship at Shields on her return, for fourteen days, until the plaintiff could have got a place to receive the coal, at £5 per day	70	0	0
3.	For the two days' demurrage incurred before the ship's departure	10	0	0
4.	For two third parts of the entire pilotage and port charges ...	20	0	0
	Making the whole amount of the damages	£240	0	0

Subsequently *Serjeant Shepherd* obtained a rule nisi for an order that the verdict might be increased to £440 on the ground that the plaintiff was entitled to freight at £20 per keel, for the entire cargo, and *Serjeant Bayley* obtained a rule nisi that the verdict might be set aside and a non-suit entered, or that each of the several constituent sums might be deducted from the amount of the damages.

Easter Term, 1808. *Serjeant Shepherd* and *Serjeant Lens*, for the plaintiff, showed cause against the rule obtained by the defendant and supported the plaintiff's rule.

Serjeant Heywood for the defendant.

Cur. adv. vult.

May 30, 1808. **SIR JAMES MANSFIELD, C.J.,** delivered the following judgment of the court.—Various objections have been made to this verdict both at the trial and upon the argument—first, that no freight at all was due, not even for the seven keels of coal delivered at Gluckstadt. The first special count in the declaration states a charterparty which clearly had in contemplation an agreement for one voyage only, which was to be from Shields to Hamburg, and the coal on its arrival was to be delivered to the freighter or his assigns at such place or places to which the ship might safely come and so to end the intended voyage. The defendant agrees that he would pay freight after the rate of £20 per keel of coal, and so in proportion by such money as should be required, and the residue by a good bill.

A It is the freighter, then, who undertakes to pay, and to pay by a good bill. This is a stipulation introduced for the benefit of the shipowner to the intent that he should not be left to his action on the charterparty in which he must prove the performance of the voyage, but so that he should have only to present his bill in order to have it paid, or, if compelled to sue on it, he would have only to prove the handwriting of the parties. The defendant, therefore, bargains that he will B take care that the bill shall be delivered to the plaintiff. The coal is consigned to Ross and Schleiden, or to their assigns, by a bill of lading in the common form. The vessel arrives at Cuxhaven, which is in the course of the voyage, and is prevented from going to Hamburg. While the master is there, Ross and Schleiden write to him to advance at Gluckstadt, which is also in the course of the voyage. That circumstance is not perhaps material, but it shows that there was no deviaC tion, as was argued. The ship is permitted to advance to Gluckstadt, where she is not able to discharge the whole seventeen keels of coal, but she stays long enough to deliver seven keels, which are accepted at that port by the consignees. It is urged that the vessel does not go to Hamburg, but the answer is that those persons to whom the coal was consigned desired that they might stop at Gluckstadt.

The master, then, having delivered, and the consignees having accepted, this D part of the cargo, is the master to receive nothing for carrying it? I can find no justice in that. It might as well be contended that, if goods are sent to Exeter and the consignee meets the wagon and takes them at Honiton, the wagon must proceed empty to Exeter or the carrier be entitled to nothing. It is said that the true meaning of the agreement and the bill of lading, taken together, is not that the defendant should be liable, but that the freight should be paid by Ross and E Schleiden. What, then, is the meaning of the agreement by which the freighter positively undertakes that the freight shall be paid for, after the rate of £20 per keel, and that by a good bill? To say that the defendant is not liable would be wholly to do away with this contract. I, therefore, think that the plaintiff is entitled to recover the £140 given him for the freight of the seven keels.

With regard to the demurrage after the ship's return home, in some situations F of events that point would be doubtful. Where a ship is chartered upon one voyage outwards only with no reference to her return and no contemplation of a disappointment happening, no decision which I have been able to find determines what shall be done in case the voyage is defeated. The books throw no light on the subject. The natural justice of the matter seems obvious—that a master should do that which a wise and prudent man would think most conducive to G the benefit of all concerned. But it appears to be wholly voluntary. I do not know that he is bound to do it, and yet, if it were a cargo of cloth or other valuable merchandise, it would be of great hardship that he might be at liberty to cast it overboard. It is singular that such a question should at this day remain undecided. But in this case the plaintiff labours under the further difficulty that we do not know how the dealings stand between the defendant and Ross and Schleiden. H There may have been an absolute sale, and the property may no longer continue in the defendant. Or the coal may have been consigned to be sold on commission by Ross and Schleiden as agents. On reading the bill of sale, which contains a general consignment, we must presume that the goods were absolutely sold to Ross and Schleiden, and that the property, therefore, is in them. If that is the case, all that has been done for the preservation of the cargo has been done, not for I Row, but for the benefit of Ross and Schleiden, and, if any liability is raised by implication of law, the right of action is against them.

The plaintiff, therefore, is not entitled to recover this sum of £70 for demurrage. As to the £10 for demurrage before the voyage, the defendant is clearly liable, on the agreement to pay that sum, endorsed on the charterparty. It was thereby agreed that the master was to be paid the £10 which Messrs. Ross and Schleiden were desired to have the goodness to pay him. It was contended that this was merely a draft, but it is nothing more than a request to Ross and Schleiden, and

the contrary interpretation would entirely do away the sense of the endorsement. I have said nothing as to the claim for freight back, nor could it be recovered in this action, as the declaration contains no demand adapted to it, but it probably would stand on the same ground as the right to the demurrage claimed after the ship's return. I do not know how we can divide the pilotage and port charges. If the cargo had consisted of seven keels only instead of seventeen, the same amount of port charges must equally have been paid. The verdict, therefore, must stand for the first, third, and fourth items, amounting to £170.

Rule absolute for reducing the verdict by striking out the sum of £70 and discharged as to the residue; plaintiff's rule discharged.

PAYNE *v.* DREWE

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.), February 8, 1804]

[Reported 4 East, 523; 1 Smith, K.B. 170; 102 E.R. 931]

Execution—Fieri facias—Execution of writ—Duty of sheriff—Previous writ of sequestration—No notice to sheriff and nothing done under writ by sequestrators.

On Mar. 17, 1800, plaintiffs, who had filed a bill in the Court of Chancery against one S., obtained judgment against him for £2,000. That sum being unpaid a writ of sequestration was issued on June 17, 1800. In 1801 the plaintiff in the present action obtained judgment in the Court of King's Bench against S. for £227 10s., and on Nov. 28, 1801, the plaintiff obtained a writ of fi. fa. Nothing was done under the writ of sequestration to take possession of the goods of S., but in January, 1802, when the sheriff's officer visited S.'s house to execute the writ of fi. fa., S. told the officer that his goods were under sequestration. The sheriff, at the return of the writ, returned nulla bona. The plaintiff then brought this action against the sheriff for making a false return.

Held: the mere existence of the writ of sequestration, nothing having been done on it and no notice of it having been given by the sequestrators or the parties for whom they acted to the sheriff, did not constitute an excuse in law for the sheriff's not executing the writ of fi. fa., and, therefore, the plaintiff was entitled to judgment against him.

Notes. Considered: *Giles* v. *Grover*, [1824–34] All E.R. Rep. 547. Referred to: *Doker* v. *Hasler* (1825), 3 L.J.O.S.C.P. 109; *Lucas* v. *Nockells* (1833), 10 Bing. 157; *Samuel* v. *Duke* (1838), 6 Dowl. 537.

As to the writs of fi. fa. and sequestration, see 16 Halsbury's Laws (3rd Edn.) 40–62, 68–77; and for cases see 21 Digest (Repl.) 558 et seq., 686 et seq.

Cases referred to:

(1) *Burdett* v. *Rockley* (1682), 1 Vern. 58; 23 E.R. 308, L.C.; 21 Digest (Repl.) 700, *2023*.

(2) *Smalcomb* v. *Buckingham* (1697), Carth. 419; 1 Com. 35; Holt, K.B. 302; 5 Mod. Rep. 376; 12 Mod. Rep. 146; 1 Salk. 320; 3 Salk. 159; 88 E.R. 1225; sub nom. *Smallcomb* v. *Cross and Buckingham*, 1 Ld. Raym. 251; sub nom. *Smallcorn* v. *London (Sheriff)*, Comb. 428; 21 Digest (Repl.) 560, *567*.

(3) *Rawlinson* v. *Oriel* (1688), Comb. 144; 90 E.R. 394; 21 Digest (Repl.) 617, *1044*.

(4) *Lowthal* v. *Tonkins* (1740), Barn. Ch. 39; 2 Eq. Cas. Abr. 380; 27 E.R. 546, L.C.; 21 Digest (Repl.) 618, *1051*.

(5) *Letchmere* v. *Thorowgood* (1688), 3 Mod. Rep. 236; 1 Show. 12; 87 E.R. 153; sub nom. *Lechmere* v. *Thorowgood*, Comb. 123; 21 Digest (Repl.) 617, *1041*.

(6) *Cooper* v. *Chitty* (1756), 1 Wm. Bl. 65; 1 Burr. 20; 1 Keny. 395; 96 E.R. 36; 5 Digest (Repl.) 893, *7429*.

(7) *Rorke* v. *Dayrell* (1791), 4 Term Rep. 402; 100 E.R. 1087; 5 Digest (Repl.) 867, *7282*.

(8) *Herbert's Case* (1731), 3 P. Wms. 116; 2 Eq. Cas. Abr. 222, pl. 7; 24 E.R. 992; 28 Digest (Repl.) 714, *2254*.

(9) *Hutchinson* v. *Johnson* (1787), 1 Term Rep. 729; 99 E.R. 1346; 21 Digest (Repl.) 561, *575*.

Action against the defendant, as sheriff of Dorsetshire, for a false return of nulla bona to a writ of testatum fieri facias, sued out on a judgment against one Charles Sturt for £227 10s.

The defendant was sheriff of the county of Dorset at the suing out and return of the writ in question. The judgment was regularly obtained for the plaintiff against Sturt in 1801 for £227 10s., and a testatum fieri facias was sued out into Dorsetshire on Nov. 28, 1801, returnable on Saturday next after eight days of St. Hilary, 1802. There were sufficient goods of Sturt at his house at Brownsea in the defendant's bailiwick at the time of the entry of the officer under the fieri facias in January, 1802, and these were taken possession of and an inventory made thereof by him, but the sheriff afterwards quitted possession and made a return of "nulla bona," in consequence of the sequestration hereinafter mentioned.

In 1790 a bill in Chancery had been filed against Sturt and others by H. W. Portman and others, and after answer was put in and other proceedings, an order was made by that court, on Mar. 17, 1800, for the payment of £2,000 by Charles Sturt to H. A. Sturt. That sum being unpaid, an order nisi for a commission of sequestration to issue, directed to commissioners to be therein named, to sequester Charles Sturt's personal estate, was made on May 5, 1800, which order was made absolute for a sequestration on June 13, 1800. A writ of sequestration under the Great Seal was issued on June 17, 1800, dated on that day, and was shortly afterwards delivered to the sequestrators therein named.

At the trial of the present action no evidence was given of the sequestrators' having ever taken possession of any of the goods. On the contrary, it was admitted that the sequestration had never been laid on. In January, 1802, before the return of the writ (which was delivered to the defendant on Dec. 17, 1801), when Mr. Starling, an agent for the plaintiff, went with the sheriff's officer, who had a warrant, to Charles Sturt's house at Brownsea, Mr. Sturt was in possession of the house and goods. Upon their communicating to him the business they came upon, he told them that his goods were under sequestration, but the officer, by the direction of Starling, took the goods, and, with his assistance, made an inventory. After this Starling went away, leaving the officer in possession. The sheriff, at the return of the writ, returned "nulla bona."

The action was tried at Dorset Assizes in the spring of 1803 when a verdict was returned for the plaintiff for £227 10s., subject to the opinion of the court on the question whether the plaintiff was entitled to recover.

Gaselee for the plaintiff.

Dampier for the defendant.

Cur. adv. vult.

Feb. 8, 1804, **LORD ELLENBOROUGH, C.J.,** delivered the judgment of the court in which, after stating the case, he observed that as the order of Jan. 17, 1803, was made long after the time when the writ of fieri facias, for the false return of which this action was brought, had been returned, and as none of the

facts therein stated were given in evidence at the trial, the matter of such order could not be adverted to for any purpose immediately connected with this cause except to show in what manner the Lord Chancellor had considered this same sequestration in point of legal effect when represented to his Lordship as one which had been fully acted upon and under which the sequestrators had duly entered upon the real estates and sequestered the personal estate. But as this sequestration, upon the facts found stated in this case to have been laid before the jury, did not appear to have been so dealt with, no inference could be correctly drawn from the order made in that case as to the effect which the Lord Chancellor would probably allow to this sequestration, neglected in point of execution as it appeared upon this case to have been, from the moment of its delivery to the sequestrators, during a period of upwards of eighteen months which intervened before the writ of fieri facias upon which the present question arises was in fact delivered to the sheriff of Dorset. His Lordship proceeded:

The question in this case is whether the existence of a writ of sequestration founded upon a commission to certain sequestrators therein named, which writ had been delivered to the sequestrators about eighteen months before the writ of execution at common law against the goods was delivered to the sheriff of Dorset, but upon which writ of sequestration nothing was done by the sequestrators nor any notice thereof given by them or their party to the sheriff, be an excuse in point of law to the sheriff for not executing the writ of fieri facias to him delivered, but instead thereof, returning nulla bona, as he has done. The competency of this excuse depends on the nature and effect of a sequestration awarded, as this appears to have been by the Court of Chancery, for the non-performance of a personal duty.

Upon the proper nature and effect of such a sequestration, and also of sequestrations to compel appearance, answer, and the like, there is some degree of apparent uncertainty in many of the Chancery cases: see Eq. Cas. Abr. tit. Sequestration, and Dickens' Chancery Cases, vol. 1, pp. 31, 106, 130, 135, 325, 335, 354, 388, and vol. 2, pp. 472, 576, 624, 638, 711. But as we shall, for the purpose of the present question, assume that the award of the sequestration had the same obligatory effect as to the award of a writ of execution against the goods would now have at the common law, and shall even further assume, on the authority of what was said by Lord Nottingham, L.C., in *Burdett* v. *Rockley* (1) (although it is the only case we have found which goes so far), "that a sequestration binds from the very time of awarding the commission, and not only from the time of executing of it and its being laid on by the commissioners," in which respect it is put upon the footing of an execution at common law before the Statute of Frauds, and which execution at common law then related to the teste or award of the execution, I say, thus considering the effect of a sequestration for the purpose of this question (and in so considering it we allow it the most extensive effect which can possibly be claimed on its behalf), it still does not appear to us that the sequestration in question did, in the circumstances, afford a sufficient excuse to the sheriff for not executing the writ of fieri facias at the suit of the plaintiff. The sheriff is not excused, if the sale he was required to make under the fieri facias would, if made, have been a valid and effectual one in favour of his vendee, and, if he would not, by making such sale thereunder, have subjected himself either to the action of the party interested in the sequestration, or to the punishment of the Court of Chancery as for a contempt of its process. Whether the sale he would have made, supposing he had sold under the fieri facias, would have been a valid and effectual one, depends upon the sense in which, and the extent to which, goods shall be considered as bound by the award of an execution before the Statute of Frauds, and by the delivery of the writ of execution since that statute. The sense in which, and extent to which, goods are in either case said to be bound is that it binds the property as against the party himself and all claiming by assignment from, or representation through or under him, but it does not so vest the

property in the goods absolutely as to defeat the effect of a sale thereof made by the sheriff under an execution.

This was settled in *Smallcomb* v. *Cross and Buckingham* (2). That was the case of a sale by the sheriff under a second writ of fieri facias, the former fieri facias, which was first delivered to the sheriff, not having been then executed. It was an action of trover brought by the plaintiff in the last delivered fieri facias, which was so first executed, against the sheriffs and the plaintiff in the first delivered fieri facias, which was executed by the sheriff and the goods sold again after the goods had been already sold under the last delivered writ. HOLT, C.J., in delivering the judgment of the court for the plaintiff (according to the report in 1 COMYNS, 35, which agrees with the other reports of the same case),

> "declared their reason to be, for that at common law, if there were two writs of fieri facias, the one bearing teste on such a day, and the other on the next day, and the last writ was first executed, such execution should not be avoided, and the party had no remedy but against the sheriff; for the sheriff ought to make execution at his peril; and the sheriff shall be excused if there was no default in him: as if he who took the first writ out conceals it in his hand, the sheriff may rightly make execution on another writ which bears the last teste, but came first to his hands. And it hath been held, that if a recognisance be extended, the executor ought to satisfy that before a judgment which is not prosecuted; and, therefore, in the present case, as he who brought his fieri facias to the sheriff did not desire that it might be executed, the sheriff might rightly execute the last fieri facias, and such execution shall not be avoided."

All the reports of this case agree that although in general the sheriff was bound to execute that writ first that was first delivered, yet, if he do otherwise and execute the last delivered first, that the property of the goods is bound by the sale, and the party cannot seize them by virtue of his execution first delivered, but may have his remedy against the sheriff. The reason given in 1 LORD RAYMOND, 252, is:

> "Sales made by the sheriff ought not to be defeated; for if they are, no man will buy goods levied upon a writ of execution."

Other cases to the same effect are to be found in 10 VIN. ABR. 566, tit. Execution, A a., and also Comb. at p. 145 [in *Rawlinson* v. *Oriel* (3)], where it is said by HOLT, C.J., and DOLBEN, J.:

> "That the Statute of Frauds, which says that the property of goods taken in execution shall be bound only from the delivery of the writ to the sheriff, and not from the teste thereof, is to be understood only in respect of purchasers of them."

In *Lowthal* v. *Tonkins* (4) LORD HARDWICKE construes the meaning of the words "bound from the delivery of the writ to the sheriff" in the same manner, for he says (2 Eq. Cas. Abra. at p. 381):

> "The meaning of the words that the goods shall be bound from the delivery of the writ to the sheriff is, that after the writ delivered, and the defendant makes an assignment of them, except in market overt, the sheriff may take them in execution."

In a former part of the same case, LORD HARDWICKE says (ibid.):

> "Neither before this statute nor since is the property of the goods altered, but continues in the defendant till the execution executed."

What HOLT, C.J., is made in *Lechmere* v. *Thorowgood* (5) to say (Comb. 123), viz.:

> "That the property of the goods is vested by the delivery of the fieri facias, and the extent afterwards for the King comes too late, and that on the Statute of Frauds and perjuries,"

cannot be correctly stated, as it would be contrary to what HOLT, C.J., is reported by the same reporter to have said only the term following in *Rawlinson* v. *Oriel* (3)

(Comb. at p. 145), and also to what he is reported by so many reporters to have said in *Smallcomb* v. *Cross and Buckingham* (2). The comparative accuracy of COMBERBATCH as a reporter may be judged of by referring to his short report of that case under the name of *Smallcorn* v. *London* (*Sheriff*) (2) (Comb. 428), in which report the facts, point, and names of parties are all misstated. LORD MANSFIELD, in *Cooper* v. *Chitty* (6) (1 Burr. at p. 36), commenting upon the great inaccuracy of COMBERBATCH, says he must be mistaken for HOLT, C.J., could never say what he above supposes him to have said (that is to say, in *Lechmere* v. *Thorowgood* (5), Comb. p. 123). LORD KENYON, indeed, in *Rorke* v. *Dayrell* (7) (4 Term Rep. at p. 412), in commenting on LORD MANSFIELD's supposed observation, thinks it as likely that the report of LORD MANSFIELD's observation should be misstated as that COMBERBATCH should have been mistaken in reporting HOLT, C.J.'s opinion, and says:

> "As by the common law, abridged as it was by the Statute of Frauds, the property of the debtor's goods was bound by the delivery of the writ to the sheriff, there then remained no property in the debtor, on which the prerogative of the Crown could attach."

LORD KENYON cites, in support of his opinion as to the absolute vesting of the property by the delivery of the writ, no authority but that of COMBERBATCH's report of what was said by HOLT, C.J., which report of COMBERBATCH is the more unworthy of attention and credit on that point for the reason already given as to HOLT, C.J.'s opinion on that very subject, as reported by the other contemporary and better reporters of *Smallcomb* v. *Cross and Buckingham* (2), by whose concurrent testimony it must be considered as sufficiently verified. Indeed, what fell from LORD KENYON on this point [in *Rorke* v. *Dayrell* (7)] was not necessary to the case then before the court, for there was not a mere delivery of a writ of execution in that case, but the sheriff had actually seized under it, and the question was whether that were sufficient to defeat the extent of the Crown as to the goods so seized. So that the point how far goods were bound, and the property vested in the execution creditor as against all the world and for all purposes by the delivery of a writ of execution, never arose, and, therefore, it was so far extrajudicially said by his Lordship.

Assuming, therefore, upon these authorities of HOLT, C.J., and LORD HARDWICKE, and particularly on the authority of *Smallcomb* v. *Cross and Buckingham* (2) as decided by HOLT, C.J., which has been generally received and referred to as the established law on the subject, that the sheriff could have made a valid and effectual sale in this case, the next questions are: Would he, by executing the writ of fieri facias, have subjected himself to the action of the party to the sequestration or to punishment by the court out of which it issued? As to the first of these questions, it is certainly to be answered in the negative. What pretence of complaint can he have against the sheriff who gave no notice of that process in deference to which the sheriff was to forbear to levy, which he might easily have made available by ordinary diligence, and who took no steps for eighteen months to make it so? Vigilantibus non dormientibus leges subveniunt. If he did not enforce it during that period, at what period was it to be expected that he would do so? The commission extends to Mr. Charles Sturt's goods not in the bailiwick of one sheriff only, but throughout the whole realm. Were all His Majesty's subjects to hold their means of remedy against the personal estate of Mr. Sturt in whatever county they might be found, in suspense and abeyance till the parties to the sequestration should think fit to avail themselves of theirs? It would be impossible, upon the state of facts disclosed in this case, for the parties interested in the sequestration, or the sequestrators, to prove such notice of their sequestration as it would be necessary to aver in their declaration, for the communication made by Mr. Sturt himself of the fact of a sequestration being pending against himself certainly would not enure as a sufficient notice on behalf of those

who had issued such a dormant process against him, and an adverse creditor was surely not bound merely on such an intimation to believe the fact even of the sequestration having issued, still less to believe, against every reasonable presumption of fact to the contrary arising from its entire non-execution, that the sequestration was yet in full force and capable of being and meant to be still proceeded upon.

As to the light in which the Court of Chancery would view an execution at common law, executed under these circumstances, the contempt, if any, which that court would probably animadvert upon would be a contempt of its own process by those who had procured it to be awarded and the commissioners who were empowered, and who, instead of putting it in force, suffered it to become the means of protection to him against whom it was granted and required to act under it. As against these parties and also against Mr. Sturt, the defendant in the execution, the sheriff may, if he can make out a case of collusion between them, yet perhaps be able to obtain some relief by the intervention of that court in his favour. That protection and a full indemnity he might have had for asking for in the first instance from that court or this court would, upon his application, have enlarged the rule upon him to return the writ of fieri facias, unless the plaintiff would have indemnified him against the sequestration so that, if he now stand unprotected against the action of the plaintiff, it is by his own neglect that he does so. In order to found a contempt of the court, it would not, perhaps, be necessary that the sheriff should have had actual notice of the award of the sequestration, although that circumstance may be a necessary ingredient in the action of the party. By *Herbert's Case* (8), the marrying of a ward of the court may be a contempt though the parties concerned in the marriage had no notice that the infant was a ward of the court. But if every person be bound to take notice of the proceedings and so to know that the sequestration had been awarded, they ought at the same time to have the benefit of a presumed knowledge that it had not been acted upon so as to become entitled to be considered as virtually abandoned and waived by the parties originally interested in its execution. Although a writ of sequestration be not returnable at a day or term certain as a writ of fieri facias is, nor is any precise time limited for its execution, yet it requires the sequestrators, at certain proper and convenient days and hours (which may be understood, perhaps, as within a reasonable time, although it more obviously and naturally seems to mean at seasonable hours in the day for such purposes), to enter upon the lands, etc., and to collect rents, and to take into their hands his goods and chattels.

Hutchinson v. *Johnson* (9), in which it was held that where two writs of fieri facias against the same defendant are delivered to a sheriff on different days and no actual sale of the defendant's goods is made the first execution must have the priority, may be supposed, on the first view of it, to lay down a doctrine somewhat contrary to what has been already stated, but that case appears to me to decide only that where two writs of fieri facias are delivered to the same sheriff he must, as between himself and the several plaintiffs in those executions, sell under that writ which is first delivered, although he may have first seized under the last delivered writ. But in the present case there are different writs or authorities, each so far binding the goods as to warrant a sale under them, one delivered to the sheriff and another previously delivered to other persons equally competent with the sheriff to have seized under them. The question is not which of two writs, equally mandatory to the same person, shall have a priority in point of execution by him, but whether one writ mandatory to the sheriff for one purpose shall remain in his hands wholly suspended in point of execution merely because other persons having a similar competent authority under other process of another court to them directed have chosen to neglect the execution of such last-mentioned process, which brings the question nearly to this, namely, whether a writ which is from the delivery immediately binding as against the defendant so as to tie up his

hands from alienating the goods which might be seized under it is to be regarded as in effect self-executed by its own proper legal effect and force for all purposes. That it is not, *Smallcomb* v. *Cross and Buckingham* (2) decides, for, if it were so, then any sale made by the sheriff under a second execution when he had a former one in his hands would be a nullity in respect even to the sheriff's vendee thereof, which would directly contradict what was established in that case. It appears to me, therefore, not to be contradictory to any cases, nor any principles of law, and to be mainly conducive to public convenience and the prevention of fraud and vexatious delay in these matters, to hold that where there are several authorities equally competent to bind the goods of a party when executed by the proper officer, they shall be considered as effectually, and for all purposes, bound by the authority which first actually attaches upon them in point of execution, and under which an execution shall have been first executed. In this case, being of opinion that the sheriff would not, by executing the writ of execution to him directed, have subjected himself either civilly or criminally to any inconveniences, we think that he ought to have done so, and, not having done so, he has made himself liable to this action in which we are of opinion that the plaintiff is entitled to recover.

Judgment for plaintiff.

Ex parte GARLAND

[Lord Chancellor's Court (Lord Eldon, L.C.), August 17, 1803, March 4, August 13, 1804]

[Reported 10 Ves. 110; 1 Smith, K.B. 220; 32 E.R. 786]

Executor—Powers—Power to carry on business of testator—Business carried on—Limited sum provided in will—Bankruptcy of executor—Right of creditors to claim against distributed assets.

By his will, dated Feb. 17, 1798, a testator bequeathed his personal estate to trustees to be held for the benefit of his widow and their children, and directed that his business as a miller and farmer should be carried on by his widow, who was his executrix, directing that his trustees should pay her £600 for that purpose. After the death of the testator the widow carried on the business for some time, but in 1801 she became bankrupt.

Held: only the money declared by the testator to be embarked in the business was answerable to the creditors of the business, who had no claim against the distributed assets in the hands of beneficiaries under the will.

Notes. Considered: *Re Hodson, Ex parte Richardson* (1818), Buck, 202. Followed: *Thompson* v. *Andrews* (1832), 1 My. & K. 116. Applied: *Ex parte Butterfield* (1847), De G. 570. Approved: *Labouchere* v. *Tupper*, [1843–60] All E.R. Rep. 937. Distinguished: *Re Beater, Ex parte Edmunds* (1862), 4 De G.F. & J. 488. Considered: *Owen* v. *Delamere* (1872), L.R. 15 Eq. 134. *Fairland* v. *Percy* (1875), L.R. 3 P. & D. 217; *Re Beale, Ex parte Corbridge* (1876), 4 Ch.D. 246; *Re Johnson, Shearman* v. *Robinson*, [1874–80] All E.R. Rep. 1155. Applied: *Fraser* v. *Murdoch* (1881), 6 App. Cas. 855. Considered: *Strickland* v. *Symmons* (1884), 26 Ch.D. 245. Referred to: *Re Sudell, Ex parte Myers* (1833), 2 Deac. & Ch. 251; *Thompson* v. *Derham, Thompson* v. *Goodman* (1842), 1 Hare, 358; *M'Neillie* v. *Acton* (1853), 4 De G.M. & G. 744; *Re Mellor, Ex parte Manchester Bank* (1879), 12 Ch.D. 917; *Re Blundell, Blundell* v. *Blundell* (1890), 44 Ch.D. 1; *Re Millard, Ex parte Yates* (1895), 72 L.T. 823; *Re Meade, Ex parte Humber* v. *Palmer*, [1951] 2 All E.R. 168.

As to executor's power to carry on business of testator, see 16 HALSBURY'S LAWS (3rd Edn.) 366–369; and for cases see 24 DIGEST (Repl.) 610 et seq.

Case referred to:

(1) *Hankey* v. *Hammock* (1786), 3 Madd. 148, n.; Buck, 210; 56 E.R. 464; 24 Digest (Repl.) 614, *6111*.

Petition in bankruptcy.

Henry Ballman, by his will dated Feb. 17, 1798, after directing his debts, etc., to be paid, bequeathed all his leasehold and personal estates to his wife Margaret Ballman, and three other persons, their respective executors, etc., upon trust to permit Margaret Ballman to receive the rents, interest, etc., for her life or until she should marry again for her own use and the support, maintenance and education of his five children until they should respectively attain the age of twenty-one, subject to certain payments to his children, and from and after the death or second marriage of his wife in trust for all and every or such one or more of his children or their issue, and in such shares, manner, and form, as she should appoint by any deed or instrument in writing or by her will, and for want of such appointment, and as to such parts of which no such appointment should be made, in trust for all his children, at their respective ages of twenty-one, with survivorship in case of the death of any under that age, and in case of the deaths of all under that age without leaving issue then to pay his personal estate to Margaret Ballman.

The testator directed his trustees to pay to his children respectively, as they should attain twenty-one, £400 apiece out of his personal estate, and he further directed that his trade of a miller and the farming business then carried on by him should be carried on by Margaret Ballman until his trustees should think proper to establish his sons or either of them therein, and he directed his trustees upon so settling his sons or either of them in the business to permit them to take off the stock, crop, and other effects in the business at a fair valuation, and to take a bond or note from them for the amount, payable by such instalments as his trustees should think reasonable, with interest in the meantime at 4 per cent. He also directed that, as long as the businesses should be carried on by his wife the profits thereof should be applied for her own use and for the maintenance and education of his children, and an inventory and valuation of the stock, crop, and effects in his businesses should be taken within six weeks after his decease, and any sum or sums, not exceeding £300, which by a codicil he increased to £600, should be paid by his trustees to Margaret Ballman out of his personal estate for the purpose of enabling her to carry on the businesses, and she should give notes of hand to the other trustees for the sums so advanced to her and the amount of the valuation. He appointed his widow and the other trustees his executors.

After the death of the testator Margaret Ballman carried on the trades till December, 1801, when she became a bankrupt. The other trustees had, according to the directions of the will, advanced her the sum of £600, and the stock and effects were valued at £1,351 5s., for which she gave two notes to the other trustees. At the time of her bankruptcy she was indebted to the trustees in respect of those two notes, and also in £768 12s. 4d. of the testator's assets received by her. The surviving trustee proved in the bankruptcy the three sums of £1,351 5s., £600, and £768 12s. 4d.

The petition was presented by the assignees under the commission, praying that the proof might be expunged and the dividends refunded, and that it might be declared that the whole of the personal estate of the testator was liable to all the debts contracted by the bankrupt in carrying on the trades of a miller and farmer under the directions of the will. When the petition was first heard, two points were made for the assignees—(i) that the surviving trustee, as a creditor on the notes, ought to be postponed to all the other creditors of the bankrupt; (ii) that the general assets of the testator were subject to the bankruptcy. On the first point, the Lord Chancellor immediately expressed a clear opinion in favour of

the assignees. The second his Lordship considered a point of great importance, and he directed a further argument. A

Alexander and *Daniel* in support of the petition.

Richards and *Toller* for the surviving trustee under the will.

LORD ELDON, L.C.—In *Hankey* v. *Hammock* (1), before LORD KENYON, the important difficulties that have been urged upon the present occasion were not submitted to the court. Certainly LORD KENYON developed the reasons upon which he drew the conclusion in that case in a very limited degree, if at all. B

The question really goes to this, whether this court is to hold that, where a testator directs a trade to be carried on, without limitation, all the other purposes of his will are to stand still or all the administration under it to be so checked that every person taking is in effect to become a security in proportion to the property he takes, and to the extent of all time, for the trade which the testator has directed to be carried on. The inconvenience would be intolerable, amounting to this, that every legatee is to hold his legacy upon terms connected with transactions by which he cannot benefit, which he cannot control, and which may cut down all his hopes as far as they are founded upon his receipt of that bounty. On the other hand, the case of the executor is very hard. He becomes liable, as personally responsible, to the extent of all his own property, and also in his person, and as he may be proceeded against as a bankrupt, though he is but a trustee. But he places himself in that situation by his own choice, judging for himself whether it is fit and safe to enter into that situation and contract that sort of responsibility. The creditors of the testator must be either those whose debts were contracted before his death, or persons who have become creditors of the trade after his death. If they are creditors of the former description, they have the power and the means of calling forth after the testator's death the whole of his property, in discharge of their demands, and, if they do not put an end to that relation, but permit the representative to act, they have, perhaps, no more reason to complain of a decision more limited than that of LORD KENYON, than they would have if by their own conduct they permitted part of the assets to get to the hands of persons from whom they could not draw them, and relied upon his liability. C D E F

As to creditors subsequent to the death of the testator, in the first place they may determine whether they will be creditors. Next, it is admitted, they have the whole fund that is embarked in the trade, and in addition they have the personal responsibility of the individual with whom they deal, the only security in ordinary transactions of debtor and creditor. They have something very like a lien upon the estate, embarked in the trade. They have not a lien upon anything else, nor have creditors in other cases a lien upon the effects of the person, with whom they deal, though, through the equity, as to the application of the joint and separate estates to the joint and separate debts respectively they work out that lien. If it is to be determined upon the convenience, it is not so inconvenient to say that those who deal with the executor must take notice that the testator's responsibility is limited by the authority given to the executor, as to say, on the other hand, that, the executor being authorised to carry on that trade, making from day to day a great variety of engagements, or, as it has been put, entering into one great and important engagement, but also authorised by the will to do many other acts which he must equally do in a due administration under the will, wherever for the benefit of one child the trade is directed to be carried on, all the other objects of the will must at any distance of time be considered, to the extent of the property they take, security for the creditors on the trade. G H I

Such a decision was never made previously to *Hankey* v. *Hammock* (1). I am not aware that such a decision has ever been made since that case. We may recollect cases not consistent with the supposition that the law is according to that decision. It is necessary to look into other cases, from which it may appear that it was not present to the mind of the court that there was such a rule. The

difficulty also that must exist in a variety of instances is to be considered, the case that has been put, where a tradesman directs the trade to be carried on for the benefit of a son, giving him a legacy of £50,000. It is difficult to say that that legacy must not be liable, and yet it is very difficult to say it shall be liable consistently with saying that legacies to others shall not, unless upon this, that the legacy is given by the same will for the benefit of the same person who is to have the benefit of the trade, and yet I do not know that is a principle of distinction by which I can abide. In the ordinary case the eldest son, made residuary legatee and executor and ordered to carry on the trade for the benefit of another child, cannot possibly withdraw his residuary legacy from the liability the trade carried on would impose upon him personally, for he makes himself personally liable, and, therefore, with reference to the property taken from his father, though not liable as legatee, he becomes liable as a person carrying on the trade, his legacy assisting the means of his responsibility in carrying on the trade. That person, therefore, both legatee and executor, must answer for his acts as to the trade. Why should not another legatee? The answer is that that person is liable, not as legatee, but on the ground that the property is part of his general substance, and he may spend it, notwithstanding his liability as executor. So may another legatee, but the power of spending his general substance shows there is no great convenience in this doctrine

In this case, I fear, I shall be under the necessity of contradicting the authority of a judge I most highly respect, feeling a strong opinion that only the property, declared to be embarked in the trade shall be answerable to the creditors of the trade. If I am not bound by decision, the convenience of mankind requires me to hold that the creditors of the trade, as such, have no claim against the distributed assets in the hands of third persons under the direction of the same will which has authorised the trade to be carried on for the benefit of other persons. In my opinion it is impossible to hold that the trade is to be carried on, perhaps for a century, and at the end of that time the creditors dealing with the trade are, merely because it is directed by the will to be carried on, to pursue the general assets, distributed perhaps to fifty families.

Order that proof should stand in respect of £768 12s. 4d.

MOGGRIDGE AND ANOTHER *v.* THACKWELL AND OTHERS

[Lord Chancellor's Court (Lord Eldon, L.C.), December 14, 15, 16, 17, 1802, May 12, 1803]

[Reported 7 Ves. 36; 32 E.R. 15]

Charity—Crown —Parens patriae—Charitable bequest to no definite object—No trustees—Administration of charity by order under Sign Manual.

Charity—Cy-près doctrine —Failure of mode directed to effectuate charity —Object of charity illegal or mistaken religious purpose.

Where money is given to charity generally and indefinitely, not fixing itself on any object, the Crown, as parens patriae, is the constitutional trustee who will administer the charity by order under the Sign Manual, but where the execution is to be by a trustee with general objects or some object pointed out the court will conduct the administration of the trust.

If the substantial intention of the will is to give to charity, the failure, by accident or other circumstances, of the particular mode in which the charity is to be effectuated shall not destroy the charity, but the law will substitute cy-près another mode of devoting the property to charitable purposes. If the gift denotes a charitable intention, but the object to which its exercise is applied is illegal, the court will exercise the charitable intention and execute it to establish some charity agreeable to the law. If a legacy is given to a mistaken religious purpose, the court will give it to a real religious purpose.

Notes. Applied: *Paice* v. *Archbishop of Canterbury* (1807), 14 Ves. 364. Explained: *Mills* v. *Farmer*, [1814–23] All E.R. Rep. 53. Considered: *Ommanney* v. *Butcher*, [1814–23] All E.R. Rep. 154. Applied: *A.-G.* v. *Ironmongers' Co.*, [1824–34] All E.R. Rep. 620. Followed: *Reeve* v. *A.-G.* (1843), 3 Hare, 191. Explained: *Pocock* v. *A.-G.* (1876), 3 Ch.D. 342; *Re Rymer*, *Rymer* v. *Stanfield*, [1891–4] All E.R. Rep. 328. Considered: *Re Davis*, *Hannen* v. *Hillyer*, [1900–3] All E.R. Rep. 336. Applied: *Re Pyne*, *Lilley* v. *A.-G.*, [1903] 1 Ch. 83; *Re Willis*, *Shaw* v. *Willis*, [1921] 1 Ch. 44. Considered: *Re Bennett*, *Sucker* v. *A.-G.*, [1959] 3 All E.R. 295. Referred to: *Corbyn* v. *French* (1799), 4 Ves. 418; *Cary* v. *Abbot* (1802), 7 Ves. 490; *Martin* v. *Margham* (1844), 14 Sim. 230; *Nightingale* v. *Goulbourn*, [1843–60] All E.R. Rep. 420; *Marsh* v. *Means* (1857), 30 L.T.O.S. 89; *Wilson* v. *O'Leary* (1871), L.R. 12 Eq. 525; *Lyons* v. *A.-G. of Bengal* (1876), 1 App. Cas. 91; *Biscoe* v. *Jackson* (1887), 56 L.T. 753; *Re Slevin*, *Slevin* v. *Hepburn*, [1891] 1 Ch. 373; *Re Eades*, *Eades* v. *Eades*, [1920] 2 Ch. 353; *Re Gardner's Will Trusts*, *Boucher* v. *Horn*, [1936] 3 All E.R. 938; *Re Lawton*, *Lloyds Bank, Ltd.* v. *Longfleet St. Mary's Parochial Church Council*, [1940] Ch. 984; *Re Lysaght*, *Hill* v. *Royal College of Surgeons of England*, [1965] 2 All E.R. 888.

As to the cy-près doctrine and the Crown as protector of charitable trusts, see 4 Halsbury's Laws (3rd Edn.) 317–325, 407, 408. For cases see 8 Digest (Repl.) 459–469, 503, 504.

Cases referred to:

(1) *White* v. *White* (1778), 1 Bro. C.C. 12; 28 E.R. 955, L.C.; 8 Digest (Repl.) 466, *1663*.

(2) *A.-G.* v. *Syderfen* (1683), 1 Vern. 224; cited in 7 Ves. 43, n.; 23 E.R. 430; 8 Digest (Repl.) 465, *1655*.

(3) *A.-G.* v. *Peacock* (1676), Cas. temp. Finch, 245; 23 E.R. 135; sub nom. *A.-G.* v. *Matthews*, 2 Lev. 167; 8 Digest (Repl.) 503, *2233*.

(4) *Anon.* (1702), Freem. Ch. 261; 22 E.R. 1197; 8 Digest (Repl.) 466, *1656*.

(5) *Wheeler* v. *Sheer* (1730), Mos. 288, 301; 25 E.R. 399, 406, L.C.; 8 Digest (Repl.) 468, *1690*.

(6) *Jones' Case* (1690), [1893] 2 Ch. 49, n.; sub nom. *Gates* v. *Jones*, cited in 7 Ves. 496; 2 Vern. 266; 23 E.R. 773, H.L.; 8 Digest (Repl.) 503, *2240*.

(7) *Clifford* v. *Francis* (1679), Freem. Ch. 330; 22 E.R. 1235; 8 Digest (Repl.) 503, *2227.*

(8) *A.-G.* v. *Baxter* (1684), 1 Vern. 248; reversed sub nom. *A.-G.* v. *Hughes* (1689), 2 Vern. 105; 23 E.R. 677; 8 Digest (Repl.) 335, *166.*

(9) *Da Costa* v. *Da Paz* (1754), Dick. 258; 3 Hare, 194, n.; sub nom. *De Costa* v. *De Pas*, Amb. 228; 27 E.R. 150; sub nom. *De Costa* v. *De Paz*, 2 Swan. 487, n., L.C.; 8 Digest (Repl.) 461, *1615.*

(10) *A.-G.* v. *Combe* (1679), 2 Cas. in Ch. 18; 22 E.R. 825; sub nom. *Anon.*, Freem. Ch. 40, L.C.; 8 Digest (Repl.) 461, *1611.*

(11) *A.-G.* v. *Guise* (1692), 2 Vern. 266; 23 E.R. 772; 8 Digest (Repl.) 461, *1613.*

(12) *A.-G.* v. *Bowyer* (1783), 3 Ves. 714; 30 E.R. 1235, L.C.; subsequent proceedings (1800), 5 Ves. 300, L.C.; 8 Digest (Repl.) 460, *1601.*

(13) *A.-G.* v. *Bishop of Oxford* (1786), 1 Bro. C.C. 444, n.; cited in 4 Ves. 431; 28 E.R. 1231; 8 Digest (Repl.) 468, *1686.*

(14) *Baylis* v. *A.-G.* (1741), 2 Atk. 239; 26 E.R. 548, L.C.; 8 Digest (Repl.) 406, *983.*

(15) *A.-G.* v. *Hickman* (1732), Kel. W. 34; 2 Eq. Cas. Abr. 193, pl. 14; 25 E.R. 482, L.C.; 8 Digest (Repl.) 466, *1662.*

(16) *Doyley* v. *Doyley*, *A.-G.* v. *Doyley* (1735), 7 Ves. 58, n.; 2 Eq. Cas. Abr. 194; 32 E.R. 35; 8 Digest (Repl.) 404, *952.*

(17) *A.-G.* v. *Gleg* (1738), 1 Atk. 356; 26 E.R. 227; sub nom. *A.-G.* v. *Glegg*, Amb. 584; sub nom. *A.-G.* v. *Speed*, West temp. Hard. 491, L.C.; 8 Digest (Repl.) 495, *2122.*

(18) *Cook* v. *Duckenfield* (1743), 2 Atk. 562; 26 E.R. 737, L.C.; 8 Digest (Repl.) 451, *1467.*

(19) *A.-G.* v. *Herrick* (1772), Amb. 712; 27 E.R. 461, L.C.; 8 Digest (Repl.) 503, *2228.*

(20) *Malim* v. *Keighley* (1795), 2 Ves. 529; 30 E.R. 760; 47 Digest (Repl.) 55, *396.*

Also referred to in argument:

Wynne v. *Hawkins* (1782), 1 Bro. C.C. 179; 28 E.R. 1068, L.C.; 47 Digest (Repl.) 47, *306.*

Sprange v. *Barnard* (1789), 2 Bro. C.C. 585; 29 E.R. 320; 47 Digest (Repl.) 58, *419.*

Pushman v. *Filliter* (1795), 3 Ves. 7; 30 E.R. 864; 47 Digest (Repl.) 49, *335.*

Bland v. *Bland* (1745), 2 Cox, Eq. Cas. 349; 9 Mod. Rep. 478; 30 E.R. 161; 47 Digest (Repl.) 44, *281.*

A.-G. v. *Tyndall* (1764), Amb. 614; 2 Eden, 207; 27 E.R. 399, L.C.; 8 Digest (Repl.) 370, *552.*

Widmore v. *Woodroffe* (1766), Amb. 636; Dick. 392; 1 Bro. C.C. 13, n., 33, n.; 27 E.R. 413, L.C.; 8 Digest (Repl.) 373, *602.*

A.-G. v. *Whitchurch* (1796), 3 Ves. 141; 30 E.R. 937; 8 Digest (Repl.) 421, *1119.*

A.-G. v. *Goulding* (1788), 2 Bro. C.C. 428; 29 E.R. 239; 8 Digest (Repl.) 421, *1118.*

Brown v. *Yeall* (1791), cited in 7 Ves. 47, 50, n.; 32 E.R. 18, 20, 34, L.C.; 8 Digest (Repl.) 389, *821.*

A.-G. v. *Boultbee* (1794), 2 Ves. 380; 30 E.R. 683; affirmed (1796), 3 Ves. 220, L.C.; 8 Digest (Repl.) 459, *1594.*

A.-G. v. *Andrew* (1798), 3 Ves. 633; 30 E.R. 1194, L.C.; affirmed (1800), Feb. 20, H.L. (see 7 Ves. 223); 8 Digest (Repl.) 466, *1669.*

Brown v. *Higgs* (1799), 4 Ves. 708; 31 E.R. 366; re-heard (1800), 5 Ves. 495; affirmed (1801), 8 Ves. 561, L.C.; (1813), 18 Ves. 192, H.L.; 37 Digest (Repl.) 406, *1349.*

Duke of Marlborough v. *Lord Godolphin* (1750), 2 Ves. Sen. 61; 28 E.R. 41, L.C.; 37 Digest (Repl.) 237, *31.*

R. v. *Lady Portington* (1692), 1 Salk. 162; 91 E.R. 151; 8 Digest (Repl.) 503, *2239.*

A.-G. v. *Bishop of Chester* (1785), 1 Bro. C.C. 444; 28 E.R. 1229, L.C.; 8 Digest (Repl.) 422, *1129.*

A.-G. v. *London Corpn.* (1790), 3 Bro. C.C. 171; 1 Ves. 243; 29 E.R. 472, L.C.; 8 Digest (Repl.) 462, *1625.*

Pierson v. *Garnet* (1787), 2 Bro. C.C. 226; Finch. Prec. Ch. 201, n.; 29 E.R. 126, L.C.; 47 Digest (Repl.) 51, *360.*

Isaac v. *Gompertz* (1786), cited in 7 Ves. 61; 32 E.R. 23, L.C.; 8 Digest (Repl.) 339, *212.*

A.-G. v. *Oglander* (1790), 3 Bro. C.C. 166; 1 Ves. 246; 29 E.R. 468, L.C.; 8 Digest (Repl.) 461, *1622.*

Sonley v. *Clockmakers' Co.* (1780), 1 Bro. C.C. 81; 28 E.R. 998, L.C.; 8 Digest (Repl.) 501, *2219.*

A.-G. v. *Lady Downing* (1766), Amb. 550; 27 E.R. 353, L.C.; subsequent proceedings (1769), Amb. 571, L.C. (see also I Wilm. 1); 8 Digest (Repl.) 327, *104.*

Petition by next of kin for re-hearing of a cause brought on before LORD ROSSLYN [then LORD LOUGHBOROUGH, L.C.], for further directions upon the Master's report, approving a scheme for effectuating the purposes of the charity under a decree of LORD THURLOW.

Ann Cam, by her will, dated June 16, 1779, gave to Mr. Thackwell and his heirs, certain estates, and, reciting that she was tenant in tail of the estates called Hill Netherton and Laycelles, and by suffering a recovery could make herself tenant in fee of them, but out of regard to her aunt Walker and her family she chose to let the estate tail continue and the estates to go according to the present limitations, she gave some other estates in London to two persons and their heirs respectively. All the rest of her real estates she gave to John Moggridge, of Bradford, in the county of Wilts., and James Vaston, of Clapton, in the county of Middlesex, and their heirs, but chargeable with the payment of several annuities. The testatrix then gave a number of pecuniary legacies to some of her next of kin and other persons, and concluded thus:

> "I give all the rest and residue of my personal estate to James Vaston, of Clapton, Middlesex, gentleman, his executors and administrators; desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families and good characters; and I appoint the said John Moggridge and Mr. Vaston, executors of this my will; and I desire Robert Woodford, of Taplow, Bucks., Esquire, and Richard Wicherley, to aid and assist my executors."

The decree, as it was finally pronounced by LORD THURLOW upon a motion to vary the minutes, declared that the residue of the testatrix's personal estate passed by her will, and ought to go and be applied in charity, regard being had to poor clergymen with good characters and large families according to the recommendation in the will, and that the Master should approve of a scheme to effectuate the purposes of the said charity, with liberty for the parties to lay proposals before him for that purpose.

By the scheme, submitted by the plaintiff, the executor, and the next of kin, and approved by the Master, it was proposed that the defendant Thomas Walker, first cousin and heir-at-law of the testatrix ex parte materna, might be allowed out of the residue of the testatrix's personal estate the sum of £5,000 under the particular circumstances of his case, and that small annuities should be granted to several other persons who were either relations of the testatrix or were in her life dependent on her bounty; that a school might be established at Dymocke, the residence of the testatrix and her family, for poor children of that parish; that £1,000 might be appropriated in aid of the Gloucester Infirmary and

£1,000 in aid of an intended lunatic asylum at Gloucester; that £6,000 3 per cent. bank annuities might be transferred and the dividends appropriated to a charity instituted in aid of the distribution annually made for the relief of widows and orphans of clergymen in the diocese of Gloucester, to be applied for the relief of poor clergymen who had large families and good characters according to the rules of distribution of the institution, and lastly, that the residue and remainder of the said funds and of all the testatrix's personal estate should be called Mrs. Ann Cam's benefaction to poor clergymen and be invested in the 3 per cent. consolidated bank annuities in the name of the governors of the charity for the relief of poor widows and children of clergymen, the interest and dividends to be applied by the governors in or towards the relief of poor clergymen with good characters and large families according to the recommendation in the will.

The report then stated the evidence in support of these proposals. As to Thomas Walker the affidavits stated that he would have been entitled to the estates of Hill Netherton and Laycelles, of the value of £12,000, as heir of his mother if the testatrix had not barred the entail, deducing his title, and stating the clause in her will as to that and that long after making the will she suffered a recovery; that at various times she assisted him; and stating other circumstances as evidence of her regard and intentions in his favour, particularly to leave him a sum of money in lieu of those estates shortly before she was seized with the illness of which she died, and that he was a proper object to partake of the charitable fund.

Lloyd, *Stanley* and *Whishaw* for some of the next of kin.

Mansfield, *Richards*, *Romilly*, *Burton* and *G. Wilson* for others of the next of kin supporting the petition for re-hearing.

Spencer Perceval and *Finch* for the executor.

Cox for the Attorney-General.

May 12, 1803. **LORD ELDON, L.C.** I understand that LORD ROSSLYN, lately Lord Chancellor, intimated, that it was fit that this cause should be re-heard. On what ground that recommendation was made, or on what view of the case his Lordship was disposed to think so, I have not been able to collect from the argument. Whether his opinion was that the declaration of the decree that the residue of the personal estate was to be applied in charity was not warranted by the true construction of the will, construed on the principles on which the court has acted with regard to charities, or, that if it was so warranted, the residue was not to be disposed of by such a distribution as would be contained in a scheme before the Master, but ought to be disposed of by the King as parens patriae, I have not been informed. That circumstance, however, makes it my duty to consider this case very anxiously, and that is considerably increased by my conviction that, if the decree is affirmed, it would be a considerable surprise upon the testatrix. After the most anxious consideration I cannot feel myself in a situation authorising me to say that I am at liberty to depart from what appears to have been the established doctrine of this court as applied to those particular legatees, called charities.

This will strikes me as a will that in the terms manifests as strong a purpose to place discretion in an individual as can be expressed by any terms, but, notwithstanding that, it seem to me that the cases have gone a length, on principles wise or otherwise it is not for me to determine, which has formed a precedent that binds me in this court, and, whatever the House of Lords may think proper to do on a review of these cases, it is much fitter, if they are to be departed from, that they should be departed from by the authority in the last resort than by an individual judge sitting here. The circumstance, to be found in LORD THURLOW'S decree, giving the costs as between attorney and client, and the fact, that the re-hearing was produced by an intimation from the court itself, leave me no difficulty in saying that the expense of the re-hearing ought to be paid in the same manner. The nature of the question, as well as the authority of the recommendation, makes it not unfit that all parties should have their costs as between attorney and client out of this

fund. It is some consolation, therefore, to the court that this attempt will be no expense to them.

In what the doctrine originated, whether, as supposed by LORD THURLOW in *White* v. *White* (1), in the principles of the civil law as applied to charities, or in the religious notions entertained formerly in this country, I know not, but we all know that there was a period when in this country a portion of the residue of every man's estate was applied to charity, and the ordinary thought himself obliged so to apply it on the ground that there was a general principle of piety in the testator. When the statute compelled a distribution it is not impossible that the same favour should have been extended to charity in the construction of wills by their own force purporting to authorise such a distribution. I have no doubt that cases much older than those I shall cite may be found, all of which appear to prove that, if the testator has manifested a general intention to give to charity, the failure of the particular mode in which the charity is to be effectuated shall not destroy the charity, but, if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished.

One of the earliest cases, mentioned in *A.-G.* v. *Syderfen* (2) is *Frier* v. *Peacock* [i.e., *A.-G.* v. *Peacock* (3)]. According to that case the generality of the gift made the effectuating it impracticable, and for that reason, the substance of the gift being to assist the poor, the court substituted a practicable mode of assisting the poor, and reduced the number of legatees whom that general term would embrace to forty poor boys. That case is more fully reported at 2 LEVINZ, 167, under the name of *A.-G.* v. *Matthews*. There the decision is thus stated (2 Lev. at p. 168):

> "This decree of the commissioners was now quashed by the LORD KEEPER FINCH, because, this being a general charity and for the poor in general, the commissioners have nothing to do with it: but it is to be determined by the King himself in this court upon an information by the Attorney-General in behalf of the King; which accordingly he directed to be brought. And now upon the information the Lord Keeper said this general charity belongs to the King himself to dispose, but yet to the poor; and, therefore, the disposal of £80 per annum, to Paul's was out of the trust, and void; and the distribution to the three parishes good, and to be confirmed. But as to the poor kindred of Frier, who prayed to be considered, no consideration, he said, could be had of them; for the disposition must be such as may endure for ever; and they cannot live poor for ever. But before he would dispose of the residue, he said he would acquaint the King with the case, and the value of the estate; which appeared to be £400 per annum at least, to have his directions how the disposition of this general charity should be, and that to be confirmed by the decree of this court. And afterwards the King directed it should go to the maintenance of the mathematical scholars in Christ's Hospital whom the King had lately appointed to be brought up there in order to be instructed in the art of navigation; which, ut audivi, was accordingly confirmed by the decree of this court."

The authority of this case is strongly confirmed in *A.-G.* v. *Syderfen* (2), and upon inquiry at Christ's Hospital I have been furnished with the original papers in that cause, which furnish an answer to the objection stated to the authority of that case. It appears from the papers that previously to the decree the King's Sign Manual had been obtained and was brought into court, and the decree was made according to that, and that, it is intimated at the Bar, was a proceeding not fit for a court of justice. If that observation could not be displaced otherwise, it would be displaced sufficiently for this purpose by this, that, however the cause came into court, the authority of it has been universally recognised ever since. That observation founds no objection to the propriety of the proceeding, for the case was a devise, subject to a sum of £1,000 for such charitable uses as the devisor had by a paper directed. The person to whom the estate was given so charged had taken to the

A enjoyment of the estate under the will, as far as it was beneficial to himself, and had, as is frequent in such cases, taken no notice of the fact, that there was a charge for the benefit of the charity. The hospital found out that there was such a will, and if so, the money charge, as the law then stood, was clearly at the disposal of the King. It is perfectly familiar that where an interest of such a kind is given to charity, or, where there is an escheat for want of heirs, and the fact is not B communicated, it is usual to petition the King stating that there is such an interest and praying some reward on the ground of the discovery if it can be made out. That is familiar practice, whether well or ill founded. It occurred in my experience, when Solicitor and Attorney-General, in several instances as to escheat, and the ordinary rule on an escheat is for the Crown to give a lease, as good a lease as it can give, to the person making the discovery. This case originated in the C discovery made by the hospital of the charitable disposition, and a petition was presented on that ground. I have the petition, with the opinion of the Attorney-General of that day upon it, and in consequence of that he filed his information. That produced the cause, which is very accurately reported in Vernon upon a comparison with the papers.

The answer expressly insists upon the point that, if any writing was at any D time made by the testator, it was afterwards revoked and cancelled, and that the court would have no authority to insist either that it was in its own disposal or that it was in the disposal of the Crown without an inquiry upon the point that that paper was revoked, and that it was not unreasonable that there should be some inquiry a reason is given that made the suggestion of revocation not improbable, that subsequent to the making of this will he had charged several E great sums of money upon his land and that the whole estate would scarce amount to answer all the charges thereon. After the answer the case was again laid before the Attorney-General for his opinion, regard being had to the circumstances disclosed by the answer. His opinion is that the executors ought to be made parties, but that then, notwithstanding the circumstances in the answer, they may, when the executors are made parties, go to a hearing. The effect of the reasoning F at the hearing was, according to the book, this: The Lord Keeper argues that the charity exists, though the writing was not to be found; whereas the question was whether the charity was not destroyed because the writing was not to be found; and the idea of indemnity against the paper being found and expressing different charitable uses is kept up through the whole. How it was collected that it was intended to be a permanent charity it is very difficult to say, the writing not G appearing.

There is a material difference between the present case and *Frier* v. *Peacock* [i.e., *A.-G.* v. *Peacock* (3)], for in that case the will itself devoting the property to charity was producible. It appears from the papers that this decree was carried into actual execution, the papers containing the evidence of payment of the money, a copy of the receipt, and a deduction of the costs of the suit, beginning with H the first application and including all the proceedings, which are very reasonable, not exceeding £34. Whether the decree proceeds upon good reasoning, or upon that which fair reasoning might displace, it asserts, that where it is altogether uncertain and indefinite it is in the disposal of the King.

With regard to the doctrine here laid down, there is a very strong declaration in [*Anon.* (4)] Freeman, Ch., Case 330 b., p. 261:

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> "It was said, and not denied, that if a man deviseth a sum of money to such charitable uses as he shall direct by a codicil to be annexed to his will, or by a note in writing, and afterwards leaves no direction, neither by note, nor codicil, the Court of Chancery hath power to dispose of it to such charitable uses as the court shall think fit."

That dictum seems very much at variance with one way of interpreting *Wheeler* v. *Sheer* (5). It would seem that *A.-G.* v. *Syderfen* (2) might have proceeded upon

the principle that, the testator having once given to charitable uses, if it was not shown that he had revoked that gift, his general purpose was charity, and should be enforced though you could not show what was the use, a very strong proposition. It goes on thus:

> "And so it was held in the case of Mr. Sidrofen's will [*A.-G.* v. *Syderfen* (2)] and the case of one Jones [*Jones' Case* (6)]: but if the will points at any particular charity, as for maintenance of a schoolmaster or poor widows, then the Court of Chancery ought not to direct it to any other purpose but such as is pointed at by the will."

I mark this; because it is not immaterial as to some of the late doctrine of the court.

> "As if a devise should be for such school as he should appoint, and appoints none, the court may apply it for what school they please: but for no other purpose than a school; although it may be for what school the court thinks fit."

If there is any authority in this case, it goes a length that leads one a little to doubt it, that, if the disposition is for such general charitable use as the testator shall appoint and he does not appoint, that is a gift in præsenti to operate at his death to give to charity, reserving only to himself to particularise in futuro by what mode that general charitable purpose shall be executed, and illustrating it by that case of such school as the testator shall appoint, that that will authorise the court to say that he meant a school, though with that discretion, and that he meant only to reserve to himself the opportunity of selecting some school. That was going a great length.

In *Clifford* v. *Francis* (7), the doctrine is laid down that when money is given to a charity, without expressing what charity, there the King is the disposer of the charity; and a bill ought to be preferred in the Attorney-General's name. I cite this to show that it contains a doctrine precisely the same as *A.-G.* v. *Syderfen* (2), and *A.-G.* v. *Matthews* (3). So those three cases seem to have established at the year 1679 that the doctrine of this court was that where the property was not vested in trustees, and the gift was to charity generally, not to be ascertained by the act of individuals referred to, the charity was to be disposed of, not by a scheme before the Master, but by the King, the disposer of such charities in his character of parens patriae.

In *A.-G.* v. *Baxter* (8), in 1684, it was alleged that the charity was against law, and, therefore, the right of applying this money was in the King. That doctrine is recognised in other cases, that if the gift denotes a charitable intention, but the object to which the exercise of it is applied is against the policy of the law, the court would lay hold of the charitable intention and execute it for the purpose of establishing some charity agreeable to the law in the room of that contrary to it. That is according to *Da Costa* v. *Da Paz* (9); which I shall mention from LORD HARDWICKE's notes where you will see the ground on which this decree was reversed. If the particular ground on which it was reversed had not occurred, this case would prove that the intention being charity, his primary purpose would be held charitable, and they would not suppose that he would relinquish that, because the secondary purpose could not be answered, but would uphold the general primary purpose by giving that which the testator had so given to dissenting ministers, to Chelsea College. Certainly in *Da Costa* v. *Da Paz* (9) LORD HARDWICKE followed that.

This sort of decision seems to have been followed in another case, in 1679, *A.-G.* v. *Combe* (10), shortly mentioned in *A.-G.* v. *Guise* (11) (2 Vern. at p. 267), in which case it is said that if a legacy is given to a superstitious purpose or a mistaken religious purpose the court will not apply it to that, but will act upon the supposed intention for charity, and give it to a real religious purpose, as where charity is intended, but a mistaken charity. Thus £10 a year for a weekly sermon on Saturday, at St. Alban's, the preacher to be chosen by the majority of the inhabitants. They thought that a mistaken charity, that it was quite wild, that the

A preacher should be chosen by the majority, but still the purpose was charity and they directed the £10 to be paid to a catechist to preach weekly at St. Alban's on Saturday being named by the bishop of the diocese.

A.-G. v. *Baxter* (8) is mentioned in Lord Hardwicke's note-book thus:

> "The case of Mr. Baxter upon Mayo's will: the decree reversed; not upon anything contradicting the general principle reported to have been stated, but because really a legacy to sixty particular ejected ministers to be named by Baxter, and as if a legacy to those sixty individuals."

Lord Hardwicke, therefore, affirms the principle, but asserts that it was ill applied in the construction of that will.

Da Costa v. *Da Paz* (9) came on in 1754. The report of that case [in Ambler] is not very accurate, attending to the law of the country with regard to superstitious uses. Lord Hardwicke says:

> "I held the donation in this case to be a charitable use; and that it was unlawful and void; that the power of appointing and directing, to what charitable use it should be applied, was in the Crown; and I recommended to the Attorney-General to apply to the King for his Sign Manual, to direct to what charitable use it should be applied."

The ground, therefore, does not connect itself with that dictum in Ambler as to a superstitious use. Lord Hardwicke held it void, but that it was given to a charitable use, and being so given, though to one unlawful and void, the Crown had the right, which must be on the principle that the testator's intention of charity was the principal intention, that he meant at all events some charity, that his unlawful purpose was a mode of disappointing it, and that the mode, therefore, was out of the question and the intention should be carried into effect by another mode.

These cases do not appear necessarily to trench upon some of the later authorities in this court, which, however, I admit are not very reconcilable with some others, particularly *A.-G.* v. *Bowyer* (12), and Wilmot, C.J., goes very fully into the doctrine in his advice to Lord Camden. But these cases do not necessarily trench upon the later authorities. I allude to *A.-G.* v. *Bishop of Oxford* (13) (the case of Wheatley Church), and some cases before Buller, J., and Lord Alvanley, where the cy-près doctrine is said to have been formerly carried to a monstrous length, in later cases much restrained, for in those cases the charity was given to a lawful, not an unlawful, use, but from circumstances it could not be applied, and it was held that, there being a charitable intention and lawful, if you could not apply it to that, you should not to another lawful use, inferring a general intention of charity. I do not go through all the cases, viz., *Baylis* v. *A.-G.* (14), or *White* v. *White* (1) where the gift was to such lying-in hospital as the executor should appoint. In the former case a blank left for the name of the person according to whose will the £200 was given to Bread Street ward was not filled up, and in the latter the executor to appoint the lying-in hospital was not named, or where several particular charities are named and the distribution is given to a person who dies before the testator, for they are not applicable to a case where it is given by the general term "charity."

Those cases are decided on principles, which both Lord Thurlow and Mr. Mansfield in the argument of *White* v. *White* (1) state very fully to have gone upon this, and, considering the principle, those decisions have not gone far in disappointing the next of kin, only holding that the testator having expressly said he meant to give to Bread Street ward, to some lying-in hospital or to some of the particular charities expressly named, the selection of the objects in some cases, in others the mode, being left to individuals, the testator had gone a length beyond the testators in cases of the former class, not having left it to that person to say what charity, but having decided that himself, leaving him only the selection of some objects by the determination of the mode by which some individuals selected

by him, should take. In *White* v. *White* (1) MR. MANSFIELD says that the obliteration of the name shall not defeat the intent so as to prevent the money from going to some one or all the lying-in hospitals. It is impossible it should go as it was left, but under all the cases the court will stand in the executor's place and all the rules show great latitude and liberality of construction. WILMOT, C.J., doubts extremely, whether the court ever should have gone the length it has, but says that the court is now bound by precedent. LORD THURLOW in his judgment says, that it has been argued that the court has great extent of jurisdiction in making legacies certain, which were before uncertain. That observation is confined to these charitable legacies. Then referring to *A.-G.* v. *Syderfen* (2) he does not take notice of the circumstance that, though there had been an appointment, it might have been revoked; and the non-existence of it was prima facie evidence of the fact that it was revoked. There was nothing more particular in the charity in *White* v. *White* (1), than that it was to be to some lying-in hospital. *A.-G.* v. *Hickman* (15) is referred to by LORD THURLOW, which case is held very high authority by WILMOT, C.J., in *A.-G.* v. BOWYER (12).

I doubt very much whether the decree in *Wheeler* v. *Sheer* (5) was made on the principle stated by LORD THURLOW. If it was determined on the ground that referring to a future codicil the testator had not by his will determined that he had as yet any charitable purpose, it is directly against some of the passages in FREEMAN [*Anon.* (4)] which I have stated. That doubt I express on the ground that there were two codicils, and in the latter the testator does not repeat that he gave to such charitable uses, but for the uses, trusts, and purposes, generally. That latter codicil, therefore, seems in this respect something like a revocation of the will as to the charitable purpose being dropped by the codicil and the general use and purpose only mentioned, and that reduces the case precisely to what it would have been if by the will only general uses, intents, and purposes, had been mentioned and not charitable purposes. The court does not go on the ground that LORD THURLOW intimates, that they would lay hold of the testator's reference to a future act as showing that his intention for charity was not even inchoate at the date of the will, and, therefore, determined in favour of the next of kin.

A.-G. v. *Hickman* (15) is very strong, and forms the foundation of a great deal of what WILMOT, C.J., says. As that case is reported in EQUITY CASES ABRIDGED, and *A.-G.* v. *Doyley* (16), as there reported, are agreeable to the Register's Book. In the former the bequest is given in a method the testator will not prescribe, but, leaving it to another person, requiring him to take the advice of two other persons. I take it that this case goes a very considerable length, authorised by preceding determinations for charity as particularly favoured, for what anyone was to take, what charity, and by what mode, all this is left totally uncertain by the testator, and he had taken no means to ascertain it, but what had altogether failed by the death of all those persons, and yet the court said that they would entrust themselves with the discretion which was left personally to others upon the ground that charity was the essence and substance and the mode only a shadow. The distinction is very nice between the words used in that case and a gift to such charities as A, B, and C, should appoint if you do not hold that in the latter instance the same doctrine applies, this being clear, that the generality of the term "charity," is no objection to a legacy to charity, and, therefore, there is no ground to say, though the discretion fails in the one case, that it shall not in the other. All the cases show that charity in general is sufficient. By another account of this case from a manuscript note, this is represented as falling from LORD KING.

> "The substance of the charity remains, notwithstanding the death of the trustees before the testator; and though at law it is a lapsed legacy, yet in equity it is subsisting; and here is a sufficient certainty of the testator's intention to revive it. The intention therefore of the party is sufficiently

A manifested, that this charity should continue within 43 Eliz., c. 4 [Charitable Gifts Act, 1601: repealed]."

This case was followed by *A.-G.* v. *Doyley* (16) in which the court said that they would cut the difficulty by a sort of technical rule that equality is equity, and they divided the subject into two moieties, giving one moiety to the relations and the B other to such charitable uses as the court itself should appoint. These cases are pretty fully recognised in the judgment of WILMOT, C.J., which recognises the doctrine of the court, that it sees a general intention for charity in these cases. It is very difficult, I think, seeing that intention to build a Jewish synagogue, to discover an intention to build a foundling hospital rather than that the money should not be applied, but the court has said so always. He states *Da Costa* v. C *Da Paz* (9), distinguishing that, as it was a charitable bequest in the intention of the testator (and I repeat that I should not have discovered that), though of such a nature as not to be permitted, that it was not a superstitious use given to the Crown for its own use, which corrects that dictum in AMBLER. WILMOT, C.J., follows the former cases. He does not say what would become of the fund if the purpose is legal, but it cannot be applied to that purpose, but he says that, if the D purpose is unlawful, these cases authorise the court to say it should be applied to some other charitable purpose, and then it devolves upon the Crown, as parens patriae. I do not state the case of Wheatley Church (*A.-G.* v. *Bishop of Oxford* (13)), and some of LORD ALVANLEY'S later cases, adopting that opinion of LORD KENYON that, if there is a legal purpose, which from circumstances cannot be executed, this court will not carry it into execution cy-près by directing it to any E other purpose. BULLER, J., also held the same doctrine, and that applies to the sort of case where it would be a good personal gift to persons in an hospital, etc., but cannot on account of the Statute of Mortmain or otherwise take place, if it cannot be applied in the mode directed it must fail altogether. All the cases prove that, where the substantial intention is charity, though the mode by which it is to be executed fails by accident or other circumstances, the court will find some F means of effectuating that general intention.

In this case it is not to be argued merely upon Vaston's death. I agree with LORD THURLOW that that makes no difference, for the question is what the testatrix must be taken to have meant if she had died immediately after the will was executed, and it is infinitely difficult to contend, that the court can construe it otherwise because he died in her lifetime than if he had outlived her. It is said G that, if he had, he would have had all his life to select the charities. I doubt that extremely. It is assuming the question. The court at least would call upon him to act. *A.-G.* v. *Gleg* (17) proves that. The question would arise exactly in the same way, for, if he had survived her, had addressed himself to the execution of the trust, and had died suddenly while about it and before he had completed it, the mode would have failed precisely as by his death before her, for, unless the H means by which it is to be executed were effectuated by his act, the circumstance of his dying before her can make no difference as to the question whether the court will supply other means. The question results upon the whole: Did she intend he should be a trustee for charity?

If these authorities are to stand, though I had for ten years a strong persuasion upon this will that she meant, the objects should be selected by him only, I must I check such conjectures by attention to the rules upon which the court acts with regard to charities, and I am reluctantly driven to say there is no substantial difference between these words in which she has bequeathed to Vaston to dispose in such charities as he shall think proper, and the words, in which it was expressed in *A.-G.* v. *Hickman* (15). Those cases call upon me to say that the general intention of this testatrix, who seems to have been saturated and satiated with the idea of charity and yet not to have had mind enough herself to determine upon the particular objects, was to devote her property to charity, and according

to these precedents Vaston was only the means and instrument by which that general intention was to be executed, and, therefore, this court will carry that general intention into effect.

The next question, by what means that is to be done, is a most difficult question, for, it being established that where money is given to charity generally and indefinitely, without trustees or objects selected, the King, as parens patriae, is the constitutional trustee, it is very difficult to raise a solid distinction between an original gift absolutely indefinite and without qualification and a case in which by matter ex post facto the gift stands before the court in consequence of that accident as if it had been originally given indefinitely without any means for carrying it into execution prescribed. All I can say upon it is that I do not know what doctrine could be laid down that would not be met by some authority on this point, whether the proposition is that the Crown is to dispose of it or the Master by a scheme. In *Cook* v. *Duckenfield* (18) it appears by the Register's Book to have been executed by a scheme before the Master. There the means prescribed by the testator could not be followed, and the court took upon itself to execute it by a scheme before the Master, not, as represented in the report of *A.-G.* v. *Herrick* (19), by Sign Manual. *A.-G.* v. *Herrick* (19) was a case of an estate vested in trustees. They were to sell, receive the money, and apply it to some particular purposes and then to charitable uses. In the natural construction you would say that they were to determine what charitable uses under the ordinary control of this court.

Cook v. *Duckenfield* (18) is there referred to, and another case in 1743 is there stated as from LORD HARDWICKE'S notes, that there being no particular charity, His Majesty may dispose of the £400 to such charity as he shall think fit. I cannot collect what that case was, nor can I find the passage referred to in LORD HARDWICKE'S notes. *Da Costa* v. *Da Paz* (9) is by no means given in the words of LORD HARDWICKE'S notes, as it there purports to be. *A.-G.* v. *Peacock* (3) is mentioned, which, I have no doubt from the date, was the case upon Frier's will. It was difficult to say there that the trustees were to determine what poor people were to take; recollecting what the law did upon uses so expressed, you cannot well call them trustees for the poor. The Lord Chancellor concluded that he would apply to His Majesty, as LORD NOTTINGHAM did in *A.-G.* v. *Peacock* (3). The difficulty upon this case is that it seems a devise to trustees still existing, and that the meaning was that the distribution should be by them if they thought proper, but LORD APSLEY thought otherwise, and that property was disposed of, as I have stated. In the other cases, where all the trustees are dead, in others, where some of them are dead, the discretion being wholly or partly gone, or, where the trustees surviving would not act, or where some would and others would not, yet the court in a great number, if not in all, those instances, did by a scheme distribute the fund. The run, therefore, of the cases, with the exception of the last, that have occurred rather import that where originally a trust is created for the distribution of a charity and the trust is not carried into execution because it was originally a trust, and not in a strict sense, a general, indefinite, gift to charity, general and undefined, or to the poor in general, the court would execute it by a scheme, and in the case I put of Vaston's surviving the testatrix and partly executing and dying before he had completed the execution, the question would come to this, whether the court should supply the defect, or, on the other hand, whether the court would carry on that which it might have taken into its own hands if a bill had been filed against Vaston and he had begun to execute in consequence and had not lived to finish it. The question there would have arisen whether the court should take it upon itself, as it would, controlling his discretion, if he had lived, and whether the court might not have gone on itself to select the objects. LORD THURLOW seems to have thought there was a ground for distinguishing it. There is a singular expression used by him in one of the cases: "the property becoming fiscal." Yet, he seems to have thought that, if Vaston in the

A execution of his duty according to a sound construction of his right had excluded certain persons, that would have been controlled by this court. I allude here to the recommendation about poor clergymen. It the question was drily on whether that makes him a trustee for poor clergymen, it is very difficult to say that it does in a strict sense, for, if words of recommendation are not to be taken to be imperative unless the objects and the subject are certain: see *Malim* v. *Keighley* (20); B it is difficult to say that, if recommendation is mounted on a gift purely discretional where the subject is wholly uncertain, that shall be a trust. Lord Thurlow thought it necessary for him to apply the strict question, trust or no trust, but on the principle, very strongly stated in *A.-G.* v. *Gleg* (17), that, however extensive, this court would control the discretion. Lord Thurlow seems to think that a due exercise of the discretion would entitle the court to call on him C to attend to the recommendation, and accordingly in the decree directs the scheme to have regard to that recommendation, and, if Vaston had been alive, I think he would have directed Vaston to have the same regard. I doubt whether, if the decree upon the principles attaching to charitable uses must have called upon the trustees, it can be said that, because the trustee is dead, the court is not to make a decree ordering such direction, for no such order could be given to the D King executing by Sign Manual.

Therefore, I rather think, the decree is right. I have conversed with many persons upon it. I have great difficulty in my own mind, and have found great difficulty in the mind of every person I have consulted, but the general principle thought most reconcilable to the cases is that, where there is a general indefinite purpose, not fixing itself upon any object, as this in a degree does, the disposition E is in the King by Sign Manual, but where the execution is to be by a trustee with general or some objects pointed out there the court will take the administration of the trust. It must be recollected that I am called on to reverse the decree of a predecessor, and of a predecessor who, all the reports inform us, had great occasion to consider this subject. I should hesitate with reference to that circumstance, but where authority meets authority and precedent clashes with precedent, F I doubt whether I could make a decree more satisfactory to my own mind than that which has been made. I have the less difficulty from the doctrine hinted at in *A-G.* v. *Matthews* (3) as the doctrine of the constitution of the country, and this is also the language of Wilmot, C.J., that whether this court, or the King by Sign Manual, executes it, the constitution finds a trustee in the court or the King to act in the one case as the court would act, and, considering the King parens G patriae, as one who would act exercising a discretion with reference to the intention. Therefore, there would not be, as there ought not, any difference in the execution, and I am delivered from the anxiety I should feel from the consideration that I should be taking away from the natural expectations of those whose disappointment I regret as much as anyone, for those whose duty it would be to advise the Crown would think themselves equally bound to attend to the particular object.

H On this ground I am of opinion the decree is right, at least so far that I am not disposed to do that in effect which no judge will in terms take upon himself to reverse decisions that have been acted upon for centuries. If this decision is wrong and if this strange doctrine, as I should have called it if I had sat here two centuries ago, that you can find a charitable purpose in a purpose that is to fail altogether can be shaken, I can do no more than allow them to go to a higher I tribunal, and I have some consolation from the precedent given by Lord Thurlow, and the recommendation of Lord Rosslyn to re-hear the cause, in being enabled to say the experiment should be made without expense to the parties. I support the decree, therefore, giving the costs of all parties as between attorney and client, out of the fund.

On Mar. 5, 1807, the decree was affirmed on an appeal to the House of Lords.

Petition refused.

LOWES *v.* LUSH

[Rolls Court (Sir William Grant, M.R.), February 15, 1808]

[Reported 14 Ves. 547; 33 E.R. 631]

Specific Performance—Sale of land—Contract—Refusal of decree—Act of bankruptcy by vendor—Purchaser unable to show debt.

An act of bankruptcy is a sufficient objection to a vendor's title without the purchaser showing a debt on which a commission could issue.

Where, therefore, the vendor had assigned all his effects prior to a sale of land, the purchaser was not compelled to perform the contract even though he could prove a debt on which a commission might issue.

Notes. Applied: *Smith* v. *Death* (1820), 5 Madd. 371. Considered: *Pryke* v. *Waddingham* (1852), 10 Hare, 1. Referred to: *Franklin* v. *Brownlow* (1808), 14 Ves. 550; *Pott* v. *Turner* (1830), 6 Bing. 702; *Jennings' Trustee* v. *King*, [1952] 2 All E.R. 608.

As to conditions precedent to a decree of specific performance, see 36 Halsbury's Laws (3rd Edn.) 310 et seq.; and for cases see 40 Digest (Repl.) 223 et seq.

Cases referred to:

(1) *Marlow* v. *Smith* (1723), 2 P. Wms. 198; 24 E.R. 698; 40 Digest (Repl.) 160, *1228*.

(2) *Cooper* v. *Denne*, *Denne* v. *Cooper* (1792), 4 Bro. C.C. 80; 1 Ves. 565; 29 E.R. 788; 40 Digest (Repl.) 160, *1230*.

(3) *Sheffield* v. *Lord Mulgrave* (1795), 2 Ves. 526; 30 E.R. 758, L.C.; 44 Digest (Repl.) 85, *688*.

(4) *Roake* v. *Kidd* (1800), 5 Ves. 647; 31 E.R. 785, L.C.; 40 Digest (Repl.) 160, *1240*.

Bill for specific performance.

The defendant agreed to purchase land from the plaintiff. Under the usual reference as to the title an objection was taken on behalf of the defendant as purchaser, on a deed of assignment of all his effects executed by the plaintiff with a view to the sale, as amounting to an act of bankruptcy. On that ground an exception was taken by the defendant to the Master's report in favour of the title, the plaintiff in his examination having sworn that he owed no debt on which a commission of bankruptcy could issue.

Sir Samuel Romilly, *Fonblanque* and *Owen* for the defendant, supported the exception: The court will not compel a purchaser to take a doubtful title: *Marlow* v. *Smith* (1); *Cooper* v. *Denne* (2); *Sheffield* v. *Lord Mulgrave* (3); *Roake* v. *Kidd* (4), as this must now be by the effect of the deed that has been executed. It is sufficient for a purchaser to show, as an objection to the title, that an act of bankruptcy has been committed. He need not show that there was a debt on which a commission might have issued. It may be impossible for him to establish it, but it is equally impossible to ascertain that there is no debt, and when the purchase has been completed, a creditor may come forward whose debt may be made the foundation of a commission. The assertion that there is no such debt rests only on the evidence of the vendor himself.

Richards, *Hart* and *Cooke* for the plaintiff, proposed a reference to inquire whether there was any debt on which a commission might issue.

Sir Samuel Romilly in reply: A reference would not give the purchaser security because a creditor might come forward at a future time, and would not be bound, as in the case of an advertisement for creditors, to come in under a decree.

SIR WILLIAM GRANT, M.R.—I take all the parties to be equally innocent. They were under a common mistake as to the proper mode of carrying into execution

their common purpose. In endeavouring to effect it a deed has been executed, which, according to the determinations, operates as an act of bankruptcy. If a trader has committed an act of bankruptcy, a serious question arises whether the court will oblige a purchaser to take the title from him on the mere possibility that the act of bankruptcy may never produce any effect. Many acts of bankruptcy have been committed without any consequences arising by which a purchaser could be affected. However, until the time fixed by the Act of Parliament has expired, it is extremely difficult to give any assurance that he has got an available title, not merely a marketable title, but one which he can take with reasonable safety.

Then the question is whether by the means proposed, this purchaser would arrive at that certainty. If the plaintiff can, with precision, ascertain that there is no creditor who can take out a commission, there is an end of the force of the objection; but the difficulty is, by what process that can be ascertained. It is truly stated that even under a reference to inquire what debts were owing by the plaintiff at the time when he executed this deed, a report that there were none would not give such an assurance. What obligation is there on any creditor to come in before the Master? How, by not coming in, would he be barred from the remedy which the law gives him by taking out a commission? A report that no creditor had appeared on the advertisement, would not give security to the title.

Therefore, though it is unfortunate for this plaintiff who has entered into a fair agreement, yet it would be as hard on the other hand that the purchaser should be obliged to take a title which the court cannot warrant to him.

Exception allowed; bill dismissed.

Ex parte LANGSTON

[Lord Chancellor's Court (Lord Eldon, L.C.), August 15, 1810]

[Reported 17 Ves. 227; 1 Rose, 26; 34 E.R. 88]

Mortgage — Equitable mortgage — Deposit of title deeds — Further advances comprised in security.

A mere deposit of title deeds upon an advance of money without a word passing gives an equitable lien. Evidence is admissible to establish an agreement that further advances are to be covered by the security, and such agreement, even though by parol, will be effective.

Notes. Considered: *Re Hewett, Ex parte Hooper* (1815), 1 Mer. 7. Applied: *Re Burkill, Ex parte Nettleship* (1841), 2 Mont. D. & De G. 124. Followed: *Maughan* v. *Ridley* (1863), 2 New Rep. 58. Applied: *Re Trethowan, Ex parte Tweedy* (1877), 46 L.J. Bcy. 43. Followed: *Re McMahon, McMahon* v. *McMahon* (1886), 55 L.T. 763.

As to equitable mortgages, see 27 Halsbury's Laws (3rd Edn.) 165 et seq.; and for cases see 35 Digest (Repl.) 296, 297.

Petition by creditors praying that money produced by the sale of certain premises over which they claimed an equitable lien for the whole of their debt might be paid to them, and that they might be admitted to prove for the residue.

The petition of Langston & Co., bankers, stated that on June 13, 1810, the petitioners, who had been the bankers of Joshua and Edward Knight, carrying on business in partnership as corn-factors, at the request of Edward Knight, the surviving partner, advanced £4,000 on account of the partnership above the amount of their property in the hands of the petitioners; relying on their

credit, and on the faith of Knight's assurances that the advance should be covered the next day. On Wednesday, June 14, the petitioners received £1,800; and in the evening of that day Knight, with Henderson, the executor of Joshua Knight, and Gillies, their friend, called on the petitioners and represented to Boycott, one of them, that they were safe as to any money advanced to the firm of Knights, at the same time paying £2,200 by drafts of Henderson and Gillies on their bankers: Henderson stating that the petitioners would be perfectly safe in any accommodation they might give on account of the Knights, as Joshua had left considerable funded property which would be sold as soon as probate could be obtained for the purpose of any advances which the petitioners might make in the interim: Knight said that he had £900 to pay the next day, which he hoped Boycott would honour, which he promised, expressing a wish at the same time for some collateral security to justify him to his partners; upon which Knight immediately proposed to send to the petitioners the leases of their warehouses at Horsleydown, which he stated to be worth at least £8,000, in order that the same might be left and deposited with the petitioners as a security for their advances on account of Joshua and Edward Knight; which proposal was agreed to by Henderson.

The petition further stated that the petitioners, being thus fully satisfied of the solidity of the firm, paid a draft accordingly in favour of Gillies for £921 3s. 1d. On June 15 Henderson called and stated the situation of the Knights, showing a written statement, viz., £20,000 stock; saying that Joshua Knight had left besides considerable property, about £25,000, out of business; giving otherwise a very favourable account of the circumstances of the partnership; adding that he had himself lent them £1,200, and would lend them more if convenient to him. Knight brought the leases which he in the presence and with the approbation of Henderson delivered to Cazalet, one of the petitioners, as a security for the advances which they might make on account of the firm of Joshua and Edward Knight: Henderson stating that it would be necessary to provide for their drafts until the Monday or Tuesday following, when the probate would be ready and the stock should be positively sold to replace any sums the petitioners might advance. On June 16 Knight represented to the petitioners that £5,000 would be necessary for the payments he should want to make that week; and the petitioners accordingly advanced £5,000 upon the faith of the assurances and securities aforesaid. On Saturday, June 17, about four in the afternoon Knight called again, desiring to have £2,000 more, which he assured the petitioners should certainly be repaid on Tuesday, June 20, as Henderson had actually sold stock which would be transferred and paid for on that day, to the amount of £5,000. The petitioners at first refused: but on Knight's solemn assurance that it would be repaid on Tuesday, or, even in case it should not, that the security in the hands of the petitioners was worth from £7,000 to £8,000, and, therefore, at all events they must be secure in such advance, they advanced £2,000 in full confidence that the security which they held as aforesaid would protect them; relying also on the assurances they had received from Henderson as to the solvency and property of the parties and the repayment of their advances on the following Tuesday.

The petition further stated that, no provision being made for the repayment, the petitioners on Tuesday, June 20, required from Henderson and Knight, that Knight, in whom, as surviving partner, the leasehold premises were vested, should give the petitioners a confirmation of their security upon those premises for the whole of their advances; on which a memorandum, dated June 20, was signed by Knight, stating that on June 14 Knight with the consent of Henderson, executor of Joshua Knight, deposited with the petitioners the title deeds, etc., as a security to them for the sum of £4,000, which Langston & Co. then advanced and paid for the said firm, and on the security whereof other and further advances had been since made by Langston & Co. to and on account of the said firm, amounting to the further sum of £3,300. Knight agreed to charge and subject the said title deeds and premises with the payment of the moneys aforesaid, and interest; and also to make such

A further security thereon for the said moneys and interest as Langston & Co. should require "and which the said Edward Knight doth hereby ratify and confirm."

On June 23 a commission of bankruptcy issued against Knight on an act of bankruptcy committed on June 20. The petitioners claimed an equitable lien for the whole of their debt; stating also, that £1,200, part of the further advances, was borrowed to repay that sum which had been lent by Henderson, who on June 14 and B 15 had reason to alter his opinion as to the affairs of Knight; and had then determined not to sell the stock, as executor; and that the representation in the memorandum that the deposit was made as a security for the sum of £4,000 was at the instance of Henderson.

The prayer of the petition was that the money produced by the sale of the premises, which had taken place by agreement, might be paid to the petitioners; C and that they might be admitted to prove the residue of their demand under the commission. The statement in the memorandum of June 14, as the date of the deposit, was admitted to be a mistake.

Sir Samuel Romilly for the petitioners.
Sir Arthur Piggott and *Trower* for the assignees.

D **LORD ELDON, L.C.**—If this paper, dated June 20, the day on which the act of bankruptcy was committed, contains nothing that is not consistent with the present representation of these creditors, that circumstance, though it will not effectually confirm their representation, cannot possibly have any effect to their prejudice. It has been long settled that a mere deposit of title deeds upon an advance of money, without a word passing, gives an equitable lien; and, as the court would infer from E that deposit that the money, then advanced, should be charged, as if there was a written agreement, there is no doubt that, if it was made out by oath uncontradicted, additional advances, would also be charged. It is not probable that a person, having made an advance upon a security which he holds, should make further advances without security. The petition states the conversation when the last advance of £2,000 was made: Knight, after his solemn assurance that it would be F repaid on Tuesday, adding, that in case it should not, the security in the hands of the bankers was worth from £7,000 to £8,000, and, therefore, at all events they must be secure in such advance: a representation of the borrower that the person lending would be safe in all events upon the security he held; and the advance upon the confidence of that representation is surely equivalent to an express agreement, by parol at least, that, if he did advance, he should hold the security for the amount. G Then, no provision being made for re-payment, the creditors call for a confirmation of their security, and an instrument is signed, which on the face of it is perfectly consistent with what is sworn; not only stating that the advances were made on the security of the premises, but purporting to be a ratification. Then, this being sworn positively, and without contradiction, I am perfectly satisfied that the petitioners are entitled to hold this security for their debt.

Order accordingly.

CLEGG *v.* LEVY

[COURT OF KING'S BENCH (Lord Ellenborough, C.J.), January 11, 1812]

[Reported 3 Camp. 166]

Conflict of Laws—Contract—Foreign contract—Stamp—Necessity for stamp if document produced in English court—Proof of foreign law requiring stamp.

If a stamp is necessary to the validity of an agreement made in a foreign country, the agreement cannot be received in evidence in the English courts without the stamp. If the law of the foreign country requiring the stamp is in writing, an authenticated copy must be produced.

Notes. Considered: *De Bode's Case* (1845), 8 Q.B.D. 208. Referred to: *Republica de Guatemala* v. *Nunez*, [1927] 1 K.B. 669; *Re Delhi Electric Supply and Traction Co.*, [1953] 2 All E.R. 1452.

As to formalities of foreign contracts, see 7 HALSBURY'S LAWS (3rd Edn.) 71, 72; and for cases see 11 DIGEST (Repl.) 429, 430.

Case referred to:

(1) *Inglis* v. *Usherwood* (1801), 1 East, 515; 102 E.R. 198; subsequent proceedings sub nom. *Bohtlingk* v. *Inglis* (1803), 3 East, 381; 102 E.R. 643; 39 Digest (Repl.) 762, *2393 et seq.*

Action for goods sold and delivered.

The principal defence set up was a partnership between the plaintiff and the defendant in respect of the goods in question. To prove this, an unstamped agreement was put in which had been signed by the parties at Surinam. The witness who proved the plaintiff's signature to it had resided as a merchant in Surinam, and stated that, in that colony, all agreements must be stamped to be of any validity, and that there was a written law of the colony to that effect.

Topping and *Comyn* for the plaintiff.

Garrow and *Lawer* for the defendant.

LORD ELLENBOROUGH, C.J.—I should clearly hold that, if a stamp was necessary to render this agreement valid in Surinam, it cannot be received in evidence without that stamp here. A contract must be available by the law of the place where it is entered into, or it is void all the world over. But I must have more distinct evidence of the law of Surinam on this subject than the parol examination of a merchant. The law being in writing, an authenticated copy of it ought to be produced. Although this gentleman supposes that it applies to all agreements, it may possibly contain an exception, like our own Stamp Act, as to agreements for the sale of goods, wares and merchandises. In *Inglis* v. *Usherwood* (1), respecting the right to stop in transitu in Russia, LORD KENYON, C.J., required the written law of Russia on this subject to be given in evidence. I will, therefore, admit this agreement to be read, unless you prove in the same way that, by the law of Surinam, a stamp was necessary to give it validity.

The agreement was read accordingly, but did not apply to the goods in question.

Verdict for plaintiff.

CLIFFORD *v.* BRANDON

[Court of Common Pleas (Sir James Mansfield, C.J.), Michaelmas Term, 1809]

[Reported 2 Camp. 358; 170 E.R. 1183]

Theatre—Applause or hissing—Right of audience—Persons visiting with settled intention to hiss—Conspiracy—Admission of public—Right of proprietors to fix charges.

The audience at a theatre has a right to express by applause or hisses the sensations which naturally present themselves at the moment as the result of the presentation of a play, but if any body of persons were to go to the theatre with the settled intention of hissing an actor, or even of damning a piece, there can be no doubt that such a deliberate and pre-concerted scheme would amount to a conspiracy and that the persons concerned in it might be brought to punishment. The proprietors of a theatre have a right to manage their property in their own way, and to fix what charges for admission they think most to their advantage.

Riot—Tumult and disorder to effect object—Need of personal violence or damage to property—Rioter—Person encouraging or taking part in riot.

If persons endeavour to effect an object by tumult and disorder, they are guilty of a riot. It is not necessary, to constitute this crime, that personal violence should have been committed or that property should have been damaged. If any person promotes, encourages, or takes part in a riot, whether by words, signs, or gestures, or by wearing the badge or ensign of the rioters, he is himself to be considered a rioter, and he is liable to be arrested for a breach of the peace. All concerned are principals.

Notes. Referred to: *R.* v. *Stainer* (1870), 39 L.J.M.C. 54; *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1889), [1891-4] All E.R. Rep. 278; *Allen* v. *Flood*, [1895–9] All E.R. Rep. 52; *Quinn* v. *Leathem*, [1900–3] All E.R. Rep. 1; *Said* v. *Butt*, [1920] All E.R. Rep. 232; *R.* v. *Newland*, [1953] 2 All E.R. 1067.

As to rout and riot, see 10 Halsbury's Laws (3rd Edn.) 587–590, and as to the rights of theatre audiences, see ibid., vol. 37, p. 9. For cases see 15 Digest (Repl.) 791–795; 45 Digest (Repl.) 194–198.

Action for damages for assault and false imprisonment.

The first count of the declaration stated that the defendant made an assault upon the plaintiff in a public theatre, the Theatre Royal, Covent Garden, seized and laid hold of him and struck him a great many violent blows, and compelled him to go out of the theatre along a street to a police office, and detained him in prison there, without any reasonable or probable cause. The second count was for false imprisonment generally, and the last for a common assault.

The defendant denied liability. In his defence he said that at the material time the theatre was a public theatre in which the proprietors had lawful licence, power, and authority to present tragedies, comedies, operas, plays, and farces, and to take reasonable sums of money as the prices of admission to the theatre from persons wishing to see and hear the performance of plays. On the day in the declaration mentioned the plaintiff, with other persons to the number of three and more, during the performance of a play, unlawfully made or caused to be made a great noise, riot, disturbance and tumult in the theatre for the purpose of compelling the proprietors of the theatre to reduce the prices of admission into certain parts of the theatre. The defendant, as the servant of the proprietors of the theatre and by their command, gave charge of the plaintiff in the theatre to one S.T., who was a constable and peace or police officer duly authorised to take such charge, to be by him taken and carried before a magistrate to be examined touching and concerning the said riot and breach of the peace and to be dealt with according to law. For that purpose S.T. took the plaintiff in custody

before Mr. James Read, one of the justices, to be examined concerning the said offence and to be dealt with according to law. The plaintiff was necessarily detained in custody and imprisoned until he was discharged.

It appeared in evidence that the plaintiff, Mr. Clifford, a gentleman of great eminence at the Bar, on Oct. 31, 1808, between 9 and 10 p.m. went into the pit of Covent Garden Theatre which had been lately rebuilt. On this, as on every night from the first opening of the house, great noise and confusion prevailed on account of the prices of admission to the pit and boxes being raised, and the public being excluded from a number of boxes which were let to particular individuals for the season. The performance on the stage was inaudible. The spectators sometimes stood on the benches, and at other times sat down with their backs to the performers, while the play was being presented. "God Save the King!" and "Rule Britannia!" were sung by persons in different parts of the theatre, horns were blown, bells were rung, and rattles were sprung, placards were exhibited exhorting the audience to resist the oppression of the managers, and a number of men wore in their hats the letters "O. P." or "N. P. B." meaning "Old Prices" and "No Private Boxes." Although there were some sham-fights in the pit, no violence was offered to any person either on the stage or in any other part of the house, and no injury was done to the theatre or any of its decorations. When Mr. Clifford entered, there was a cry of: "Here comes the honest counsellor!" and, a passage being made for him, he seated himself in the centre of the pit. Soon afterwards, a gentleman asked him, if there was any harm in wearing the letters "O. P." He answered "No." The gentleman then asked him, if he had any objection to wear them himself. He said he had not. The letters "O P.." were then placed in his hat, and he put it on thus ornamented. He continued, however, to sit without taking any part in the disturbance, and he persuaded a person who was near him to desist from blowing a trumpet. Having conducted himself in this quiet manner while he remained in the theatre, he was retiring from it. Whether the performance was entirely over at the time, did not certainly appear. When he had got about two yards from the pit door, where the money is received, the defendant, who was box-keeper to the theatre, ordered him to be taken into custody. A constable, accordingly, laid hold of him, and carried him to the police office in Bow Street before Mr. Read the magistrate presiding there, but nothing being proved against him, except that he wore "O. P." in his hat, after being detained about half an hour, he was set at liberty.

Serjeant Best, *Serjeant Runnington*, *C. Warren*, and *C. Runnington* for the plaintiff.

Serjeant Shepherd, *Serjeant Lens*, and *Gurney* for the defendant.

SIR JAMES MANSFIELD, C.J.—The first question for the consideration of the jury will be whether the plaintiff was instigating a riot in Covent Garden Theatre on the evening in question, and then they must determine whether he was arrested while the riot continued.

As to the existence of a riot in the house, no doubt can be entertained. It appears that for a great many nights there were riots there of such a nature as go to put an end altogether to dramatic representation. I cannot tell upon what grounds many people conceive they have a right at a theatre to make such a prodigious noise as to prevent others from hearing what is going forward on the stage. Theatres are not absolute necessaries of life, and any person may stay away who does not approve of the manner in which they are managed. If the prices of admission are unreasonable, the evil will cure itself. People will not go, and the proprietors will be ruined unless they lower their demands. But the proprietors of a theatre have a right to manage their property in their own way, and to fix what prices of admission they think most for their own advantage. It is said that, if the prices asked are considered too high, people have a right to express their disapprobation in the tumultuous manner they have adopted. From this

A doctrine I must altogether dissent. If the proprietors have acted contrary to the conditions of the patent, the patent itself may be set aside by a writ of scire facias in the Court of Chancery. The private boxes furnish as little ground for violence. The house is the property of a certain number of individuals, to be used by them according to their own discretion. I conceive it quite impossible that anything which has been done by the managers in raising the prices, or making B some of the boxes private, can be any sort of justification in point of law for such scenes as took place on the night in question—scenes which are a disgrace to the country and tend to bring us back to a state of barbarism.

If questions of this sort are to be decided by multitudes of people assembling tumultuously and behaving in such a manner as to frighten decent members of society from going to the theatre, there will be an end of the law. It is time for C the public to understand that the proceedings which have lately taken place at this theatre are in a high degree illegal, and that all those who participate in them are liable to be punished severely in proportion to their offences. These premeditated and systematic tumults have been compared to that noise which has been at all times witnessed at theatres in the immediate expression of the feelings of the audience upon a new piece, or the merits or defects of a particular D performer. The cases, however, are widely different. The audience have certainly a right to express by applause or hisses the sensations which naturally present themselves at the moment, and nobody has ever hindered, or would ever question, the exercise of that right. But if any body of men were to go to the theatre with the settled intention of hissing an actor, or even of damning a piece, there can be no doubt that such a deliberate and pre-concerted scheme would amount to a E conspiracy, and that the persons concerned in it might be brought to punishment.*

If people endeavour to effect an object by tumult and disorder, they are guilty of a riot. It is not necessary, to constitute this crime, that personal violence should have been committed, or that a house should have been pulled in pieces. I am clearly of opinion that the scenes which have been described amount to a riot. How can it be said there was no terror? Would any of the jury allow their F wives or daughters to go to the theatre during these disturbances? Must not those who entertain a different opinion upon the matters in dispute, and are friendly to the managers, expect to meet violent ill treatment? The jury will consider, then, whether Mr. Clifford was an instigator of the riot, which one of his witnesses has represented as resembling a quarrel among a thousand drunken sailors. The law is that, if any person encourages or promotes, or takes part in a G riot, whether by words, signs or gestures, or by wearing a badge or ensign of the rioters, he is himself to be considered a rioter, and he is liable to be arrested for a breach of the peace. In this case, all are principals. It is not easy to conceive that the plaintiff had no intention to encourage the rioters. How happened it that at his entrance he was saluted with the exclamation: "Here comes the honest counsellor!" How had he deserved this peculiar panegyric? How came it that a H word from him was sufficient to prevent a man blowing a trumpet? For what purpose did he go to the theatre? Was it to see the play? Why did he wear "O. P." in his hat? Did he not know the meaning of these letters, and, if he did, with what view did he exhibit them but to encourage the mob by his example and to impress upon them the idea they were acting agreeably to law? Upon all these circumstances the jury will exercise their judgments, and consider whether the I plaintiff instigated the riot. If he in any way encouraged the rioters, he is guilty.

We now come to the moment of his apprehension. The rule of law is that a private person cannot arrest another for a mere breach of the peace at a time

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* Macklin, the famous comedian, indicted several persons for a conspiracy to ruin him in his profession. They were tried before Lord Mansfield, and, it being proved, that they had entered into a plan to hiss him as often as he appeared on the stage, they were found guilty under his Lordship's direction, but the prosecutor declined calling upon them to receive the judgment of the court.

subsequent to the commission of the offence without a warrant from a magistrate. But there is some difficulty in determining when this power to arrest actually ceases. Here if the riot had been over a considerable time, the plaintiff had taken the "O. P." out of his hat hours before, and there appeared no immediate danger of the riot being renewed, the defendant had clearly no right to arrest him without a warrant for his past offence. If, however, at the time of the arrest the riot which the plaintiff instigated still continued, I think he may fairly be said, under the circumstances, to have been arrested at the time of committing the offence. There is a contrariety of evidence as to this point, upon which the jury must determine.

The jury, after retiring for some time, found a verdict for the plaintiff, with £5 damages. Being asked for their reasons, the foreman said they thought unanimously that the arrest was illegal, but some of them proceeded on the ground that the riot was over and others that the wearing the letters " O. P." in a theatre was not any instigation to riot.

Verdict for plaintiff.

OUTRAM *v.* MOREWOOD AND WIFE

[Court of King's Bench (Lord Ellenborough, C.J., Grose, Lawrence and Le Blanc, JJ.). February 11, 1803]

[Reported 3 East, 346; 102 E.R. 630]

Estoppel—Estoppel by record—Trespass—Finding on title—Bar to action for injury to same right of possession—Preclusion of parties and privies from contending to contrary of previous finding.

A finding in an action upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession. The estoppel precludes parties and privies from contending to the contrary of that point or matter of fact which, having been once distinctly put in issue by them or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them.

Notes. Explained and distinguished: *Vooght* v. *Winch*, [1814-23] All E.R. Rep. 270. Considered: *Barrs* v. *Jackson* (1842), 1 Y. & C. Ch. Cas. 585. Referred to: *Doe* v. *Huddart* (1835), 2 Cr. M. & R. 316; *Eastmure* v. *Laws* (1839), 5 Bing. N.C. 444; *Jones* v. *Lewis*, [1919] 1 K.B. 328; *Hoystead* v. *Taxation Comr.*, [1925] All E.R. Rep. 56; *Marginson* v. *Blackburn Borough Council*, [1938] 2 All E.R. 539.

As to estoppel by record, see 15 Halsbury's Laws (3rd Edn.) 191 et seq.; and for cases see 21 Digest (Repl.) 202 et seq.

Cases referred to:

(1) *Ferrer's Case* (1599), 6 Co. Rep. 7 a; 77 E.R. 263; sub nom. *Ferrers* v. *Arden*, Cro. Eliz. 668; 21 Digest (Repl.) 274, *480.*

(2) *Incledon* v. *Burges* (1689), Carth. 65; 1 Show. 27; 90 E.R. 642; sub nom. *Ingleton* v. *Burges*, Comb. 166; 11 Digest (Repl.) 22, *255.*

(3) *Basset* v. *Bennett* (1767), cited 3 East, p. 364; 102 E.R. 630; 21 Digest (Repl.) 230, *243.*

(4) *Evelyn* v. *Haynes* (1782), cited in 3 East, p. 365; 102 E.R. 637; 21 Digest (Repl.) 239, *287.*

(5) *Kinnersley* v. *Orpe* (1780), 2 Doug. K.B. 517; 99 E.R. 330; 21 Digest (Repl.) 265, *428.*

Action of trespass against the defendants, for that they broke and entered a

A certain coal mine, or vein of coal, lying under a close of the plaintiff called the Cow Close, or Great Cow Pasture, in the parish of Alfreton in the county of Derby, and dug, took, and carried away coal.

The defendants, Henry Case Morewood and Ellen, his wife, pleaded and showed title regularly brought down to them in right of the wife by fine, recovery, bargain and sale, releases, and descents, from one Sir John Zouch, who in 1597 was seised B in fee of the manor of Alfreton and certain messuages and lands within the manor, under which title the defendants claimed all the coal under those lands except such as was within and under any of the messuages, buildings, orchards, and grounds which, at the time of suffering a certain recovery in the time of Queen Elizabeth, were standing on the said lands and tenements which coal mines, with the exception aforesaid, passed under a bargain and sale from Sir John Zouch C to certain bargainees. The defendants averred that the coal in question was under the lands of that former owner, Sir John Zouch, and was devised by bargain and sale to certain immediate bargainees, and from them to the defendant, the wife, and was not within or under any of the messuages, buildings, orchards, and gardens, which were the subject of the exception. To this plea the plaintiff replied, and was not within or under any of the messuages, buildings, orchards, and D of trespass brought by him against the defendant, the wife, she being then sole, in which he declared for the same trespass as now. To that the wife pleaded, and derived title in the same manner as was now done by her and her husband, alleging that the coal mines in question were at the time of making the before-mentioned bargain and sale by Sir John Zouch part and parcel of the coal mines by that indenture bargained and sold. On which point, viz., whether the coal mines E claimed by the plaintiff and mentioned in his declaration were parcel of what passed under Zouch's bargain and sale to the persons under whom the wife claimed, an issue was taken, and found for the plaintiff and against the wife.

Feb. 11, 1803. **LORD ELLENBOROUGH, C.J.,** delivered the judgment of the court in which he stated the facts and continued: The question is whether the F defendants, the husband and wife, are estopped by this verdict and judgment from now averring (contrary to the title so there found against the wife) that the coal mines in question are parcel of the coal mines bargained and sold by the indenture above mentioned.

The operation and effect of this finding, if it operate at all as a conclusive bar, must be by way of estoppel. If the wife were bound by this finding as an estoppel, G and precluded from averring the contrary of what was then so found, the husband, in respect of his privity, either in estate or in law, would be equally bound, according to what is said in Co. Litt., 352 a.

> "Privies in estates, as the feoffee, lessee, etc.: privies in law, as the lords by escheat, tenant by the curtesy, tenant in dower, the incumbent of a bene- H fice, and others that come in by act in law in the post, shall be bound by and take advantage of estoppels."

The question then is: Is the wife herself estopped by this former finding to aver the contrary? In Brooke's Abr., tit. Estoppel, pl. 15 (who cites Y.B. 33 Hen. 6, fos. 7, 19, and 50) (and see also to same effect, Brooke's Abr., tit. Estate, 158, citing Y.B. 2 Edw. 4, fo. 17), it is said to be

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> "agreed that all the records in which the freehold comes in debate shall be estopped with the land, and run with the land; so that a man may plead this, as party, or as heir, as privy, or by que estate."

But if it be said that by the freehold coming in debate must be meant a question respecting the same in a suit in which the freehold is immediately recoverable, as in an assize, or writ of entry, I answer that a recovery in any one suit upon issue joined on matter of title is equally conclusive upon the subject-matter of such title, and that a finding upon title in trespass not only operates as a bar to the

future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession. In trespass for breaking the plaintiff's close (reported in 3 Leon. 194) the defendant pleaded

> "that heretofore he himself brought an ejectione firmæ against the plaintiff of the same land in which the trespass is supposed to be done, and had judgment to recover; and demanded judgment if against, etc. It was moved that the bar was not good, because that the defendant had not averred his title; and the recovery in one action of trespass is no bar in another, etc. Quod curia concessit. But as to the matter, the court was clear that the bar was good. By PERIAM, J. [PERYAM], whoever pleaded it, it was well pleaded, for as by recovery in assize the freehold is bound, so by recovery in ejectione firmæ the possession is bound. And by ANDERSON, J., a recovery in one ejectione firmæ is a bar in another, especially, as PERIAM, J., said, if the party relieth upon the estoppel. Afterwards judgment was given that the plaintiff should be barred."

This, it will be recollected, was an action of ejectione firmæ, and not an ejectment moulded and regulated by rules of court as it is at present. The court very properly distinguished there between what operates by way of bar to a future recovery for the same thing and what by way of estoppel. That was the case of a mere recovery in ejectione firmæ without title alleged, and the plaintiff might in respect of possession or other varying circumstances of title, be well entitled to recover at one time, and not be so at another. It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury, but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact which, having been once distinctly put in issue by them or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them.

The authorities upon which a contrary doctrine has been endeavoured to be maintained are the opinions of LORD COKE as collected from his preface to his 8th REPORT; the resolution and doctrine in *Ferrer's Case* (1); *Incledon* v. *Burges* (2); to which may be added what passed in court in *Basset* v. *Bennett* (3) upon a motion for a new trial in this court in 1767, and *Evelyn* v. *Haynes* (4), tried at the Surrey Summer Assizes, 1782, before LORD MANSFIELD, and the decision against the estoppel endeavoured to be maintained in *Kinnersley* v. *Orpe* (5). As to the first of these supposed authorities on the subject, viz., LORD COKE's preface to the 8th REPORT, he there laments the multiplicity of suits in one and the same cause, whereon he says:

> "Oftentimes there are divers verdicts on the one side, and divers on the other, and yet the plaintiff or defendant can come to no finite end, nor can hold the possession in quiet, though it be often tried and adjudged for either party."

He adds:

> "In personal actions, concerning debts, goods, and chattels, a recovery or bar in one action is a bar in another; and there is an end of the controversy. In real actions for freehold and inheritance, being of a higher and worthier nature, and standing upon a greater variety of titles and difficulties in law, there could not be above two trials, or at the most (and that very rarely) three; and in the meantime after one recovery the possession rested quiet."

The complaint of LORD COKE is, perhaps, without much foundation, and it is certainly misapplied to the present subject. There must necessarily be a greater or less multiplicity of suits, according to the nature of the suit and the subject

on which it operates. The possession of land is changed much more frequently, and the right to it is capable of an infinitely greater number of modifications and interests, than the right to the freehold. The species of action accommodated to the right of possession, however acquired, and to injuries in whatever manner done thereto, must be, of course, more frequently called into use than other species of action which respect rights of property, either founded on entails or descents from different descriptions of ancestors, and the various acts of wrong by which such special rights are interrupted or destroyed. The judgment, which is the fruit of the action, can only follow the nature of the particular right claimed, and the injury complained of, and can conclude no further than the existence of the right, the injury thereto, and the compensation due for the same.

In trespass, damages for an injury to possession are the only thing demanded by the declaration. The judgment can only give the plaintiff an ascertained right to his damages and the means of obtaining them; it concludes nothing upon the ulterior right of possession, much less of property, in the land (unless a question of that kind be raised by the plea and a traverse thereon), and does not even give him the means of obtaining that possession, for the disturbance of which he has obtained damages. Neither, however, would a verdict and judgment in a real action operate by way of bar to future actions of trespass or bring the parties "to the finite end" wished for by LORD COKE, because there may be, notwithstanding the verdict and judgment in the real action, even in that which is most conclusive upon the right (I mean a writ of right itself) a right of possession derived under the owner of the inheritance in fee simple or those under whom he claims, which may enable a plaintiff in trespass to recover for an injury to his possession done by the very person in whose favour the absolute right of property shall have been affirmed in a real action. A judgment, therefore, in each species of action is final only for its own proper purpose and object, and no further. The judgment in trespass affirms a right of possession to be, as between the plaintiff and defendant, in the plaintiff at the time of the trespass committed. In the real action it affirms a right to the freehold of the land to be in the demandant at the time of the writ brought. Each species of judgment, from one in an action of trespass to one upon a writ of right, is equally conclusive upon its own subject-matter by way of bar to future litigation for the thing thereby decided. Only the matter of the one judgment is in its nature, and according to its class and degree in the order of actions, more conclusive upon the general right of property in the land, than the other. What, therefore, LORD COKE says, that in personal actions concerning debts, goods, and effects (by way of distinction from other actions), a recovery in one action is a bar to another is not true of personal actions alone, but is equally and universally true as to all actions whatsoever, quoad their subject-matters. Besides, this doctrine has no material bearing on the present question which, it must be recollected, is whether an allegation on record, upon which issue has been once taken and found, is, between the parties taking it and their privies, conclusive according to the finding thereof, so as to estop the parties respectively from again litigating that fact, once so tried and found.

As to *Ferrer's Case* (1), which is to be found reported in CRO. ELIZ. 668, sub nom. *Ferrers* v. *Arden*, with a statement of the facts upon which the resolutions reported by LORD COKE at 6 Co. Rep. 7a are founded, it was an action of trover for an ox brought by the plaintiffs and another person then deceased against the defendant, who pleaded a former recovery in trespass for the same cause of action brought by the plaintiffs and the deceased person against three persons who were, jointly with the defendant, guilty of the conversion complained of, but in which former action the present defendant had not been joined. To this plea the plaintiffs demurred. The court upon argument was divided whether the bar were good or not, and no judgment was given, but the matter was ended by arbitration according to the report in CRO. ELIZ. The effect of the resolutions in that case, as reported in 6 Co. REP. 7a, was

"that the law has provided greater safety and remedy for matters of freehold and inheritance than for debts and chattels; for there once barred, always barred,"

but that in matters of freehold the party may bring an action of a higher nature, and therein try the matter again. Although it be true that the same matter may be thus tried again, yet the former judgment is no less conclusive upon the immediate right then in demand as far as that former judgment purports to bind and as against all such parties as it is competent by law to bind. Upon the complaint made by LORD COKE in his preface to the 8th REPORT, which is again repeated in this REPORT, I have observed already, and again observe, that neither the one nor the other of these authorities at all touches the present question, which is that of the effect of a precise allegation made in pleading on record and tried and found between the parties.

Incledon v. *Burges* (2), as reported in 1 SHOW. 27, COMB. 166 and CARTH. 65, was an action of trespass for breaking a close. Plea, a prescriptive right of common of turbary, etc. Replication traversing such prescription. The rejoinder by way of estoppel was that in such a term one of the plaintiffs brought an action of trespass against the defendant wherein he pleaded the same prescription and issue tried upon it, and found for the defendant, and demurrer to the rejoinder. According to SHOWER, the argument in favour of the demurrer against the estoppel was that the parties were different, that there was another plaintiff who was not party to the former suit, and, finally, they took exception to the declaration for not concluding against the peace of both the kings. On this last objection the court determined it, and not on the estoppel. The court, according to SHOWER, gave no judgment on the estoppel, but only said

"an estoppel upon a verdict goes a great way: issue in tail shall never falsify it: but if one man is estopped, and he joins another with him, whether this shall avoid the estoppel is a quære."

The report in CARTHEW only says that the court gave no opinion as to the matter in law, the estoppel, but judgment was given as to the objection taken to the declaration of contra pacem domini regis, and it does not appear to have been argued that it would not have been an estoppel if clear of other objections. In the report in COMB. 166, the argument on the estoppel turned on there being another plaintiff joined. HOLT, C.J., says (Comb. at p. 167) that the meaning

"of *Ferrer's Case* (1) is that it is a bar for the same individual thing; but here is a new cause of action, Y.B. 13 Edw. 4, fos. 2, 3, 4, there one trespass is a bar to another by way of estoppel; that is, for taking a villein; but that is grounded perhaps on the reason of the favour of liberty, Y.B. 7 Hen. 6, fo. 8 [pl. 14]. In trespass on an issue, whether such an one died seised, a verdict was a bar to another action of trespass by way of estoppel, because there issue was joined on a matter in the realty. As to the section of LITTLETON [s. 672] before cited, the joining cannot privilege, as a release by one, who afterwards joins with another; that release is pleadable to both: if this had been in a real action, where there might be summons and severance, there it is admitted it would be an estoppel."

DOLBEN, J., said (ibid. at p. 168):

"*Ferrer's Case* (1) is not like this; for here is a new cause of action, a new trespass; but in *Ferrer's Case* (1) it was another action for the same trespass. And the court was certainly against Tremain."

It must certainly be admitted that the present question in substance arose and might have been decided, but was not decided in *Incledon* v. *Burges* (2), and that the decision proceeded on another ground. It appears that HOLT, C.J., was aware of the case in the YEAR BOOK 13 Edw. 4, fos. 2, 3, 4, of the estoppel pleaded in the action of trespass for taking a villein, and also of the case in the YEAR BOOK 7 Hen. 6,

A fo. 8 [pl. 14], but he certainly is not warranted by anything to be found in the report of Y.B. 13 Edw. 4, in suggesting that the decision in that case was grounded on any reason in favour of liberty, nor, as to Y.B. 7 Hen. 6, fo. 8 [pl. 14], in saying that the estoppel in that case was sustained because there the issue (which was on the dying seised of a certain person) was joined on a matter in the realty.

The only question in the case in the Year Book 13 Edw. 4, was that which was B made by Catesby, i.e., upon the identity of the matter in issue. There by partition the villein, who had been regardant to a manor, was allotted with certain lands to one sister in gross, and the manor to the other sister. The ancestor of the villein had answered in the former suit, in which it had been alleged that he was a villein regardant, that he was free and not a villein in manner and form as alleged, and it was so found. The effect of this finding as an estoppel, which was relied upon by C the plaintiff in that suit (the son of the supposed villein in the former) was rested in argument, not on the ground that it would be no estoppel if the issue were the same, but on the ground of the issue being different, thereby admitting that it would have been an estoppel if the issue had been the same, and of that opinion Brian, J., and the rest of the court seem to have been.

The case in the Year Book 7 Hen. 6, fos. 8, 9, [pl. 14] was this. Assize was D brought against Popham and others, and the plaint was of a mill with other lands and tenements. Popham said that assize ought not to be, for one J. Popham was seised of the tenements, now put in view and plaint in his demesne as of fee and died so seised, after whose death the plaintiff claimed as by force of a lease made to him by the said J. Popham for term of life, whereas nothing passed by the deed, E and he demanded judgment. The plaintiff said that the father of the tenant had nothing but by the disseisin done to the plaintiff, and he made continual claim, and could not enter for fear of death. To which the tenant said that at another time he brought trespass against the plaintiff, in which the plaintiff justified because the father of the tenant leased to him for life, and the tenant said that his father died seised, and this was found for the tenant, and he recovered damages, judgment if he F shall be received to defeat this issue once found. Rolfe, who argued for the plaintiff that he should not be estopped, said:

> "he knew well that the plaintiff should not be received to say that the tenant's father did not die seised, which had been tried in the writ of trespass, but to aver a thing which stands well with the first issue, it seems he shall be received; because it does not follow that if he died seised, therefore he died seised of a G good estate; but we have shown how he died seised."

So that it seems clearly admitted by those who argued against the estoppel that the party was estopped as to the very issue found against him; but not as to other matters consistent therewith, that is, consistent with the fact of dying seised, but avoiding the effect thereof in point of law (that is, avoiding its effect as a descent to toll an entry) by the disseisin, continual claim, and non-entry for fear of death H as alleged. Cottesmore, J. [Cotesmore] then says:

> "In writ of trespass of close broken the issue trenches well enough in the realty; as if the defendant justify his entry by reason of inheritance which he has in the freehold; if this be traversed, this shall be peremptory; and so it was in our case. Popham brought trespass; the [then] defendant pleaded in bar, because of a lease made to him for life, and the plaintiff made title by descent I of the inheritance, which was traversed, and found with the plaintiff; which issue was merely in the realty. Wherefore it seems to me, that the [now] plaintiff shall not be received now to disturb it."

Martin, J. [Martyn], says:

> "As my companion has said, the issue is as high in a writ of trespass, if taken in the realty, as in an assize; and if the present plaintiff in the writ or trespass had traversed the descent as he did, and it had been found with the plaintiff,

and the plaintiff had also brought trespass, should he be permitted to avoid the descent, by such descent as he has now done? I say not. No more shall he be received in this assize, where the plaint is of the same tenements."

The case came on again, Y.B. 7 Hen. 6, fo. 20 [pl. 3], when MARTIN, J., said he thought the plaintiff should be estopped to avoid the descent, for this was found once against him with the now tenants, upon which they recovered their damages, and for this the descent, which was the cause of the judgment and upon which judgment was given, ought to be understood to be a good descent, and especially per ent. primes. [MARTIN, J., said:] There was a like case, where a release was pleaded in bar, and the plaintiff said it was made by duress of imprisonment, and was afterwards nonsuit, and brought a new writ, and the release was again pleaded in bar; and he would have avoided the deed because it was made at a time when he was within age and he was not received so to do, for that when he had said the deed was made by duress, etc., he acknowledged it to be good in all points but that. Likewise in this case, when the descent is found against the plaintiff, it shall be held as acknowledged by him, and, if so, it is to be understood as well acknowledged, as at this time other matter was not shown. COKAIN contended that the continual claim was contrary to the issue; wherefore the averment could not be received. But STRANGWAYS, J., said it was not contrary, and that the averment might be received. He thought that the inquest had only to inquire if J. Popham the father died seised in fact, which they had done, but the matter of law arising from the continual claim was not in charge to them. It seemed to him a marvellous thing to intend a matter upon a verdict necessarily, of which, nevertheless, the inquest had not power to inquire. So that it seems clear that STRANGWAYS, J., who differed from MARTIN, J., thought the finding was an estoppel as far as it went. BROOKE (Abr., tit. Estoppel, 77) says, in his abridgment of this case, which was not decided; "Optima opinio was that it was a good estoppel;" and concludes, "sic vide, issue tried in action of trespass, and judgment given upon this, is a good estoppel in a real action." By this case it appears to have been on all sides then admitted in argument that an issue taken and found upon a traverse of a precise fact, material to the right in question, in an action of trespass, is equally peremptory by way of conclusion as to that same fact, and upon the same right, between the same parties in an assize. The authorities, therefore, which HOLT, C.J., referred to in *Incledon* v. *Burges* (2) would, if further examined, have warranted the court (supposing the difference of parties to have opposed no objection to their so doing) in then giving a judgment upon the point now in question, as well as upon the other point, of contra pacem, etc., on which it was actually given.

As to *Basset* v. *Bennett* (3), in which a new trial was moved for, because a verdict was taken for the defendant both on the general issue and on the plea of liberum tenementum, whereas there was only evidence to support the finding for the defendant on the general issue, and where the new trial is said to have been refused because the court held that the finding on the liberum tenementum would not prejudice the plaintiff as a judgment in a possessory action was not conclusive on real rights. If it were indeed so laid down by the court, the doctrine must certainly be received with some degree of qualification and allowance. The plea would be conclusive that at the time of pleading the plea the soil and freehold were in the defendant, and, if properly pleaded by way of estoppel, it would estop the plaintiff against whom it was found from again alleging the contrary. But if not brought forward by plea as an estoppel, but only offered in evidence, it would be material evidence indeed that the right of freehold was at the time as found, but not conclusive between the parties as an estoppel would be. In that case the proper course would certainly have been for the judge at the trial to have discharged the jury from finding any verdict on the plea of liberum tenementum, on which no evidence was given.

As to the other case relied upon by the plaintiff, in *Evelyn* v. *Haynes* (4), which

A was a second action for obstructing a watercourse tried before LORD MANSFIELD upon a plea of not guilty, a verdict for the plaintiff in another action brought against the defendant for another obstruction to the same watercourse was given in evidence. LORD MANSFIELD held, very properly, that the plaintiff had not obtained such a determination of his right by the former verdict as the law considered as conclusive. It could only be conclusive upon the right if it could have been used, and B were actually used in pleading by way of estoppel, which it could not be in that case (i), because no issue was taken in the first action upon any precise point, which is necessary to constitute an estoppel thereupon in the second action; (ii) it was not even pleaded by way of estoppel in the second action, but only offered as evidence on the general issue, and in order to be an estoppel it must have been, as already observed, pleaded as such by apt averments.

C As to *Kinnersley* v. *Orpe* (5), it is extraordinary that it should ever have been for a moment supposed that there could be an estoppel in such a case. It was not pleaded as such, neither were the parties in the second suit the same as those in the first. The doubt seems rather to be whether the former record in the action of trespass was at all admissible in evidence upon the subsequent action for penalties for fishing under the statute 5 Geo. 3, c. 14, ss. 3, 4 [preservation of fish] against the D defendant, who was no party to the former action, than as to any conclusive effect it could have had if pleaded by way of estoppel, which, however, it was not in that case.

None of the cases, therefore, cited on the part of the plaintiff negatives the conclusiveness of a verdict found on any precise point once put in issue between the same parties, or their privies. The cases adverted to by HOLT, C.J., which have E been fully explained and enforced by the defendant's counsel, together with the other authorities on the subject of protestation and estoppel, cited from BROOKE'S ABR., Protestation, pl. 9, FITZHERBERT, Estoppel, pl. 20, are, in our opinion, as well as upon the reason and convenience of the thing and the analogy to the rules of law in other cases, decisive; that the husband and wife, the defendants in this case, are estopped by the former verdict and judgment on the same point in the action of F trespass, to which the wife was a party, from averring that the coal mines now in question are parcel of the coal mines bargained and sold by Sir John Zouch, and consequently, that the plaintiff ought to recover.

Judgment for plaintiff.

NESBITT AND OTHERS *v.* TREDENNICK AND OTHERS

[Lord Chancellor's Court in Ireland (Lord Manners, L.C.), February 18, 19, 22, 1808]

[Reported 1 Ball & B. 29]

Mortgage—Mortgagee—Mortgage of lease—New lease obtained by mortgagee—Trust for mortgagor—Engrafting new lease on old.

Where a mortgagee, executor, trustee, or tenant for life, obtains an advantage by being either in possession of the property concerned or behind the back of the mortgagor, cestui que trust, or remainderman, he shall not retain it for his own benefit, but shall hold it in trust, and a new lease obtained by such mortgagee, executor, trustee, or tenant for life will be considered as a graft on the old one if there be a remnant of the old lease or a tenant-right of renewal on which the new lease can be engrafted.

Notes. As to the trust relation between mortgagor and mortgagee and parties to other transactions, see 38 Halsbury's Laws (3rd Edn.) 817–822; and for cases see 47 Digest (Repl.) 14, 15, 101–113.

Cases referred to:

(1) *Keech* v. *Sandford* (1726), Sel. Cas. Ch. 61; 2 Eq. Cas. Abr. 741; Cas. temp. King, 61; 25 E.R. 223, L.C.; 47 Digest (Repl.) 104, *749*.

(2) *Lee* v. *Lord Vernon* (1776), 5 Bro. Parl. Cas. 10, H.L.

Also referred to in argument:

Rakestraw v. *Brewer* (1729), 2 P. Wms. 511; Cas. temp. King, 55; Mos. 189; 2 Eq. Cas. Abr. 162, 601; Sel. Cas. Ch. 55; 24 E.R. 839, L.C.; 35 Digest (Repl.) 354, *593*.

Pickering v. *Vowles* (1738), 1 Bro. C.C. 197; 28 E.R. 1080, L.C.; 47 Digest (Repl.) 103, *742*.

Fitzgerald v. *Rainsford* (1804), 1 Ball & B. 37, n.

Bill praying for an order that a lease of Sept. 15, 1794, was to be deemed a graft on an earlier lease and a declaration that it was held in trust for the plaintiffs.

Henry Nesbitt, the plaintiffs' father, being possessed of the lands of Rooskey, which he held under a lease from Gifford Nesbitt (the immediate tenant to the see of Elphin) with a toties quoties clause of renewal, on his marriage in 1758 charged those and other lands with a jointure for his wife. In 1786 he granted them in mortgage to Sir William Newcomen, in 1787 he executed a further mortgage of them to George Nesbitt (one of the defendants), and in 1789 he died, having bequeathed those lands to his younger children, the plaintiffs. The interest of the lessor became vested in C. Downing, a defendant, who, in Michaelmas Term, 1792, brought an ejectment for the non-payment of a large arrear of rent then due, with which the plaintiffs and the mortgagees were duly served, and on Dec. 3 he was put into possession under a writ of habere issued on the judgment in ejectment. The plaintiffs and the mortgagees suffered the time given by the statute to expire without redeeming.

For a year and an half after the ejectment was brought, the plaintiffs advertised the lands for sale, but without effect, and in July, 1794, a treaty for purchase commenced between them and G. Nesbitt, on behalf of his son-in-law Tredennick, a defendant, but owing to the high price demanded, the large arrear of rent and jointure then due, and the sum secured by the first mortgage not being satisfied, the treaty broke off, and on July 5, Nesbitt wrote to the attorney of the plaintiffs expressing regret at the treaty being ended and stating that, if it were not settled, he would make the best bargain he could with Downing. He gave the plaintiffs notice that he would not redeem, and by his answer expressly denied the charge of having amused the plaintiffs with hopes of his redeeming. On Aug. 19, 1794, after the treaty had broken off, Nesbitt wrote to Downing, offering to pay "everything

A then due for rent, fines, and costs, on the terms of his getting a lease at the same rent, and with the same covenants, as the plaintiffs held under, after Sept. 3 then next" (the day on which the mortgagees' right to redeem the lands evicted, would expire), and stating that, if any other of the parties interested should make a lodgment on or before that day, the agreement should be void. On Aug. 21 Downing assented to the proposal on being indemnified against any claim of the plaintiffs
B that might arise from making such a lease. This was acceded to, and a bond to that effect was executed. Downing in the letter also stated that Nesbitt ought to apprise the plaintiffs of their danger. On Sept. 15, 1794, Downing, in consideration of £2,377 12s. 4d., the amount of the rent, renewal fines, and costs then due, granted a lease of those lands for the same term at the same rent and under the same covenants as contained in the original lease to Nesbitt who afterwards assigned
C to Tredennick for £6,770 17s. 8d. Tredennick considerably improved the lands.

The bill prayed that the lease granted by Downing to Nesbitt might be deemed a graft on the original lease, and declared to be taken in trust for the plaintiffs, and that they might stand in the place of Nesbitt on paying all rent, renewal fines, and costs due, and for an account of the rents and profits.

D *Sautin*, *Serjeant Ball*, *Kirwan*, *George Moore*, *sen.*, and *Meredyth* for the plaintiffs.

Plunket, *Burston*, *R. Johnston* and *Crofton* for the defendants.

Feb. 22, 1808. **LORD MANNERS, L.C.**—I have formed a strong opinion on this case, that the plaintiffs are not entitled to relief, (i) considering it as a question of fraud, and (ii) on the question whether the defendant can, according to the
E principles laid down in the cases referred to, be deemed a trustee.

In 1792 the children of Henry Nesbitt were entitled to a lease for nineteen years with a toties quoties clause of renewal, being a derivative lease under the see of Elphin, which Henry in 1736 mortgaged to Sir William Newcomen for a large sum. In 1787 he mortgaged the lease to George Nesbitt for a further sum of money. In 1758, by settlement, he had charged it with a jointure of £150 per
F annum for his wife. There was also a great arrear of rent due, to recover which arrear or to evict the lease, in Michaelmas Term, 1792 (which is material), Clotworthy Downing, the landlord, brought his ejectment and gave notice to all parties interested. In December, 1793, more than a year afterwards, the habere was executed. Thence to June 3, 1794, the lessees had a right to redeem, and till Sept. 3 the mortgagees. Nothing was done until after Sept. 3, when all the
G rights derived under this lease were extinguished in "law and equity," which words are material.

What was the situation in which George Nesbitt stood? He was second mortgagee of this lease, encumbered as it was with the mortgage to Sir William Newcomen, and a large arrear of jointure and of rent. His conduct was, I think, completely free from any imputation of fraud. In his answer referred to by the
H plaintiffs he states that the lessees' interest was advertised for sale, and he recommended his son-in-law Tredennick to purchase it, and a treaty accordingly took place between the attorney for the plaintiffs and the agent for Tredennick. He expressly denies amusing them with hopes, but, the treaty failing, on Sept. 15, 1794, a lease was executed by Downing to George Nesbitt, in consideration of £2,377 12s. 4d., the amount of the rent, fines, and costs, due in arrear. This was
I the money of Tredennick, and by him lent as part of the consideration for the assignment from George Nesbitt to him that was afterwards made. He also states that a proposal was made to him by the plaintiffs to advance money to discharge the rent and fines then in arrear, to be repaid by instalments, with which, from its unreasonableness, he declined to comply, and that he gave express notice he would not redeem. He also admits the treaty entered into with the plaintiffs, but says that it was broken off by their not being able to make out a good title and from the exorbitancy of their demands.

This is the evidence of that transaction as relied on by the plaintiffs in addition to the letters from George Nesbitt to the attorney for the plaintiffs. These clearly show that there was not a scintilla of fraud on the part either of Tredennick or of George Nesbitt. In the first letter dated May, 1794, the only difference between them was as to the quantum of rent claimed by Downing's agent. In the same month there is another letter to the same effect, and on July 6 another expressive of his sorrow that the negotiation was at an end, as it was the only means he had of serving the children, the plaintiffs, that he had no money of his own to advance, and that it was their own unreasonableness which determined the treaty. What is the inference from these letters? He induces his son-in-law, a monied man, to enter into a treaty for a purchase which is broken off from the extravagance of the plaintiffs' demands, and from the title not proving good. The estate was deeply encumbered, and was advertised from 1792 to 1794, when no purchaser could be got.

The first letter from George Nesbitt to Downing was in August, 1794, when the treaty was at an end, the plaintiffs having had from 1792 to 1794 to look out for a purchaser. What does Nesbitt now do? He offers to pay everything due for rent, costs and renewal fines upon getting a lease at the same rent, and with the like covenants, as the original contained, with this further proviso in his proposal:

> "That if any of the other parties interested should make a lodgment before September, then the agreement to be null and void."

Here George Nesbitt put the same construction upon the statute, that the plaintiffs contend for now, and evinced great fairness. On Aug. 21, 1794, Downing replied, agreeing to the proposal, but he referred him to his confidential counsel to arrange it, and concluded by saying: "You ought to remind the young men of their danger." Nesbitt by these letters clearly showed that he conceived he had but a scanty security for his money. He was willing to lose the benefit of the land, and resort only to his personal security on the covenant, and he, therefore, tells them that he will not redeem.

Surely this conduct is perfectly fair and open, and does not furnish any ground to impute or infer fraud, but it is contended that the connection of mortgagor and mortgagee still continued, and that this new lease is to be deemed a trust from the continuance of such connection. I do not see how, for that subsists only as long as the interest subsists, which in September, 1794, was entirely gone. But then it is further contended that there are cases affording a principle decisive of this, namely, that where leasehold property is limited to different persons in succession and one renews, he does so for the benefit of the others.

In Mr. Gwillim's edition of Bacon's Abridgment, vol. 4, 221, the principles are very clearly, and I think correctly, laid down. The treatise on leases is the work of Gilbert, C.B., but the chapter I allude to is the editor's. The *Rumford Market Case* [*Keech* v. *Sandford* (1)], is not in point. There a lease of the profits of a market was devised to a trustee for the benefit of an infant, a renewal was refused to the infant but was granted to the trustee, and that was decreed a trust for the infant. There the trustee, who on an application for a renewal to the infant being refused, surrenders the remainder of the then subsisting term belonging to the infant and takes a new lease to himself, which was a gross fraud, but that is not this case. The principle to be extracted from all the authorities amounts to this, that whenever a mortgagee, executor, trustee, or tenant for life, gets an advantage by being either in possession or behind the back of the mortgagor, cestui que trust or remainderman, he shall not retain the same for his own benefit, but shall hold it in trust. The new lease in any of those cases will be considered as a graft upon the old one. In the present case there is full notice given by the mortgagee that he will not redeem, and he gives his reasons for it. He does not go behind the back of the mortgagor, nor is he in possession, nor does he use any means of getting himself an advantage which belongs to another. He cannot, as

A I apprehend, be brought within the principles of those cases by which in taking a new lease he becomes clothed with a trust.

In all the cases upon this subject either the party by being in possession obtained the renewal, or it was done behind the back, or by some contrivance in fraud of those who were interested in the old lease, and there was either a remnant of the old lease or a tenant-right of renewal on which the new lease could be engrafted.

B Here no part of Nesbitt's conduct shows a contrivance, nor was he in possession. All that Nesbitt or Tredennick treated for was a new lease, giving, however, full opportunity to the plaintiffs to dispose of their interests or to renew if they were enabled so to do. It was urged by their counsel that a court of equity will relieve against penalties and forfeitures to secure the rent, but those are cases of contract between lessors and lessees and introduced by the acts of the parties themselves

C to secure the rent, not where a forfeiture arises under the provisions of an Act of Parliament, and where the lessee has so totally forfeited his interest as not to be relievable either in law or equity, but I have no occasion to touch upon the Act of Parliament.

Lee v. *Lord Vernon* (2) is a very strong case, but it proceeded upon the principle of the party having an ulterior interest beyond his term, and it shows that the

D principle ought not to be carried too far. In that case the bill was dismissed, and the dismissal was affirmed upon a writ of error.

Bill dismissed.

BIBL. LONDIN JUR.